

2002

Wayne J. Soules v. Dale H. Curtis : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WAYNE J. SOULES,
Plaintiff/Appellant,

vs.

DALE H. CURTIS,
Defendant/Appellee.

Appellate Court No. 20020542-CA
Priority No. 15

BRIEF OF APPELLEE

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

Defendant has no objection to the Plaintiff's statement of jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendant disagrees with the Plaintiff's Statement of the Issues Presented for Review #1. Plaintiff's issue #1 was not a basis of the Court's decisions on the Order on Motion to Strike Plaintiff's Motion to Substitute Decedent's Heirs as a Party (R. at 129-32) and the Order on URCP Rule 25 Motion to Dismiss (R. at 150-52). The following is a more appropriate statement of the issue presented for review:

I. Whether the District Court exceeded its permitted range of discretion by striking the Plaintiff's Utah Rules of Civil Procedure ("URCP") Rule 25 motion to substitute because the motion sought to substitute the wrong party and did not contain the required notice of hearing.

Standard of Review: Whether the Court exceeded its permitted range of discretion in granting a motion to strike is reviewed on an abuse of discretion standard. Rivera ex rel. Rivera v. State Farm Mut. Auto. Ins. Co., 2000 UT 36, ¶7, 1 P.3d 539.

The Defendant does not object to the Plaintiff's Statement of Issue Presented for Review #2 and the Standard of Review.

DETERMINATIVE STATUTES AND RULES

The Defendant agrees the interpretation of URCP Rule 25, Utah Code Ann. §75-3-104 (1975) and Utah Code Ann. §78-11-12(1)(a)(1991) are determinative of this appeal. In addition, the Defendant asserts that URCP 41 and its interpretation is determinative of this appeal. However, the Defendant disagrees that Utah Code Ann. §75-2-103 (1998) and Utah Code Ann. §75-2-106 (1998) are determinative of any issue in this case.

- **URCP Rule 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.

- (b) Incompetency.** If a party becomes incompetent, the

court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) Public Officers; Death or Separation From Office. When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

URCP Rule 25.

- **URCP Rule 41. DISMISSAL OF ACTIONS**

(a) Voluntary Dismissal; Effect Thereof.

(1) *By Plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed

by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any

counterclaim, cross- claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or Undertaking to Be Delivered to Adverse Party. Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

URCP Rule 41

- **78-11-12 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).

(b) If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal

representatives or heirs of that person have a cause of action against the wrongdoer or personal representatives of the wrongdoer only for special damages occurring prior to death that result from the injury caused by the wrongdoer, including income loss. "Special damages" does not include pain and suffering, loss of enjoyment of life, and other not readily quantifiable damages frequently referred to as general damages.

(2) Under Subsection (1) neither the injured person nor the personal representatives or heirs of the person who died may recover judgment except upon competent satisfactory evidence other than the testimony of that injured person.

Utah Code Ann. §78-11-12 (2001).

- **75-3-104 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.

Editorial Board Comment.--This and sections of Part 8, Chapter 3, are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (§ 75-3-301). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (§ 75-3-203). But, if a personal representative has been appointed and has closed the estate under circumstances which leave

a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under § 75-3-807 or 75-3-1003 has been breached. The methods for closing estates are outlined in §§ 75-3-1001 through 75-3-1003. Termination of appointment under § 75-3-608 et seq. may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

Utah Code Ann. §75-3-104 (1975).

STATEMENT OF THE CASE

The Plaintiff filed a personal injury action against the Defendant as a result of an automobile accident. Before the action could be tried, the Defendant passed away. The Defendant's death was suggested upon the record by the Defendant's counsel. In addition, Defendant's counsel sent a letter to the Plaintiff's counsel indicating that at that time no personal representative had been appointed for the Defendant's estate. The Plaintiff moved to substitute the Defendant's surviving siblings as the "proper party" to the action. The Plaintiff failed to provide the Defendant's surviving siblings with a notice of a hearing on motion to name them as parties to the action. Accordingly, Defendant's counsel moved to strike the motion to add the Defendant's brothers and sisters as the "proper party" to this action under URCP Rule 25. The District Court agreed with the Defendant and struck the motion to add the Defendant's siblings as the "property party."

The Plaintiff failed to make a motion that sought to substitute the Defendant's *personal representative* as a party to this action within ninety (90) days of the notice of suggestion of death. Defendant's counsel moved to dismiss the action for the Plaintiff's failure to comply with URCP Rule 25. The Plaintiff did not oppose the motion to dismiss and the Court granted the motion. After the Court granted the motion, the Plaintiff appealed.

STATEMENT OF FACTS

1. On December 10, 2001, a Notice of Suggestion of Death was filed by the Defendant's counsel. (R. at 35).
2. On December 18, 2001, Defendant's counsel informed the Plaintiff's counsel that no personal representative had been appointed for the Defendant's estate. (R. at 113).
3. On March 1, 2002, the Plaintiff filed a motion and supporting memorandum to substitute the "proper parties" for the deceased Defendant. (R. at 65-71).
4. However, rather than seeking to name the personal representative of the Defendant, the Plaintiff's motion sought to have the Defendant's surviving siblings (two brothers and three sisters) substituted as the "proper parties" in this case. (R. at 69-70).

5. The Affidavit of Thomas N. Thompson filed in support of the motion to substitute states, "It is necessary to substitute the names of the decedent's heirs for the decedent in this case." (R. at 74).

6. The Plaintiff then served upon four of the five of the Defendant's surviving siblings a "Notice of Plaintiff's Motion to Substitute Proper Parties for Deceased Defendant." (As to Sara Flink, R. at 75-76; As to N. De Von Curtis, R. at 78-79; As to Barbara Inkley, R. at 85-86; As to J. Kent Curtis, R. at 118-19).

7. Each notice contained the same statement, "You have been identified as a sibling of the decedent, Dale H. Curtis, who is a proper party defendant to the above action." (As to Sara Flink, R. at 76; As to N. De Von Curtis, R. at 79; As to Barbara Inkley, R. at 86; As to J. Kent Curtis, R. at 119).

8. In addition, rather than provide the Defendant's surviving siblings with a notice of a hearing set on the motion so that they could appear and defend, each notice contained the statement "Should you have any objection to this motion, you should file the same with the Clerk, Third Judicial District Court, . . . at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice." (As to Sara

Flink, R. at 76; As to N. De Von Curtis, R. at 79; As to Barbara Inkley, R. at 86; As to J. Kent Curtis, R. at 119).

9. However, the Plaintiff did not serve Rula Flink, the Defendant's sister, with the notice, motion to substitute or supporting memorandum. (Entire Record).

10. Neither Sara Flink, N. De Von Curtis, Barbara Inkley, nor J. Kent Curtis is the Defendant's personal representative. (Entire Record).

11. On March 5, 2002, Defendant filed a Motion to Strike the Plaintiff's Motion to Substitute Parties with supporting memorandum upon the grounds that the motion to substitute sought to substitute the wrong parties and did not contain the required notice of hearing. (R. at 92-99).

12. Although aware of the deficiencies of his motion to substitute prior to the expiration of the ninety (90) day period, the Plaintiff refused to move to substitute the personal representative of the Defendant and continued forward with his claim that the Defendant's surviving siblings were the proper parties to this action. (Entire Record).

13. The District Court found (a) that the Defendant's death was suggested on the record on December 7, 2001; (b) the Plaintiff was attempting to substitute the Defendant's heirs as the proper party in this action; (c) the Defendant's heirs are not the Defendant's personal

representatives; and (d) the Plaintiff's motion to substitute does not contain a notice of hearing. (R. at 130)

14. The Court concluded that the Plaintiff's motion to substitute does not seek to substitute the Decedent's personal representative for the deceased party and is improper and must be stricken. (R. at 131)

15. The Court also concluded that the Plaintiff's motion to substitute did not contain the required notice of hearing and that defect was also fatal to the motion. (R. at 131).

16. The Court entered an Order granting the Motion to Strike Plaintiff's motion to substitute Decedent's Heirs as a Party on April 29, 2002. (R. at 129-32)

17. On April 18, 2002, the Defendant moved with supporting memorandum to dismiss the action pursuant to URCP Rule 25 for the Plaintiff's failure to move to substitute the proper party for the deceased Defendant. (R. at 124-28).

18. The Plaintiff did not oppose the motion to dismiss. (R. at 136-37 and 138).

19. On June 12, 2002, the Court entered an order granting the Defendant's motion to dismiss with prejudice. (R. at 150-52).

SUMMARY OF THE ARGUMENT

The Court did not exceed its permitted range of discretion by striking the Plaintiff's motion to substitute that sought to substitute the wrong parties and failed to contain the required notice of hearing. Upon the death of the Defendant, the Plaintiff's cause of action could be revived against the personal representative of the Defendant. The Plaintiff merely had to file a motion seeking to substitute the Defendant's personal representative or "John/Jane Doe, the undetermined personal representative of the Defendant." The Plaintiff refused to do so and sought to have the Defendant's surviving siblings named as a party to this action. In addition, the Plaintiff's motion to substitute failed to contain the required notice of hearing. Accordingly, the District Court, within its permitted range of discretion, struck the motion to substitute. In the alternative, the District Court's interpretation that URCP Rule 25 required the Plaintiff to timely move to substitute the personal representative of the Defendant (whether known or unknown) with a notice of hearing within ninety (90) days of the notice of suggestion of death was correct.

Finally, the District Court, within its permitted range of discretion, dismissed the Plaintiff's action with prejudice because he failed to comply with the requirements of URCP Rule 25.

ARGUMENT

I. THE DISTRICT COURT WAS WITHIN ITS PERMITTED RANGE OF DISCRETION WHEN IT STRUCK THE PLAINTIFF'S MOTION TO SUBSTITUTE BECAUSE THE MOTION SOUGHT TO SUBSTITUTE THE WRONG PARTIES.

The District Court did not abuse its discretion when it struck the Plaintiff's motion to substitute for failing to name the proper party. URCP Rule 25 states: "[u]nless 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." URCP Rule 25. Once Defendant's death was suggested on the record, the Plaintiff was required to move to substitute the Defendant's personal representative even if he did not know who that individual would be. See Stoddard v. Smith, 2001 UT 47, ¶19, 27 P.3d 546. See also Utah Code Ann. §78-11-12(1)(a) ("The injured person . . . ha[s] a cause of action against the . . . **personal representative of the wrongdoer** for special and general damages . . .")(emphasis added). Defendant's counsel even informed the Plaintiff's counsel eleven (11) days after filing the "Notice of Suggestion of Death" there was no personal representative of the Defendant, at that time. See December 18, 2001 letter (R. at 113). Accordingly, all the Plaintiff had to do was file a motion to

substitute John/Jane Doe, Personal Representative of the Defendant's Estate, as the Defendant. See Stoddard v. Smith, 2001 UT 47, ¶19, 27 P.3d 546. However, the Plaintiff refused to do so. Instead, the Plaintiff attempted to substitute the Decedent's surviving siblings as the defendants in this action. See Motion to Substitute Proper Party and Memorandum (R. at 65-71). The Affidavit of Thomas N. Thompson filed in support of the motion to substitute states, "It is necessary to substitute the names of the decedent's heirs for the decedent in this case." See Affidavit of Thomas N. Thompson at ¶5, (R. at 74). Such a motion and request is clearly improper. There is no provision in the Utah Code that allows a Plaintiff to assert a cause of action against a decedent's heirs for the decedent's alleged negligence. See Utah Code Ann. §78-11-12. The Plaintiff's cause of action lies against the estate of the decedent through the personal representative. *Id.* Yet, the Plaintiff insisted on naming the Decedent's heirs as defendants and refused to substitute the personal representative of the estate as the proper party even though he had knowledge of this deficiency prior to the expiration of the ninety (90) days.

Moreover, the Plaintiff only sought to name four of the five surviving siblings as defendants in this action. While each sibling qualified potentially as the personal representative of the estate, none of the siblings were actually appointed as the personal representative of the estate. In addition, if the

Court has failed to strike the Plaintiff's motion to substitute, this case would have continued against individuals who have no authority or responsibility for the Defendant's estate. If the Plaintiff obtained a judgment under that scenario, the judgment would attach to the Defendant's siblings' assets, as individuals, and not the estate of the Defendant.

Furthermore, another individual, such as the Defendant's un-served sister, Rula Flink, could have been appointed the Defendant's personal representative and she would not even be a party to this action. The Plaintiff argued that the District Court should alter his motion to substitute the descendant's heirs as a party and make it a motion that appoints the heirs as the personal representatives of the estate to comply with URCP Rule 25. "Once all of the heirs are served, the Plaintiff will move to appoint all of those heirs as co-personal representatives of the Estate of Dale H. Curtis, deceased." See Opposition to Defendant Motion to Strike Plaintiff's motion to substitute Parties at page 3, (R. at 102). However, the District Court did not have the authority to appoint personal representatives of the estate. A proceeding to appoint a personal representative is independent of the personal injury action. See Utah Code Ann. §75-3-106 (1975). Therefore, the Court did not exceed its permitted range of discretion by striking the Plaintiff's motion to substitute the Defendant's surviving siblings as parties to the action.

II. THE DISTRICT COURT WAS WITHIN ITS PERMITTED DISCRETION WHEN IT STRUCK THE PLAINTIFF'S MOTION TO SUBSTITUTE PROPER PARTIES BECAUSE IT FAILED TO PROVIDE THE PROPER NOTICE.

The District Court did not abuse its discretion when it struck the Plaintiff's motion to substitute because it failed to comply with the notice requirements of URCP Rule 25. The rule specifically requires that the motion to substitute be served "together with the notice of hearing." URCP Rule 25(a)(1). Even assuming *arguendo* that the Decedent's heirs are proper parties, the Plaintiff's failure to serve upon them a "notice of hearing" in the manner provided in Rule 4 for the service of a summons is fatal to the motion. As the Utah Supreme Court states: "the rule **requires** that the motion, **'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 by Rule 4 for the service of summons.'" Stoddard v. Smith, 2001 UT 47, ¶13, 27 P.3d 546 (emphasis added). The Plaintiff simply failed to meet this requirement and the District Court was within its permitted range of discretion by striking the motion to substitute for this failure.

In addition, rather than provide the Defendant's surviving siblings with a notice of a hearing set on the motion so that they could appear and defend, each notice contained the statement "Should you have any objection

to this motion, you should file the same with the Clerk, Third Judicial District Court, . . . at any time within fourteen days after service of the attached documents upon you. In the absence of a timely objection, the Court may grant the Plaintiff's motion without further notice." (As to Sara Flink, R. at 76; As to N. De Von Curtis, R. at 79; As to Barbara Inkley, R. at 86; As to J. Kent Curtis, R. at 119). The Plaintiff attempted to circumvent the required hearing by stating that an objection needed to be filed in fourteen days or the Court would grant the motion without further notice. However, under URCP Rule 25, a party who is being sought to be substituted as a defendant is entitled to a hearing. In addition to seeking to substitute the wrong parties, the Plaintiff's motion denied those parties the right to a hearing. Accordingly, the District Court was within its permitted range of discretion when it struck the Plaintiff's motion to substitute Proper Parties because it failed to provide the substituted parties with a hearing on the motion.

III. IN THE ALTERNATIVE, THE DISTRICT COURT WAS CORRECT WHEN IT STRUCK THE PLAINTIFF'S MOTION TO SUBSTITUTE BECAUSE THE MOTION SOUGHT TO SUBSTITUTE THE WRONG PARTIES AND FAILED TO CONTAIN THE REQUIRED NOTICE OF HEARING.

In the alternative, if the standard of review of this issue is correctness, the District Court was correct when it struck the Plaintiff's motion to substitute the decedent's brothers and sisters as the proper parties in this action and failed to contain the required notice of hearing. Based upon the foregoing argument, the District Court was correct when it struck the Plaintiff's motion to substitute because it failed to bring the required parties before the Court. In addition, the motion to substitute failed to provide the noticed parties with their due process right to appear and defend. Accordingly, the District Court was correct by striking the Plaintiff's motion that failed to substitute the proper party and failed to include a required notice of hearing.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE PLAINTIFF'S COMPLAINT WITH PREJUDICE BECAUSE UNDER URCP RULE 41(B) A DISMISSAL WITH PREJUDICE WAS PRESUMED.

The District Court did not exceed its permitted range of discretion when it dismissed the Plaintiff's complaint with prejudice because a dismissal

pursuant to URCP Rule 25 is an adjudication on the merits and a dismissal with prejudice is presumed. In the case of Donahue v. Smith, 2001 UT 46, 27 P.3d 552, the Plaintiff's complaint was dismissed with prejudice pursuant to URCP Rule 25 because the Plaintiff failed to file a motion for substitution within ninety days after the suggestion of death was filed. The Plaintiff appealed the District Court's decision and stated that the District Court erred in dismissing the complaint with prejudice. The Utah Supreme Court reviewed URCP Rule 41 and upheld the District Court's decision to dismiss the action with prejudice. The Utah Supreme Court stated:

[b]ecause the language in rule 41(b) refers only to a dismissal under rule 19(b), and because the district court granted the motion to dismiss based on plaintiff's failure to comply with rule 25, the district court properly determined that the dismissal was for a failure to 'to comply with these rules.' **Therefore, under rule 41(b), a dismissal with prejudice was presumed, and the district court was not in error to so rule.**

Donahue v. Smith, 2001 UT 46, ¶18, 27 P.3d 552 (emphasis added). One of the reasons for this presumption is that the Decedent's estate needs to be closed in a timely manner. A dismissal without prejudice exposes the estate and the distributees to additional liabilities for an additional year after the dismissal. The ninety day requirement of URCP Rule 25 ensures that cases against the estate of a deceased individual will be brought quickly or not at all. Accordingly, a dismissal for the Plaintiff's failure to comply with URCP Rule 25

is presumed to be with prejudice. Therefore, the District Court's action of dismissing the Plaintiff's complaint with prejudice did not exceed the permitted range of discretion and such a dismissal was presumed.

Moreover, the Plaintiff's reliance on the case of Hartford Leasing Corporation v. State of Utah, 888 P.2d 694 (Utah Ct. App. 1994) is misplaced. The Plaintiff argues that the District Court should have applied the "totality of the circumstances" criteria set forth in Hartford to determine whether to dismiss the complaint with or without prejudice. However, the Hartford case dealt with a dismissal for lack of prosecution and not a dismissal for the failure to timely substitute the proper party. The Utah Supreme Court has stated that a dismissal with prejudice is presumed when a party failed to timely substitute a proper party and did not apply the "totality of the circumstance" criteria. See Donahue v. Smith, 2001 UT 46, ¶8, 27 P.3d 552. Accordingly, the District Court acted as it was presumed to do and did not abuse its discretion in dismissing the Plaintiff's complaint with prejudice.

Finally, the Plaintiff alleges that the Court should not have dismissed the complaint with prejudice because he "did everything possible to bring the proper parties before the Court" and "[t]he Defendant . . . made no effort to advise the plaintiff of who should properly be appointed as personal

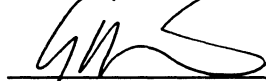
representative . . .” See Appellant’s Brief at page 17. However, these allegations are without merit. The Defendant’s counsel informed the Plaintiff eleven (11) days after filing the “Notice of Suggestion of Death” there was no personal representative of the Defendant. Upon receiving this information, all the Plaintiff had to do was file a motion to substitute John/Jane Doe, Personal Representative of the Defendant’s Estate. The Plaintiff even could have, at any time after the notice of suggestion of death, petitioned the Court in a separate action to appoint himself or another individual as personal representative of the Defendant’s estate and then substitute that person as the Defendant in the action. See Utah Code Ann. §75-3-203 (1983). However, the Plaintiff refused to do so and insisted on attempting to substitute the Decedent’s surviving siblings as the defendants in this action. The Defendant is not required to move the Plaintiff’s case on to judgment. See Hartford, 888 P.2d at 698. It was the Plaintiff’s obligation to move to substitute the proper party and include the required notice of hearing. The Plaintiff failed to do so in the time allowed. Therefore, the District Court did not exceed its permitted range of discretion by dismissing the case with prejudice.

CONCLUSION

The District Court did not abuse its discretion or was correct in striking a motion to substitute that did not seek to substitute the proper party and failed to contain the required notice. In addition, a dismissal under URCP Rule 25 for the failure to substitute a proper party is an adjudication on the merits and presumed to be dismissed with prejudice. Accordingly, the District Court did not abuse its discretion by dismissing the Plaintiff's complaint with prejudice. Therefore, for the foregoing reasons, the District Court's Order on Motion to Strike Plaintiff's motion to substitute Decedent's Heirs as a Party and the Order on URCP Rule 25 Motion Dismiss must be upheld.

DATED this 30th day of January 2003.

PLANT, WALLACE, CHRISTENSEN & KANELL



Terry M. Plant

Cory D. Memmott

Attorneys for Defendant Curtis

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2003, I caused a two (2) true and correct copies of the foregoing document, to be hand delivered to:

James C. Haskins
Thomas N. Thompson
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