2003

In Re R. Bruce Stone v. Chris Slade : Brief of Appellee

Utah Court of Appeals

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Petitioner/Appellant,

v.

CHRIS SLADE,

Respondent/Appellee.

CASE NO. 20030560-CA

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of Salt Lake County, State of Utah
Honorable William Bohling

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ISSUES ON APPEAL

The following issues are presented on appeal:

1. Did the trial court abuse its discretion in denying a petition to conduct "equitable discovery" under Utah Rule of Civil Procedure 27?
2. Is the constitutionality of small claims court procedures properly presented to this Court in this proceeding?
3. Whether limiting small claims litigants to a single evidentiary hearing denies them a constitutional right to pre-trial discovery procedures?

STATEMENT OF THE CASE

1. Nature of the Case

This is an appeal from a judgment of the Hon. William Bohling, Third District Court, in favor of Respondent, denying a petition under Utah Rule of Civil Procedure 27 to perpetuate testimony.

2. Course of Proceedings and Disposition in the Court Below

Petitioner ("Stone") was involved in an admittedly minor rear-end automobile accident with Respondent ("Slade") and another driver, "Bobo". Slade initially filed a small claims court affidavit against Stone, only. At the small claims court hearing, it became clear that Stone blamed Bobo as a potentially responsible driver. Accordingly, Slade moved to dismiss the proceeding without

prejudice, in order to name Bobo as an additional defendant. Stone apparently filed this Petition for "equitable discovery" under Utah Rule of Civil Procedure 27 shortly afterward, but did not serve Slade.. After Slade filed this second small claims court action, Stone hurriedly served Slade with the Rule 27 petition, and obtained a stay of the second small claims court proceeding. After considering the petition, Judge Bohling denied the petition, and this appeal followed.

3. Statement of Relevant Facts on Appeal

The basic facts are set forth in Stone's Appellant's Brief. While Slade is not stipulating to all those facts, for purposes of this brief, he accepts them *arguendo*, as he and Judge Bohling did below.

SUMMARY OF ARGUMENT

Stone has improperly attempted to use Utah Rule of Civil Procedure 27 to avoid the normal process of seeking a discovery decision from the trial court, with any subsequent appellate review as may be provided. Rule 27 was never designed to provide an "equitable discovery" procedure outside the trial court hearing the underlying case.

Stone obviously wants to challenge the current rules governing small claims courts, on a constitutional basis. But courts do not anticipate constitutional violations and rule on them in advisory opinions. Should the need arise, the appellate courts can issue a writ of mandamus in the ordinary way. Use of Rule 27, with a direct appeal, attempts to improperly pre-empt the appellate court's discretion to issue a writ.

Should the court reach the constitutional issue, it should recognize the prerogative of the Legislature to create a statutory court to hear small claims with simplified procedures. Historically

litigants had no constitutional right to discovery prior to trial, so no common law rights are implicated. And as a matter of equity, if the courts read a right to unlimited discovery into small claims court, it will simultaneously bar the door to civil justice for ordinary citizens who cannot afford an attorney to do discovery battles with a well-heeled (or, like Stone, a well-insured) litigant.

ARGUMENT

I. RULE 27 IS NOT INTENDED TO PROVIDE A ROUTE FOR PARTIES TO END-RUN DISCOVERY RULES AND RULINGS IN ANOTHER PROCEEDING.

Normally, a party seeks discovery in an adversarial proceeding, and if it is denied the discovery it feels entitled to, file either an appeal or an application for a writ of mandamus. This appellate relief is sought in the proceeding in which relief on the merits is demanded. Rule 27 is not intended to provide an alternative path to the ordinary litigation process. See *Bainum v. Mackay*, 15 Utah 2d 295; 391 P2d 436; (Utah 1964)(Rule 27 not intended to provide a means for a pre-suit discovery fishing expedition). *Treutle v. Dist. Ct. Of Salt Lake County*, 7 Utah 2d 155; 320 P.2d 666; (Utah 1958)(plaintiff not allowed to perpetuate testimony by deposition prior to service of process).

Stone, in this Rule 27 proceeding, was admittedly not seeking any relief on the merits from Slade. No claim was made for money damages. There had been another proceeding previously filed, dismissed without prejudice, which was in fact re-filed, in which relief was sought on the merits. However, no discovery was sought in the currently pending small claims matter between the parties, nor was a writ of mandamus sought in that case. In fact, due to this Rule 27 proceeding, the small claims matter has been indefinitely stayed. Thus, this Rule 27 proceeding has frustrated the ordinary course of proceeding.

No discovery is ordinarily allowed in small claims court. But the Utah Supreme Court has previously granted relief by way of a writ of mandamus to review the procedures of a district court trial *de novo* from a small claims court judgment. See *Kawamoto v. Hon. Joseph C. Fratto, Jr.*, 2000 UT 6; 994 P2d 187; 386 Utah Adv Rep 34; 2000 Utah LEXIS 5, where a district court was ordered to take testimony instead of requiring proffers, in an appeal from small claims court. The *Kawamoto* case illustrates the proper way to obtain review of a small claims court case: via a petition for a writ of mandamus to the district court. Petitioner admittedly did not seek discovery or relief from either the small claims court or from the district court on appeal.

The mischief that Petitioner attempts, however, is not limited to small claims court appeals. If this Court allows Rule 27 petitions to be used in this fashion, any district court proceeding could be anticipated, pre-empted or circumvented through Rule 27. The normal appellate process would be undermined by the lack of a complete factual setting, in the context of an existing adversarial proceeding. Further, a Rule 27 proceeding might not be pursued by truly adverse parties. Creative or clever pleading could easily create the necessary setting under Rule 27 to take sworn testimony or other discovery without the hallmark of a legitimate truth-seeking process: two opposed parties vigorously exploring the facts of a case. These reasons undoubtedly lay behind Judge Bohling's denial of the Rule 27 application. No abuse of his discretion has been shown.

II. APPELLATE REVIEW IS PREMATURE WHERE NO TRIAL HAS BEEN HELD AT SMALL CLAIMS COURT AND NO TRIAL DE NOVO HAS BEEN HELD AT THE DISTRICT COURT

There has been no ruling on Petitioner's desire to conduct discovery at any level. No relief was sought from the small claims court. No relief was sought from the district court. Ordinarily,

appellate courts are reluctant to issue what amounts to an advisory opinion about something that might or might not happen. See *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 784-85 (Utah 1994) (Howe, J., dissenting) ("It is not the province of this court 'to exercise the delicate power of pronouncing a statute unconstitutional in abstract, hypothetical, or otherwise moot cases' such as the one now before us." (quoting Hoyle v. Monson, 606 P.2d 240, 242 (Utah 1980); *Olson v. Salt Lake City School Dist.*, 724 P.2d 960, 962 n.1 (Utah 1986) ("This court will not issue advisory opinions."); *Justheim v. Division of State Lands*, 659 P.2d 1075, 1077 (Utah 1983) (where question is not ripe for adjudication, court's function is not to render advisory opinions); *Black v. Alpha Fin. Corp.*, 656 P.2d 409, 410-11 (Utah 1982) ("Judicial policy dictates against our rendering an advisory opinion."); *Merhish v. H. A. Folsom & Assocs.*, 646 P.2d 731, 732 (Utah 1982) ("Strong judicial policy against issuing advisory opinions dictates that courts refrain from adjudicating moot questions."); *State v. Kallas*, 97 Utah 492, 504, 94 P.2d 414, 424 (1939) (refusing to address constitutionality of statute where determination not relevant to party's rights).

It appears that Petitioner is using Rule 27 and its direct appeal to obtain an advisory opinion on how the small claims court proceeding and any trial de novo should be held. It is not the function of an individual judge or appellate court panel to prospectively change rules properly promulgated by the Utah Supreme Court. If a constitutional right is infringed, relief can be sought. But until a party's rights are actually denied, it is premature to offer opinions. Judge Bohling properly refused to issue an advisory opinion, especially when to do so would have essentially re-written the rules of small claims court procedure on his own.

The appellate courts exercise discretion in reviewing cases such as this by way of writ of

mandamus. Stone's use of Rule 27 essentially takes away that discretion, by direct appeal from denial of his petition. The appellate courts should have the discretion to choose the time and case in which to explore any legitimate issues raised by Stone.

III. STONE HAS NOT BEEN DENIED ANY CONSTITUTIONAL RIGHT TO THE COURTS

Should the Court take a curious look at the merits of Stone's arguments, it ought to be clear that no constitutional right is violated. Common law litigants had no right to pretrial discovery. "[The common law] generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence . . . It is only in virtue of statutes that law courts now possess and exercise such powers." *Larson v. Salt Lake City*, 34 Utah 318, 327; 97 P. 483, 486 (1908). The Larson court further explained why a rule mandating pretrial discovery was not a requirement:

> It may be that in some instances the plaintiff may have better means than has the defendant of ascertaining and producing facts concerning the character and extent of injuries. In other instances the defendant may have better means than the plaintiff of ascertaining and producing facts concerning negligence. It is not infrequent, in all kinds of suits, that particular facts in issue are peculiarly within the knowledge of one of the parties. The fact that a party having peculiar knowledge of a matter fails to bring it forward may raise a presumption or justify an inference in favor of his adversary's claim; or, if he withholds certain evidence with respect thereto, the inference may be justified that, if it had been produced, it would have been unfavorable to his cause, but it furnishes no basis authorizing the court to make an order requiring him to divulge his knowledge before trial to his adversary, or to supply him with the means of obtaining it.

Larson, supra, 34 Utah at 328; 97 P. at 487. In other words, the lack of pre-hearing discovery cuts both ways. Since the plaintiff bears the burden of proof on most issues, it is the plaintiff, not the defendant, who is usually disadvantaged by such a rule.

Regardless of the merits of the arguments for pre-trial discovery, it is clear that there was no right at common law to such a procedure. The modern litigant's right to discovery was created first by the legislature, and later by court rule. It was not created by the Utah Constitution. Because discovery is entirely a creature of the Legislature or the court system, either has the power to limit that procedure without offending the Constitution. Since the small claims court was created by statute, with the express directive to create simplified procedures and evidence, the rules do not offend Article 1, Section 11. *Kawamoto v. Fratto* 725 P.2d at 1374, ("[t]he small claims court is totally a creature of statute").

The statutory small claims court does not violate Utah Constitution Article 1, Section 24 (Uniform Operation of Laws). The law applies equally to all litigants, whether plaintiff or defendant. As *Larson* noted, whether this favors or disfavors a party simply depends on which side of an issue one stands on. In applying rational basis review under this provision, the courts consider: "First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984) (citations omitted). The small claims court procedures "apply equally to all persons within a class", i.e., all litigants with small claims in small claims court. And dispensing with lengthy pretrial procedures has a rational tendency to further the objectives of the statute, in creating small claims court.

There is ample critical thought and research to indicate the wisdom of limiting the parties in small cases to a single evidentiary hearing, without lengthy or costly pretrial procedures such as discovery. See e.g., Federal Court Discovery in the 80's - Making The Rules Work, 95 F.R.D. 245

(1982); Steele, The Historical Context of Small Claims Courts, 1981 ABA Research J. 293; The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System, 37 U. San Francisco. L. Rev.315, 324 (2003)("the small claims court system is a fundamental component of American jurisprudence. . . [w]ithout such a system, it is anyone's guess as to how the civil administration of justice would be fair").

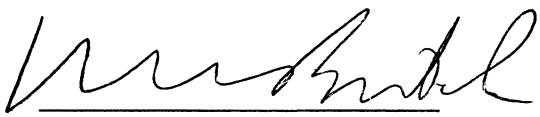
The unjustified factual assumption which Stone has tried to create is that Slade has something to hide regarding his medical history, and is using small claims court to try to do it. Slade has nothing to hide. The fact that he will not submit to a pretrial deposition or medical examination does not mean he will not testify truthfully. The fact that Stone's insurer has a running controversy with his chiropractor does not mean Slade was not hurt. Slade's counsel routinely settles cases (including with Stone's insurer) via voluntary disclosure of medical history, consisting of treatment after an accident, and before, if there is one. This is true of most injury attorneys. To suggest that the system will break down without mandatory pretrial discovery is groundless. The real world of settling personal injury cases revolves around cooperation and good faith disclosure. There is no compelling social evil here which cries out for a judicial remedy.

CONCLUSION

Rule 27 was not intended to provide an end-run of normal discovery and trial processes. It should not work to force advisory opinions out of the judiciary. And Stone is not facing any sort of violation of his rights, let alone one of a constitutional magnitude. Small claims court is a creation of statute, and it is competent in the Legislature to pare down the customary pretrial process. The

situations applies to both parties plaintiff and defendant, so the law operates uniformly within the class. And there is a clear social and economic evil which small claims court addresses, in the form of ordinary citizens who cannot afford to seek justice for claims under $5,000.00, because of the cost of the normal legal system. Judge Bohling did not abuse his discretion in refusing to invoke Rule 27.

DATED this 5 day of December, 2003.



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CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of December, 2003, I served a true and correct copy of the foregoing RESPONDENT/APPELLEE'S BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

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