

2002

Wayne Soules v. Dale H. Curtis : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WAYNE SOULES,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	Appellate Court No. 20020542-CA
	:	
DALE H. CURTIS,	:	
	:	
	:	
Defendant/Appellee.	:	Priority No. 15

OPENING BRIEF FOR APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
HON. DENNIS J. FREDERICK,
DATED JUNE 12, 2002, DISMISSING
THE ABOVE CASE WITH PREJUDICE

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JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) and Utah Code Ann. § 78-2-2(4). By Order dated August 26, 2002, this case was transferred to the Court of Appeals for disposition. The appeal herein was timely filed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Appellant was required to arrange for the appointment of a personal representative for a deceased defendant prior to moving for substitution of proper parties under Utah R. Civ. P. 25.

Standard of Review: The granting of a motion to dismiss a complaint based upon a party's failure to make a motion for substitution in a timely fashion under Rule 25 is a question of law subject to review for correctness. *Stoddard v. Smith*, 27 P.3d 546 (Utah 2001).

2. Whether the District Court abused its discretion in dismissing this case with prejudice.

Standard of Review: The dismissal of a case with prejudice is reviewed for an abuse of discretion. *Ludlow v. Salt Lake County Bd. Of Adjustment*, 893 P.2d 1101, 1104-1105 (Utah Ct. App. 1995).

APPLICABLE RULES OF PROCEDURE

The Court's analysis of Utah R. Civ. P. 25 will be dispositive of the resolution of this case on appeal:

UTAH R. CIV. P. 25. SUBSTITUTION OF PARTIES

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

APPLICABLE STATUTES

Utah statutes which may be of assistance to the Court in deciding this appeal are as follows:

UTAH CODE ANN. § 75-2-103. Share of heirs other than surviving spouse.

(1) Any part of the intestate estate not passing to the decedent's surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(a) to the decedent's descendants per capita at each generation as defined in Subsection 75-2-106(2);

(b) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(c) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);

UTAH CODE ANN. § 75-2-106 (1998). Definitions--Per capita at each generation--Terms in governing instruments.

...

(3)(a) If, under Subsection 75-2-103(1)(c) or (d), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

(i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants; and

(ii) deceased descendants in the same generation who left surviving descendants, if any.

(b) Each surviving descendant in the nearest generation is allocated one share.

UTAH CODE ANN. § 75-3-104 (1975). Claims against decedent--Necessity of Administration.

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 75-3-1004 or from a former personal representative individually liable as provided in section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

UTAH CODE ANN. § 78-11-12(1)(a) (1991). Survival of action for injury to person or death upon death of wrongdoer or injured person--Exception and restriction to out-of-pocket expenses.

(1)(a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal

representatives or heirs of the person who died have a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

STATEMENT OF THE CASE

This is a personal injury action brought by the Plaintiff Wayne J. Soules against the Defendant Dale H. Curtis. Before the case could be tried in the District Court, the Defendant Curtis passed away and, pursuant to Utah R. Civ. P. 25, the Plaintiff timely moved the court to substitute other parties for the deceased defendant prior to the expiration of 90 days from the date death was suggested on the record by the Defendant's counsel. The District Court granted the Defendant's Motion to Strike the Plaintiff's Motion to Substitute Decedent's heirs as parties upon the ground that the Decedent's heirs were not the Defendant's personal representative, and that the Plaintiff's Motion failed to contain a notice of hearing. Subsequently, the Defendant filed a motion to dismiss this case, and the District Court granted that motion and dismissed the case with prejudice. This appeal followed.

STATEMENT OF FACTS

1. The Defendant herein, Dale H. Curtis, passed away on June 20, 2001, and on December 10, 2001, a Notice of Suggestion of Death was duly filed with the District Court by his counsel. (R. at 35; Aplt. Addend. at 1)

2. Counsel for the Plaintiff independently established the date of the Defendant's death as June 20, 2001, and obtained the names of each of the Defendant's surviving siblings by reviewing the Defendant's obituary published in the Salt Lake Tribune on June 24, 2001. (R. at 72; Aplt. Append. at 9)

3. Within 90 days of December 10, 2001, the Plaintiff filed with the District Court a Motion to Substitute Proper Parties for Deceased Defendant. (R. at 65; Aplt. Append. at 2)

4. Counsel for the Plaintiff served each of the Deceased Defendant's heirs with Notice of the Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant, allowing those parties a period of 14 days within which to interpose any objection to the Plaintiff's motion. (R. at 75, 78, 85, 118; Aplt. Append. at 12, 15, 22, 51) None of the Defendant's heirs at any time objected to the Plaintiff's motion. (Entire Record)

5. Counsel for the deceased Defendant filed a Motion to Strike the Plaintiff's motion for substitution of party on March 5, 2002, upon the ground that

no personal representative had yet been appointed for the estate; that the heirs were not proper parties herein; and that no notice of hearing on the Plaintiff's motion.

(R. at 92, 94; Aplt. Append. at 29, 31)

6. Over the Plaintiff's objection, the District Court dismissed this case with prejudice on June 12, 2002. (R. at 150; Aplt. Append. at 69)

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT ERRED IN STRIKING THE PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES BECAUSE NO PERSONAL REPRESENTATIVE HAD BEEN APPOINTED FOR THE DECEASED DEFENDANT AND BECAUSE NO NOTICE OF HEARING WAS PROVIDED TO THE HEIRS WITH THE NOTICE OF INTENT TO SUBSTITUTE THEM AS PARTIES.

Neither Utah R. Civ. P. 25, nor any applicable statute, requires that a personal representative be appointed for an estate *prior* to filing a motion under Rule 25 to substitute proper parties for a deceased defendant. Any such requirement is hypertechnical and does not comport with the procedure outlined in *Stoddard v. Smith*, 27 P.3d 546 (Utah 2001). Further, while it is true that the Plaintiff did not set a hearing on his motion to substitute proper parties, and thus

no personal representative had yet been appointed for the estate; that the heirs were not proper parties herein; and that no notice of hearing on the Plaintiff's motion.

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did not give notice of any such hearing to the heirs, Rule 25 should not be read to permit dismissal of the case in these circumstances.

**II. THE DISTRICT COURT ERRED
IN FAILING TO CONSIDER THE
TOTALITY OF THE CIRCUMSTANCES
IN DETERMINING TO DISMISS
THIS CASE WITH PREJUDICE.**

The District Court erred in failing to consider the totality of the circumstances in dismissing this case with prejudice; had it done so, it should have determined that an injustice would result if the case was dismissed with prejudice. Consequently, assuming it was proper to dismiss the case at all, the Court abused its discretion in dismissing the case with prejudice.

ARGUMENT

**I. THE DISTRICT COURT ERRED IN
STRIKING THE PLAINTIFF'S MOTION
TO SUBSTITUTE PROPER PARTIES
BECAUSE NO PERSONAL
REPRESENTATIVE HAD BEEN
APPOINTED FOR THE DECEASED
DEFENDANT AND BECAUSE NO
NOTICE OF HEARING WAS PROVIDED
TO THE HEIRS WITH THE NOTICE OF
INTENT TO SUBSTITUTE THEM AS
PARTIES.**

The District Court determined, in effect, that, because no personal

representative was appointed for the decedent's estate prior to the timely filing of a motion to substitute proper parties under Rule 25, no proper parties were brought before the Court and thus this case should be dismissed. Such a reading of Rule 25 and the applicable statutes is unduly harsh and not in accord with the analysis of the Utah Supreme Court in *Stoddard v. Smith*, 27 P.3d 546 (Utah 2001). There, the Court first expressed its concern that the failure of the decedent's counsel to identify a person who may be substituted as a proper party "would open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days," *id.* at 550, *citing Rend v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969). The Court rejected the view of federal courts holding that identification by the decedent's counsel of a person who may be substituted is implicitly required by Rule 26. Significantly, however, the court also expressly rejected any requirement that the party seeking substitution actually know the identity of the person to be substituted when filing the motion:

However, with or without notice of the appropriate substitute, our holding does not unduly burden the party filing the motion for substitution. Under our interpretation of our rule 25, a party filing a motion for substitution does not have to know the identity of the person who may be substituted when filing the motion. A party, such as plaintiff in this case, may simply file a motion seeking to substitute the "Personal Representative of the Estate of the Decedent" or "John/Jane Doe." Once the motion is made, the proper person to be substituted for the decedent may be ascertained in due course, by

discovery if necessary. Consequently, there is no concern that a failure to identify, in the suggestion of death, a person who may be substituted for the deceased party, will result in “tactical maneuver[ing].

Id. at 551.

Thus, the dismissal of this case by the District Court permitted the very evil the Supreme Court sought to address in *Stoddard*, by placing the burden upon the Plaintiff of “locating the representative of the estate within 90 days.” Under *Stoddard*, it is only the timely *filing* of the motion for substitution that matters; indeed, it is unnecessary even to know the names of the persons who might be properly jointed as parties. The effect of *Stoddard* is to allow all such issues as the name of an appropriate personal representative and the timing the appointment to be addressed after the timely filing of the motion for substitution. The *Stoddard* plaintiff did not prevail in that case solely because he failed to file his motion for substitution in a timely fashion; here, however, all parties in the instant case agree that the Plaintiff’s motion was timely filed.

Nor does the Utah Supreme Court in *Stoddard* impose any requirement that the plaintiff assume the burden of arranging for the appointment of an appropriate personal representative within 90 days. To the contrary, the Court only required that the motion seek to substitute the unnamed personal representative *or*

“John/Jane Doe.” Here, the Plaintiff’s motion went much further, and ascertained the names of all of the decedent’s heirs at law, serving them with a copy of his notice to substitute them as parties so that one or all of them could subsequently be named as personal representatives, following the rule outlined in *Stoddard*.

Inexplicably, however, the District Court concluded, in effect, that it was the Plaintiff’s burden to arrange for the appointment of a personal representative, then seek to join that specific individual in the instant case, all within the applicable 90 day period set forth in Rule 25. Yet nothing in the rule itself or any applicable statute requires any such result.

In the Court below, the Defendant relied upon UTAH CODE ANN. § 75-2-104 for the proposition that “[n]o proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative.” The cited statute, however, is inapplicable to this case. First, there is no claim to “revive” or “commence.” The claim of an injured party is not extinguished merely by the death of the tortfeasor; rather, it expressly *survives* the death of the wrongful party. UTAH CODE ANN. § 78-11-12(1)(a) provides that such causes of action “*do not abate* upon the death of the wrongdoer.” (Emphasis added.) The same statute goes on to provide that the injured party has “a cause of action against the wrongdoer or the personal

representatives of the wrongdoer for special and general damages . . .”. Thus, while it is clear that, at some point, a personal representative must be named and must appear as the substituted party, the Utah probate code does not require that this occur prior to the filing of a motion to substitute proper parties after a suggestion of death. The District Court’s holding to the contrary should be reversed.

Additionally, however, the District Court also determined that the Plaintiff’s failure to include a notice of hearing with his Notice of Plaintiff’s Motion to Substitute Proper Parties was also fatal to his claims. (R. at 129; Aplt. Append. at 54) On the notice issue, Rule 25 provides that “[t]he motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons.” However, at the time notice of the Plaintiff’s motion was served on the heirs at law, no hearing had been scheduled on the motion; consequently, it was not at that time possible to provide the heirs with any notice of the non-existent hearing. Rule 25 should not be read so inflexibly as to require that a hearing on the motion for substitution must be scheduled prior to giving the heirs notice (and, in this case, an opportunity to object) of the Plaintiff’s intention to

name them as substituted parties. Simply put, neither the deceased Defendant nor his heirs at law are prejudiced in any fashion by the Plaintiff's decision not to serve them with any notice of hearing until after a hearing was actually scheduled. It is clear that, once the hearing is scheduled, notice of the hearing will be served on the heirs in the same manner as prescribed by Rule 25. Under these circumstances, it is respectfully submitted that it was reversible error for the District Court to dismiss the case on this basis.

**II. THE DISTRICT COURT ERRED
IN FAILING TO CONSIDER THE
TOTALITY OF THE CIRCUMSTANCES
IN DETERMINING TO DISMISS
THIS CASE WITH PREJUDICE.**

This Court has held that whether a case is properly dismissed with prejudice for failure to join a necessary party is within the sound discretion of the trial court. *See Ludlow v. Salt Lake County Bd. Of Adjustment*, 893 P.2d 1101, 1104-1105 (Utah Ct. App. 1995). Subsequently, in *Donahue v. Smith*, 27 P.3d 552 (Utah 2001), the Utah Supreme Court held that the District Court in that case properly dismissed a case with prejudice for failure to comply with the timeliness requirements of Rule 25. In *Donahue*, unlike the present case, an automobile accident victim failed at any time to file his motion to substitute proper parties

under Rule 25, despite a notice of suggestion of death filed by the opposing party. Instead, the accident victim sought a belated extension of time within which to file such a motion. The Utah Supreme Court held that, under Utah R. Civ. P. 41, the lower court did not err in dismissing the case with prejudice, and that it would also not have been reversible error to dismiss the case without prejudice. *Id.* at 555 n.3. The Court's holding in *Donahue* was implicitly supportive of the Court of Appeals's holding in *Ludlow* that such rulings are reviewed for an abuse of discretion.

It is respectfully submitted that the District Court did abuse its discretion in dismissing this case with prejudice under the facts and circumstances herein. In *Donahue*, the accident victim took no actions at all to comply with Rule 25 until after the time period provided by that rule had already run. Here, the accident victim took steps to comply with the rule and filed his motion for substitution in a timely fashion. In *Hartford Leasing Corporation v. State of Utah*, 888 P.2d 694 (Utah Ct. App. 1994), this Court held that a determination whether to dismiss for failure to prosecute required the Court to balance the need to expedite litigation and efficiently use judicial resources with the need to allow parties to have their day in court. Such a determination requires the Court to consider the totality of the circumstances on a case-by-case basis. In particular, the Court considers (1) the

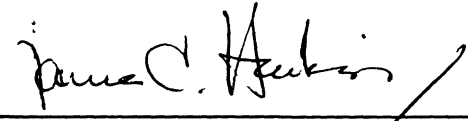
conduct of both parties; (2) the opportunity available to each party to move the case forward; (3) what each party has accomplished in moving the case forward; (4) the difficulty or prejudice imposed on the opposing party by reason of the delay; and (5) most importantly, whether injustice may result from the dismissal. *Id.* at 697-698.

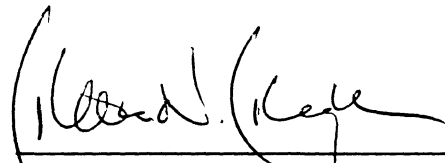
In the instant case, short of shouldering the burden of finding an appropriate personal representative for the deceased Defendant, the Plaintiff did everything possible to bring the proper parties before the Court so that the underlying merits of the dispute could be presented. He arranged for personal service upon the decedent's heirs with his motion to substitute them as parties; and he timely filed his motion to do so with the Court. The Defendant, however, made no effort to advise the Plaintiff of who should properly be appointed as personal representative of the estate to allow the case to proceed. Under these circumstances, and particularly in light of the harsh result — which would deny the plaintiff any right to be heard on the merits of his tort claim — it is respectfully submitted that the District Court abused its discretion in determining to dismiss this case with prejudice.

CONCLUSION

For the foregoing reasons, the District Court should be reversed and this case should be remanded for trial on the merits of the Plaintiff's claims.

DATED this 25th day of November, 2002.


James C. Haskins
Attorney for Plaintiff


Thomas N. Thompson
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing
BRIEF FOR APPELLANT to be delivered by first class mail, postage prepaid, to
the following, this 25th day of November, 2002.

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