2009

Brian Brent Olsen v. Eagle Mountain City : Brief of Appellee

Utah Supreme Court

M. David Eckersley; Prince, Yeats and Geldzahler; Attorney for Appellee.
Gerald H. Kinghorn; Catherine L. Brabson; Parsons Kinghorn Harris, A Professional Corporation; Attorneys for Appellant.

IN THE UTAH SUPREME COURT

BRIAN BRENT OLSEN, Appellee, v. EAGLE MOUNTAIN CITY, Appellant.	Appellate Case No. 20090831

APPELLEE'S BRIEF

Interlocutory Appeal from an Order of the
Fourth District Court, Utah County,
Honorable David Mortensen

Gerald H. Kinghorn (1825)
Catherine L. Brabson (6500)
Parsons Kinghorn Harris
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Electronic Mail: ghk@pkhlawyers.com
clb@pkhlawyers.com

Attorneys for Appellant

M. David Eckersley (0956)
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000
Facsimile: (801) 524-1098
Electronic Mail: mde@princeyeates.com

Attorneys for Appellee

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Telephone: (801) 363-4300
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Electronic Mail: ghk@pkhlawyers.com
clb@pkhlawyers.com

Attorneys for Appellant

M. David Eckersley (0956)
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000
Facsimile: (801) 524-1098
Electronic Mail: mde@princeyeates.com

Attorneys for Appellee

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to the provisions of Utah Code Ann. § 78A-3-102(d)(j) (Rep.Vol. 9 2008).

CONTROLLING STATUTES

The interpretation of the following statutes are determinative of the issue presented by this appeal:

Utah Code Ann. § 52-6-201(1) (Supp. 2009), which provides, in relevant part:

> If a state grand jury indicts, or if an information is filed against an officer or employee, in connection with or arising out of any act or omission of that officer or employee during the performance of the officer or employee's duties, within the scope of the officer or employee's employment, or under color of the officer or employee's authority, and that indictment of information is quashed or dismissed or results in a judgment of acquittal . . . that officer or employee shall be entitled to recover reasonable attorney fees and court costs necessarily incurred in the defense of that indictment or information from the public entity.

Utah Code Ann. § 52-6-202 (Supp. 2009):

> A request for reimbursement of attorney fees and court costs shall be filed in the manner provided in Sections 63G-7-902 and 63G-7-903.

Utah Code Ann. § 63G-7-902 (Rep.Vol. 2008), which provides in pertinent part:

> (1) Except as provided in Subsections (2) and (3), a governmental entity shall defend any action brought against its employee arising from an act or omission occurring:

(a) during the performance of the employee's duties;

(b) within the scope of the employee's employment; or

(c) under color of authority.

(2)(a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend the employee:

(i) within ten days after service of process upon the employee; or

(ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on the employee's behalf; or

(iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved.

(2)(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, including the making of an offer of judgment under Rule 68, Utah Rules of Civil Procedure, Offers of Judgment, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

STATEMENT OF THE CASE

This is an action wherein Mr. Olsen, a former Mayor of Eagle Mountain City, is seeking reimbursement of fees and costs incurred as a result of a prosecution against him for acts done within his official duties. Following jury trial, Mr. Olsen was acquitted on seven counts of misuse of public money, a third degree felony.

Mr. Olsen submitted a written request for such reimbursement, upon which request the City took no action. This action followed. The City moved to dismiss the complaint, which motion was denied by the court below. This Court granted the City's petition for interlocutory appeal on December 8, 2009.

The only fact relevant to the issue on appeal is that Mr. Olsen filed a written request for reimbursement, which fact is admitted by the City. Brief of Appellant at p. 3.

SUMMARY OF ARGUMENT

Under Utah law, a public official charged with a criminal offense arising from the performance of his official duties is entitled, by statute, to reimbursement of his attorney fees and costs in defending the prosecution if he is acquitted. See Utah Code Ann. § 52-6-201 (Supp. 2009). Section 52-6-202 provides that a request for such reimbursement "shall be filed in the manner provided in Sections 63G-7-902 and 63G-7-903." The manner of filing set forth in 63G-7-902 is "the employee shall make a written request to the governmental entity . . . ." Mr. Olsen did so, which is undisputed.

The City's assertion that the employee must request a defense to the criminal case is contrary to the express language of the statute, is illogical and would produce an absurd result as it would require a defendant to request that to which he has no entitlement (a defense of the criminal action) to preserve that to which he may become entitled in the future (reimbursement).

ARGUMENT

MR. OLSEN FILED A PROPER REQUEST FOR REIMBURSEMENT OF FEES AND COSTS IN THE MANNER SPECIFIED BY STATUTE

The City mistakenly assumes that when the statute, § 52-6-202, indicates that a request for reimbursement of fees and costs is to be made in the manner set forth in § 63G-7-902 that this reference somehow implicates the timing of when a request must be made. There is no basis for such an assumption and adopting the City's argument would produce an absurd result.

The "manner" specified in the statute is "by written request to the governmental entity . . ." Utah Code Ann. § 63G-7-902(2)(a). The defendant's contention that the time for making such a request is governed by the time requirements applicable to public employees requesting a defense to a civil action is contrary to the express language of the statute, is wholly illogical and would require a criminal defendant to tender his or her defense to the very entity alleged to be the victim of the crime charged.

The statute, § 63G-7-902, refers to what a public employee must do to be entitled to a defense against a "claim." "Claim" is a defined term under the Governmental Immunity Act and means "any asserted demand for or cause of action for money or damages. . ." See Utah Code Ann. § 63G-7-102(1) (Rep.Vol. 6D 2008). A criminal information is simply not a claim within the meaning of the Governmental Immunity Act. The timing

requirement of the statute obviously only applies to defense of civil actions, as is made clear by the statute's reference "service of process," "Offers of Judgment," and "judgment, compromise or settlement."

The absurdity of the City's argument is that it seeks to impose a requirement that a criminal defendant request a defense to the charges against him (to which defense he has no statutory entitlement) as a precondition to receiving his statutory entitlement to be reimbursed for attorneys fees and costs, which entitlement only arises after the criminal case is resolved in his favor.

It would also require a criminal defendant to waive his constitutionally protected right to defense counsel of his own choosing. See *State v. Barber*, 206 P.3d 1223 (Ut. App. 2009). Indeed, it would require the defendant to permit the alleged victim of his crime to choose his lawyer and to control his defense and compel him to "cooperate" with that lawyer's manner of defending him.

While the plaintiff contends that the City's interpretation of the statute is at odds with its plain meaning, as this Court has recently noted, even if the plain meaning of a statute can be gleaned from its language, giving it effect will be avoided if to do so "would work a result so absurd that the legislature could not have intended it." *State v. Jefferies*, 217 P.3d 265, 267 (Utah 2009).

> Where a statute's plain language creates an absurd, unreasonable, or inoperable result, we assume that the legislature did not intend that result. To avoid an absurd result, we endeavor to discover the underlying legislative intent and interpret the statute accordingly.
>
> *Id.* at 268.

The legislative intent in requiring an acquitted defendant to give the governmental entity notice of his claim for fees and costs is to give the entity an opportunity to investigate, and potentially resolve, the claim without the need for litigation, the same as that behind the notice of claim provision in the Governmental Immunity Act. See *Nunez v. Albo*, 53 P.3d 2 (Ut. App. 2002).

To interpret the reference in § 52-6-202 to § 63G-7-902 to mean that a criminal defendant must request a defense to which he is not entitled to preserve a right to which he might be entitled in the future would produce an absurd result not intended by anyone.

The City argues that the "procedures" in §§ 63G-7-902 and 903 apply to requests for reimbursement of attorney fees instead of simply providing the "manner" of requesting reimbursement. Brief of Appellant at p. 12. The statute, § 52-6-202, expressly provides that a request for reimbursement of fees and costs "shall be filed in the manner provided in Sections 63G-7-902 and 63G-7-903" (emphasis added). It says nothing about the "procedures" referred to by the City. That the manner of filing a claim differs from the time when a claim must be filed can be seen in a review of the original reimbursement

statute, which authorized filing of a claim "in the manner provided in Utah Governmental Immunity Act" but provided the claimant an additional year more than that set forth in the Act's notice of claim provision within which to comply. See former Utah Code Ann. § 63-30a-3. Specifying the manner in which a claim (or request) is to be filed does not speak to the time when it must be filed.

That the manner and time of asserting claims are different concepts is demonstrated in *Peterson v. Salt Lake City*, 221 P.2d 591 (Utah 1950). In that case, a claimant filed a timely notice of claim under the statute in effect at the time, but failed to adhere to the statutory manner of filing a claim, namely that it be a verified claim. The Court held that because a statute provided that a claim was barred if not filed in the manner and within the time provided by the statute, plaintiff's claim was barred and not subject to amendment.

Also demonstrating that the time and manner of filing claims are separate concepts is the fact that in the Governmental Immunity Act itself the manner of filing a claim is set forth in § 63G-7-401 and the time for filing is specified in § 63G-7-402.

The statute in question is silent as to when a request for reimbursement is to be made. The City's argument that it must be made before the entitlement to reimbursement even arises is without support in law or logic. It is not surprising that this tortured interpretation has not been advanced as a defense to a claim for reimbursement in the twenty-four years the City claims it has been a requirement.

Equally illogical is the City's argument that the legislature undertook in amending the Governmental Immunity Act to provide for the criminal defense of all public officials charged with crimes in the performance of their official duties, and made this sweeping change in the law without any reference whatsoever to criminal actions against public officials. That is exactly what the City argues when it contends that a governmental entity "shall defend any action" brought against employees arising from their employment. Appellant's Brief at p. 9. Not surprisingly, this position has never been asserted by anyone else. As noted previously, this strained reading of the statute is entirely undercut by the fact that a "claim" against which an employee can request a defense is one for money damages only.

Ironically, if the City's argument was correct, a public employee could get a criminal defense from the governmental entity and would never incur any attorney fees and there would be no reason for the statutory entitlement to reimbursement. This simply makes no sense.

It is also ironic that while the City argues that a court is duty bound to give effect to every word of a statute (Brief of Appellant at pp. 11-12), the City's interpretation of the Reimbursement of Legal Fees and Costs to Officers and Employees Act renders the word "reimbursement" meaningless. One cannot be reimbursed for an obligation that has not been incurred. The City argues that the statutory phrase in § 52-6-202 "request for

reimbursement of attorneys fees and costs" should be read to mean "request for a defense in a criminal prosecution." While the City cites authority regarding interpreting a statute according to its plain language, it then argues for an interpretation of the statute which is contrary to the plain language of the statute. Such an argument is incomprehensible.

The City is suggesting, without expressly so stating and without any supporting authority, that in 1986 the Legislature specifically intended to repeal the Reimbursement Act by implication when it amended the Governmental Immunity Act. The short answer to such a suggestion is that the present version of the Reimbursement Act was adopted by the legislature in 2008, setting forth the officials' entitlement to fees and the manner of requesting them, "a written request to the governmental entity . . ." § 63G-7-902(2)(a).

Finally, the City's contention that Mr. Olsen was required to file his request "within 10 days" after acquittal is frivolous. There is no such statutory requirement. The 10 day requirement applies to claims for a defense in a civil action and is triggered by "service of process." Section 52-6-202 provides no time limit on the filing of a reimbursement request, nor does § 52-6-201 contain an express statute of limitations, which means it would be three years pursuant to Utah Code Ann. § 78B-2-305(4) (Rep.Vol. 9 2008).

CONCLUSION

The City's argument that Mr. Olsen was required to request a defense of his criminal prosecution as a predicate to his claim for reimbursement of attorney fees and

costs is contrary to the express provisions of the Reimbursement Act, is contrary to the language of the Governmental Immunity Act, and is completely illogical. The statutory interpretation which it seeks would produce an absurd result never intended by the legislature. The order entered below should be affirmed.

DATED this 23rd day of February, 2010.

PRINCE, YEATES & GELDZAHLER

By: M. David Eckersley
M. David Eckersley
Attorneys for Plaintiff

MAILING CERTIFICIATE

I hereby certify that on the 23rd day of February, 2010, I mailed, postage prepaid, two true and correct copies of the **Appellee's Brief** to:

Gerald H. Kinghorn
Catherine L. Brabson
Parsons Kinghorn Harris
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111