

1991

Lisa Hooley Olsen v. Harold K. Hooley, Garth Hooley, Cary Hooley, Steven Hooley, Harold William Hooley : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

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IN THE UTAH SUPREME COURT

LISA HOOLEY OLSEN,
Appellant

vs.

HAROLD K. HOOLEY, GARTH HOOLEY,
CARY HOOLEY, STEVEN HOOLEY AND
HAROLD WILLIAM HOOLEY,
Appellees

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REPLY BRIEF
OF APPELLANT

Case No. 910125

Argument Priority
No. 16

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Appeal from the
Fourth Judicial District Court
Utah County, State of Utah

The Honorable Ray M. Harding, District Judge

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CLERK SUPREME COURT
UTAH

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COMES THE PLAINTIFF, by and through her counsel of record, Linda Q. Jones, and submits the following reply to Defendants' reply brief in the above entitled case.

ISSUES

Defendant's reply brief raises two issues: 1) Whether or not the operation of the discovery rule and statutes of limitations are questions of law or fact; and 2) The nature of the claims in this case. In addition, Defendants' reply brief contains a vitally important misstatement of the facts, upon which the Defendants rely for several of their arguments: Defendants describe Plaintiff as having the knowledge and memory necessary to bring a cause of action within one year of reaching the age of majority. This is a complete mischaracterization of the facts in this case.

DISCUSSION

The first issue to be clarified is whether or not the operation of the discovery rule and statutes of limitations are questions of law or fact. This is a two part issue: first, whether the discovery rule and/or particular statutes of limitations are available to the plaintiff, is a question of law; Second, whether or not, on the facts of an individual case, the discovery rule, and/or particular

statutes of limitations, are actually applicable are questions of fact, to be determined by the trier of fact. This case, in its current standing, presents a question of law: Are the discovery rule and the four year statute of limitations on reckless and negligent torts available to Plaintiff in the specific circumstances of this case?

The second issue raised by Defendants' reply concerns the nature of the claims made. Defendants claim that the only causes of action alleged in Plaintiff's complaint are criminal, and therefore the applicable statute of limitations must be that applied to intentional torts. This is not accurate. Plaintiff's complaint alleges certain criminal and tortious actions. Plaintiff's complaint does not state or indicate a particular theory of recovery, and, indeed, leaves open the possibility of several different legal theories being applied, including theories of intentional, reckless or negligent torts. The mere fact that the complaint alleges criminal actions does not limit the basis of recovery to one of intentional tort. The criminal code includes various forms and types of intent, for example, the crime of negligent homicide. In addition, the requisite degree of intent under the criminal law and

the law of tort vary widely, and intent of one form or another figures in both reckless and negligent tort.

Finally, Defendants' reply brief contains a repeated misstatement of the facts, and it is upon this misstatement that they rely as the conclusive fact in support of their counter-arguments and in support of the lower court's Dismissal (Summary Judgment). That is the repeated statement that Plaintiff "had the ability to file her lawsuit at the time she turned eighteen." (Appellees' Brief pp. 8, 10, 11, 13, 15, 16, 17, 19, 24). Defendants state that "Plaintiff has made clear that she was aware of the alleged acts of the Defendants beyond the time when she reached the age of majority." (Appellees' Brief p. 10). That statement is correct, since Plaintiff is clearly now aware of the crimes of Defendants against her. However, it is equally clear, upon a complete review of the record, including the various affidavits Plaintiff has filed in this case, that Plaintiff was not aware of the actions of Defendants against her at the time she turned eighteen and/or left home to get married. Plaintiff has neither stated nor admitted that she had any conscious awareness of Defendants' actions against her until the late 1980's. Instead, Plaintiff has repeatedly stated and claimed that

she had so deeply repressed those memories that she was completely unaware, at any conscious level, of the lengthy history of abuse she had suffered at Defendants' hands. Plaintiff states in her Affidavit In Opposition to Motion to Dismiss that when her husband asked her, some time after they were married, why her family treated another sister so badly Plaintiff honestly replied that it was because that sister "had made up lies about the family." (Plaintiff's Affidavit In Opposition of Motion to Dismiss, p. 2.) Plaintiff has also specifically stated that she had no conscious recollection of Defendants' actions until she was able, in 1990, to obtain competent psychological help in processing and dealing with what she had believed were unreal nightmares. (Memorandum in Opposition to Motion to Dismiss, pp. 2-4.) (Affidavit In Opposition to Motion to Dismiss of Ruth Killpack.) It was not until she obtained this help that she was able to bring her repressed mental record of the events into conscious awareness, to consciously remember at least some of the incidents of abuse which she had been so successful at repressing for most of her life, and recognize that she had been grievously harmed.

Defendants rely on their misstatement of Plaintiff's condition to argue that she did have a remedy within the

time period granted by the statute of limitations, and that because this remedy was available, application of the statute is not irrational, unjust, or unconstitutional under either the Utah or the United States constitutions. Relying, as they do, on this vital misstatement of the case, it is clear that on the real facts, every counter-argument they have offered must of necessity fail. The cases they have cited in support of upholding the lower court's dismissal of this case, Whattcott v. Whattcott, 790 P.2d 578, (Utah App. 1990), and the two California cases, Snyder v. Boy Scouts of America, Inc., 205 Cal. App.3d, 253 Cal. Rptr. 156 (Cal.App. 3 Dist. 1988); review denied, 1989; and De Rose v. Carswell, 242 Cal. Rptr. 368, 196 Cal. App. 3d 1011 (Cal. App. 6 Dist. 1987); review denied, 1988, are all predicated upon their version of the facts: i.e., that Plaintiff had complete conscious memory of her abuse at the hands of Defendants. These cases are inapplicable to the real circumstances of this case, where Plaintiff had completely repressed all conscious knowledge and memory of that abuse. Indeed, this court, in its most recent decision in this area, stated specifically that "this is not a case where the victim has so repressed the memory of the events that he or she has forgotten they occurred." O'Neal v.

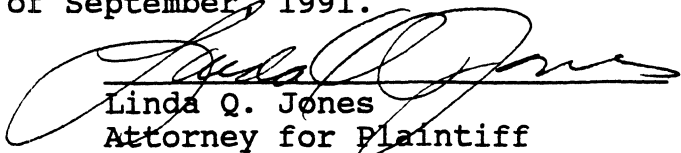
Division of Family Services, 168 Utah Adv. Rep. 3, at 7.

This is that case: Defendants' actions against Plaintiff were so unthinkable, and occurred repeatedly over such an extended period of time, that Plaintiff, as a small child and later as a teenager and adult, had unconsciously defended herself in the only way available to her--by her inability to remember or recognize the reality of those actions.

CONCLUSION

To deny this Plaintiff, in these circumstances, the availability of the discovery rule, would be to deny her every legal remedy. This would be a clear violation, as shown in Plaintiff's brief before this court, of her rights under the Utah and the United States constitutions. For these reasons, and the other reasons argued in Plaintiff's original brief, the Order of Dismissal from the court below should be reversed, and this case remanded for trial on the merits.

DATED this 29th day of September, 1991.


Linda Q. Jones
Attorney for Plaintiff