

1995

Lynn Nielsen v. Ronald Mortensen and Del Rae Mortensen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNN NIELSEN,

Plaintiff/Appellant

VS.

RONALD MORTENSEN and
DEL RAE MORTENSEN,

Defendants/Appellees

Appeals No. 950158-CA

Priority No. 15

BRIEF OF THE DEFENDANTS/APPELLEES
RONALD MORTENSEN and DEL RAE MORTENSEN

APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH, HONORABLE JOHN A. ROKICH

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**UTAH COURT OF APPEALS
BRIEF**

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STATEMENT OF JURISDICTION

The Utah Supreme Court has transferred this appeal to this Court pursuant to Utah Code Ann. § 78-2-2(4). Accordingly, this Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k) -- "cases transferred to the Court of Appeals from the Supreme Court."

ISSUE PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

1. Issue Presented for Review

Whether the District Court properly dismissed Nielsen's personal injury action on the basis that Nielsen had previously brought suit against the Mortensens for damages arising out of the same factual incident?

2. Standard of Review

This Court reviews a dismissal based on Rule 12(b)(6) "accept[ing] the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims." Wright v. University of Utah, 876 P.2d 380, 382 (Utah App. 1994) (citing Hansen v. Department of Fin. Inst., 858 P.2d 184, 185-86 (Utah App. 1993)). "The propriety of a Rule 12(b)(6) dismissal is a question of law that [this Court] review[s] for correctness, giving no particular deference to the lower court's determination." Id. (citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991); Hansen, 858 P.2d at 186). The fact that the trial court considered matters outside the pleadings is of no consequence to the instant appeal because, whether this court treats this as an appeal from an order granting a motion to dismiss under Rule 12(b)(6) or from

a Rule 56 summary judgment motion, this court reviews the trial court's decision for correctness. Schurtz v. BMW of No. Am. Inc., 814 P.2d 1108 (Utah 1991).

DETERMINATIVE PROVISIONS

This appeal does not involve the interpretation of Constitutional provisions, statutes, ordinances, rules, or regulations which would be determinative of the appeal.

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings, and Disposition in the Courts Below.

Appellant Lynn Nielsen ("Nielsen") appeals the Third District Court's Order granting Appellees Ronald and Del Rae Mortensen's ("Mortensens") Motion to Dismiss pursuant to Rule 12(b)(6), dismissing Nielsen's personal injury action with prejudice.

On April 13, 1992, Nielsen filed a small claims action against the Mortensens for property damage arising out of an alleged slip and fall at the Mortensens' premises on April 10, 1991 (hereinafter "Nielsen I"). (See copy of Small Claims Affidavit; Record, page 28). On May 6, 1992, the Small Claims Court held a trial, heard arguments from both parties, and entered a judgment in favor of the Mortensens. (See Copy of Small Claims Judgment; Record, page 29).

On May 13, 1992, Nielsen appealed the small claims decision to the Third Circuit Court, and the Circuit Court scheduled a trial de novo for August 28, 1992. (See copy of Notice of Appeal; Record, page 30). The Circuit Court in Nielsen I held the trial de novo on August 28, but Nielsen failed to appear either personally or through counsel. Rather, a friend of Nielsen's appeared on her behalf and requested a

continuance for Nielsen. Because Nielsen failed to demonstrate due diligence to appear either personally or through counsel, the Circuit Court entered a judgment against Nielsen, dismissing Nielsen I with prejudice. (See copy of Judgment and Order; Record, pages 31-32).

Subsequently, on December 30, 1993, Nielsen, through counsel, filed in the Third District Court an action for personal injury damages arising out of the same slip and fall which occurred on April 10, 1991, at the Mortensens' premises (hereinafter "Nielsen II"). (See Complaint; Record, pages 2-5). In response, on January 21, 1994, Mortensens' filed a Motion to Dismiss Nielsen's complaint pursuant to Rule 12(b)(6), asserting that the doctrine of res judicata barred Nielsen's claim for personal injury damages. (See Defendants' Motion to Dismiss and supporting memoranda; Record, pages 19-32, 36-40).

After an initial hearing, the Honorable John A. Rokich reserved his ruling on Defendants' Motion to Dismiss until a second hearing could be held on May 9, 1994, to determine when Nielsen first discovered that she was injured. (See Minute Entry; Record, page 46).

After hearing testimony from Nielsen and considering all of the evidence presented at the second hearing, Judge Rokich concluded that Nielsen knew she had been injured at the time she filed the Nielsen I complaint. The judge ruled that Nielsen II was barred by the doctrine of res judicata. Consequently, Judge Rokich granted Mortensens' Motion to Dismiss, dismissing the Nielsen II complaint with prejudice. (See Minute Entry; Record, page 73; and Order; Record, pages 74-75).

Nielsen filed a Notice of Appeal on June 20, 1994, (See Notice of Appeal; Record, page 76), and the Supreme Court of Utah received

the Notice of Appeal on October 17, 1994. Subsequently, the Supreme Court transferred Nielsen's appeal to this Court.

2. Statement of Facts

The instant appeal arises out of an alleged slip and fall which Nielsen claims occurred on April 10, 1991 at the residence of the Mortensens.

Nielsen claims that she, as a result of the fall, injured her left wrist and hand, and additionally damaged some jewelry she was wearing at the time. (Small Claims Affidavit, Third district Complaint; Record, pages 28 and 2-5).

On April 13, 1992 Nielsen filed the complaint in Nielsen I against the Mortensens, sounding in tort, for property damages resulting from the April 10, 1991 slip and fall. After the Nielsen I claims were dismissed with prejudice, on December 30, 1993, Nielsen, through counsel, filed the complaint in Nielsen II against the Mortensens, sounding also in tort, for personal injuries arising out of the same April 10, 1991 slip and fall.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's order dismissing the Nielsen II complaint because the claim preclusion branch of the of the res judicata doctrine prohibits Nielsen from splitting her personal injury claims from her property damage claims. Nielsen I and the subsequent Nielsen II meet the three requirements necessary to conclude that Nielsen is prohibited from splitting the two actions: (1) Nielsen and the Mortensens were parties to both actions; (2) Nielsen could have originally asserted the personal injury and property damage claims in the Third District Court, a court of general

jurisdiction, but chose not to; and (3) the Circuit Court, having competent jurisdiction in Nielsen I, entered a judgment by default which resulted in a final judgment on the merits.

ARGUMENT

THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE NIELSEN II COMPLAINT BECAUSE CLAIM PRECLUSION PROHIBITS SPLITTING CLAIMS WHICH ARISE OUT OF THE SAME INCIDENT.

It is axiomatic that the law disfavors the splitting of a cause of action and generally requires parties to include all claims which arise out of the same nucleus of operative facts. Indeed, the above-stated, along with similar policies provided the genesis of the res judicata doctrine. In D'Aston v. D'Aston, 844 P.2d 345 (Utah App. 1992), the Court stated:

In order for a claim to be barred by res judicata, both the prior claim and the current claim must meet three requirements: (1) both actions must involve the same parties, their privies, or assignees; (2) the claim that is asserted to be barred must have been presented or be such that it could have been presented in the first case; and (3) the first suit must have resulted in a final judgment on the merits by a court of competent jurisdiction.

Id. at 350. (Emphasis added.)

Utah courts have consistently applied the res judicata doctrine to bar lawsuits asserting claims which could have been presented in prior related lawsuits.

In Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974), a number of lessee dealers sued the oil company to recover for unlawful price discrimination in violation of Utah's Unfair Practices Act. Texaco moved for summary judgment on the basis that the same dealers had previously brought an action in federal court alleging violations of

federal law arising out of the same alleged misconduct. The state law claims were never asserted in the prior federal action, however, Texaco claimed the dealers could have brought the state claims in the prior federal action had they so desired, under the doctrine of pendent jurisdiction. The lower court agreed and granted Texaco's motion for summary judgment. In affirming the Utah Supreme Court stated:

Since plaintiffs failed to assert their state claim, when the federal court had the power to adjudicate it with the federal claim, they are barred under the doctrine of res judicata from litigating these issues in the instant action.

Id. at 382.

The court reasoned that the doctrine of res judicata applies not only to points and issues which are actually raised and decided in a prior action, but also applies to those that could have been adjudicated, as long as the claims all arise out of a common nucleus of operative facts. As before mentioned, Utah courts have consistently adhered to this rule. Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981), where a defendant was barred by res judicata from asserting an affirmative defense of impossibility of performance in a contract action when he could have asserted the defense in a prior action; D'Aston v. D'Aston, 844 P.2d 345 (Utah App. 1992), where a prior divorce proceeding which had adjudicated property disputes barred re-litigation of any of those issues by any of the parties to the prior action; Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990), where a prior decision on a contract dispute regarding buyers and seller barred seller's claim in a subsequent action on the same contract.

Nielsen I and Nielsen II satisfy the three requirements of the claim preclusion branch of the res judicata doctrine. First, there can be no dispute that both Nielsen I and Nielsen II involve the identical parties. A more detailed discussion of the second and third requirements is necessary.

A. The Claims Asserted In Nielsen II Clearly Could Have Been Asserted In Nielsen I.

The Mortensens have already cited in this brief the Utah cases regarding this issue, however, other highly persuasive authority exists dealing with factual circumstances almost identical to those presented by the instant case and is helpful in deciding the instant appeal.

The Restatement (Second) of Judgments §24(1), states:

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose.

In Comment g, illustration 14 of section 24, it states in relevant part:

. . . when the jurisdiction of the court is limited .
. . . the rule stated in this section as to splitting a claim is applicable although the first action was brought in a court which has no jurisdiction to give a judgment for more than a designated amount. (Emphasis added.)

14. In an automobile collision, A is injured and his car damaged as a result of the negligence of B. Instead of suing in a court of general jurisdiction of the state, A brings his action for damage to his car in a justice's court, which has jurisdiction in

actions for damages to property but has no jurisdiction in actions for injuries to the person. A judgment is rendered for A for damage to the car. A cannot thereafter maintain an action against B to recover for the injury to his person arising out of the same collision. (Emphasis added.)

Although not citing these specific portions, this Court has formally adopted §24 of the Restatement. See Berry v. Berry, 738 P.2d 246, 248 n. 1 (Utah App. 1987); Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1357, cert. denied 795 P.2d 1138 (Utah App. 1990).

Additionally, other jurisdictions dealing with situations almost identical to that presented by the instant case, have relied upon the res judicata doctrine and §24 in concluding that the subsequent personal injury action was barred due to a final judgment rendered in the previous property damage action. In Kirchner v. Riherd, 702 S.W.2d 33 (Ky. 1985), an injured driver brought an action in a court of general jurisdiction against the second driver for personal injury damages suffered in an automobile accident. Injured driver had previously filed a small claims complaint for property damage and loss of use of the automobile involved and obtained a judgment. At the trial level summary judgment was granted in favor of defendant driver, the Court of Appeals reversed and the Supreme Court reviewed the case.

Affirming the trial court's grant of summary judgment, the Supreme Court stated:

Where a plaintiff, who has a claim which in its entirety exceeds in amount the court's jurisdiction, brings an action and recovers judgment for an amount within the court's jurisdiction or is denied recovery by a judgment on the merits, he is, by operation of the judgment, precluded from thereafter maintaining an action for the balance of his claim, even though the court rendering the former judgment

had no authority to give a judgment upon this balance.

Id. at 34.

Similarly, in Mells v. Billops, 482 A.2d 759 (Del. Super. Ct., 1984), a motorcyclist brought an action in the justice of the peace court for property damage sustained in an automobile accident and obtained a judgment in his favor. He then brought an action in Superior Court for personal injuries arising out of the same accident. Defendant's motion for summary judgment was granted and motorcyclist appealed. Affirming, the Superior Court stated:

Justices of the Peace have jurisdiction over actions of trespass involving damages which do not exceed \$1,500.00. This limited jurisdiction does not include claims involving personal injuries. Thus, there is no question that plaintiff could not have presented his claim in its entirety in the prior adjudication, due to the limited jurisdiction of the justice of the peace court.

The fact remains, however, that plaintiff was not compelled to bring part of his claim in the justice of the peace court. Rather, he voluntarily chose a court of limited jurisdiction when he could have presented all his claims, property damage and personal injury had he brought the original action in this court.

Id. at 761.

The opinion also contains discussion and analysis of similar decisions from other jurisdictions.

In Dill v. Avery, 502 A.2d 1051 (Md. 1986), husband and wife brought an action against driver of other automobile for wife's personal injuries and both of their losses of consortium. Previously, husband and wife had filed an action against defendant for automobile

damage resulting from the same collision. The trial court granted defendant's motion to dismiss. On appeal, the dismissal was affirmed.

In discussing this issue, the Maryland Court of Appeals recognized the vast majority of jurisdictions following the Restatement Rule:

In 24 A.L.R.4th 646 (1983), a second and equally extensive annotation upon that issue cited cases in a great many jurisdictions in the course of which it is said in section 3(a) that cases generally support the broad proposition that a single act which causes simultaneous injury to the physical person and property of one individual gives rise to only one cause of action.

Id. at 1053.

Nielsen cannot persuasively argue to this Court that she could not have brought her personal injury claims in Nielsen I because of the limited jurisdictional amount of the small claims court. At all relevant times a court of general jurisdiction was available to Nielsen, but she simply chose not to avail herself of this opportunity. Clearly, the above-cited authority shows that Nielsen's claims in Nielsen II could have been and should have been brought in Nielsen I and therefore satisfy the second requirement of the claim preclusion branch of the res judicata doctrine.

B. Nielsen I Resulted In A Final Judgment For Purposes of Res Judicata.

A judgment is final for purposes of the res judicata doctrine if it, "puts an end to a lawsuit declaring that the plaintiff is or is not entitled to recover the remedy sought." Schoney v.

Memorial Estates, Inc., 863 P.2d 59, 61 (Utah App. 1993). In Schoney, the Utah Court of Appeals concluded that a default judgment entered in favor of defendants in a prior lawsuit barred the filing of a subsequent lawsuit by the same plaintiff for claims arising out of the same incident.

The instant case presents a judgment very similar to that dealt with in Schoney. In the instant case, Nielsen failed to appear at the circuit court for the scheduled trial and her claims were dismissed with prejudice. Nielsen's attempts to explain to this Court the reasons for which the default was improperly entered against her are irrelevant to the instant appeal. A party cannot raise issues for the first time on appeal. If Nielsen felt that the default judgment was improperly entered against her, she could have availed herself of post trial motions as provided by the Rules of Civil Procedure, but chose not to. Clearly, the judgment entered against Nielsen in Nielsen I was a final judgment for purposes of res judicata.

Nielsen is misplaced in her assertion that an order is not final if, when appealed, it leads to a trial de novo. The authority upon which plaintiff relies is not applicable to the instant case. For example, Salt Lake City v. Piepenburg, 571 P.2d 1299 (Utah 1977), involves a prosecution and conviction for the exhibition of an obscene motion picture. The language which plaintiff cites is found in Justice Maughan's dissenting opinion and is pure dictum. Plaintiff is equally misplaced in relying upon the case of Kirk v. Div. of Occ. & Pro. Licensing, 815 P.2d 242 (Utah App. 1991), which involves an appeal of the order of an

administrative law judge and the application of the res judicata doctrine in that setting. Clearly, the instant appeal does not present this Court with such a procedural background and the case is inapplicable.

In short, Nielsen has not provided this Court with any applicable or persuasive authority to support her position. This Court should conclude that the District Court properly dismissed Nielsen's complaint in the instant case.

CONCLUSION

Assuming all of Nielsen's allegations in the instant case to be true, on April 10, 1991, Nielsen slipped and fell at the Mortensens' residence which resulted in damages to some jewelry which Nielsen was wearing at the time, along with personal injuries. Thereafter, Nielsen filed the Nielsen I lawsuit against the Mortensens alleging that the Mortensens were negligent and that such negligence caused Nielsen to suffer property damage. After an adverse final judgment was rendered against Nielsen, she decided to file Nielsen II against the Mortensens, alleged that the Mortensens were negligent and that such negligence caused Nielsen to suffer personal injuries. At all relevant times, a court of general jurisdiction was available to Nielsen, in which she could have filed a tort action against the Mortensens and asserted all claims arising out of the April 10, 1991 slip and fall, but for some reason she chose not to.

Because the parties in both Nielsen I and Nielsen II are identical, the Nielsen II claims could or should have been asserted in Nielsen I, and Nielsen I resulted in a final judgment on the merits, Judge Rokich correctly reasoned that the claim preclusion

branch of the res judicata doctrine barred Nielsen's claims in Nielsen II and properly dismissed the complaint.

This Court should enter an Order affirming the District Court's Order dismissing Nielsen's complaint against the Mortensen's with prejudice.

DATED this 13th day of April, 1995.

RICHARD K. SPRATLEY & ASSOCIATES

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CERTIFICATE OF MAILING

I certify that two copies of Appellees Ronald and Del Rae Mortensen's Brief were mailed, postage prepaid, on the 13 day of April, 1995, to:

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