

1995

# Matthew S. Kellogg vs. Stan J. Christensen : Brief of Appellee

Utah Court of Appeals

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## STATEMENT OF JURISDICTION

This court has jurisdiction of this case pursuant to Utah Code Annotated § 78-2a-3 (1992).

## ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting the Defendants' Motion to Amend their answers and plead the affirmative defense of the statute of limitations.

Standard of Review: A trial court's ruling on a motion to amend will not be disturbed absent a clear abuse of discretion. Sneddon v. Graham, 821 P.2d 1185, 1188 (Utah App. 1991).

2. Whether the trial court erred in granting summary judgment on the basis of the statute of limitations.

Standard of Review: In reviewing whether summary judgment is appropriate, the appellate court reviews the facts and all inferences fairly drawn from them in the light most favorable to the losing party. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

## DETERMINATIVE LAW

Rule 15(a) of the Utah Rules of Civil Procedure is determinative and reads in relevant part as follows:

[A] party may amend his pleading only with leave of court . . .  
and leave shall be freely given when justice so requires.

Utah Code Annotated § 78-12-29 (1989) is determinative and reads in relevant part as follows:

Within one year:

(4) an action for . . . assault, battery . . . .

## STATEMENT OF CASE

### A. Nature of Case

This case arises out of a fist fight in a golf course parking lot on August 5, 1991 in Salt Lake County.

### B. Statement of Facts

On August 5, 1991, Plaintiff Matthew Kellogg ("Kellogg") and Defendant Stan J. Christensen ("Christensen") and Defendant Robert Apgood ("Apgood") were golfing in separate parties at the Glenmoor Golf Course in Salt Lake County, Utah. Words were exchanged on the course which led to a fight in the parking lot. As a result of the fight, Kellogg suffered injuries.

Kellogg filed the Complaint on September 21, 1992, over one year after the altercation. (R. 2) Kellogg pleaded two causes of action: assault and battery and negligence. Two years after the complaint was filed, the trial court issued its order to show cause requiring the parties to appear and explain why the case had not been prosecuted. (R. 21) In response, Kellogg filed a Certificate of Readiness for Trial. (R. 23)

On October 31, 1994, a scheduling conference was held, and a trial date was set for March 7, 1995. (R. 27) Christensen, previously acting as counsel pro se, immediately retained counsel. (R. 29) Christensen then moved the court pursuant to Rule 15(a) of the Utah Rules of Civil Procedure to amend his Answer. (R. 47) On January 31, 1995, Christensen filed his Motion for Summary Judgment. (R. 107)

The court granted Christensen's Motion to Amend his Answer in conjunction with the entry of summary judgment. (R. 172-173) Kellogg then filed his Notice of Appeal. (R. 174)

## **SUMMARY OF ARGUMENT**

### **I.**

The trial court had discretion to allow Christensen to amend his Answer and plead the affirmative defense of the statute of limitations. Rule 15(a) directs the trial court to freely grant leave to amend a pleading upon motion of either party.

### **II.**

Kellogg failed to file his Complaint within the applicable statute of limitations period and, therefore, his Complaint was time-barred, and Christensen was entitled to summary judgment as a matter of law.

### **III.**

Kellogg failed to allege any facts to support a negligence cause of action.

## ARGUMENT

### I.

#### THE TRIAL COURT PROPERLY ALLOWED CHRISTENSEN TO AMEND HIS PLEADING

Kellogg argues that the trial court abused its discretion in allowing Christensen to amend his Answer. In Sneddon v. Graham, 821 P.2d 1185, 1188 (Utah App. 1991), the court of appeals stated, "[w]e will not disturb a trial court's ruling on a motion to amend a [pleading] absent a clear abuse of discretion."

Granting leave to amend is squarely within the discretion of the trial court. The only factor for the court to consider in granting a party leave is whether it would prejudice the other side.

Rule 15(a) of the Utah Rules of Civil Procedure directs the trial court to freely grant leave to amend a pleading when justice so requires. This rule is to be interpreted liberally and is clear that any party may move the court to amend his pleading at any time, even after the entry of judgment. Girard v. Appleby, 660 P.2d 245 (Utah 1983) and Gill v. Timm, 720 P.2d 1352 (Utah 1986).

The issue here is whether the trial court abused its discretion and not whether the trial court should have denied Christensen's Motion to Amend. Kellogg has failed to demonstrate that the trial court abused its discretion or that he was prejudiced by the decision. Kellogg has not argued that he was unable to adequately prepare his case because of the amended Answer.

This litigation had not been aggressively pursued. No written discovery had been exchanged and the trial court issued an Order to Show Cause to dismiss the case for failure to

prosecute. Christensen immediately sought to amend his answer after Kellogg started to pursue the action and a scheduling conference was held.

Consistent with Rule 15(a), Christensen requested leave to amend his answer. So long as leave was granted, Christensen was free to amend his pleading and include the affirmative defense of statute of limitations. In Starker v. Hunington Cleveland Irr. Co., 664 P.2d 1188, 1190 (Utah 1983), the supreme court stated that an affirmative defense can be raised in an amended pleading if leave to amend the pleading was properly granted pursuant to Rule 15(a).

Christensen followed the requirements of Rule 15(a), the trial court had discretion to allow Christensen to amend his Answer, and Christensen's amended pleading was appropriate. Kellogg has failed to show an abuse of discretion by the trial court and therefore the trial court's decision should be affirmed.

## II.

### THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

#### A. KELLOGG'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

When reviewing a grant of summary judgment, the appellate court's inquiry is whether there is any genuine issue as to a material fact, and if there is not, whether the moving party is entitled to judgment as a matter of law. The trial court's conclusions of law are reviewed for correctness and no deference is accorded to the trial court. HCA Health Services v. St. Mark's Charities, 846 P.2d 476, 481 (Utah App. 1993). A summary judgment does not resolve factual issues. Id.

The trial court in this instance was presented with a very simple issue: Did Kellogg file the Complaint within the requisite time period for an assault and battery? He did not and, therefore, summary judgment was appropriate.

Applying the law to the facts, the trial court noted that the statute of limitations for an assault and battery is one year. Utah Code Annotated § 78-12-29 (1992). The fight occurred on August 5, 1991. The Complaint was filed on September 21, 1992. Kellogg was barred from pursuing an assault and battery claim against Christensen and Apgood because of the statute of limitations.

The trial court was not presented with any genuine issue of material fact and the court correctly concluded that the statute of limitations as applied to Kellogg's first cause of action barred any recovery for assault and battery.

#### B. THERE IS NO EVIDENCE OF NEGLIGENCE.

Kellogg's second cause of action was for negligence. The trial court concluded that Kellogg had failed to state a cause of action for negligence.

The elements necessary to sustain a cause of action for negligence are: (1) a duty owed by one party to the other; (2) a breach of the duty; (3) the breach of the duty was the proximate cause of the injury; and (4) one party in fact suffered injuries or damages. Hunsaker v. State, 870 P.2d 893 (Utah 1993).

Kellogg argues that the fight which gave rise to the assault also gave rise to a negligence claim. The law in Utah is well settled; a party cannot re-characterize an intentional tort into a negligence cause of action. No facts exist in this case to support a negligence claim. The

supreme court in Ledfors v. Emery County School District, 849 P.2d 1162 (Utah 1993), stated that one must look at the facts that gave rise to the injury to determine the appropriate characterization of that cause of action. In Ledfors, the plaintiffs were attempting to avoid the imposition of the Governmental Immunity Act which barred their recovery. Here, Kellogg has attempted to avoid the imposition of the statute of limitations which would barr his recovery for assault and battery by arguing negligence. This is contrary to his own testimony. During his deposition, he stated that he believed Apgood intended to hit him.

Yeah, I would definitely say he meant to hit me. As a matter of fact, after he hit me, he was standing over the top of me doing his Hulk Hogan imitation screaming at me like he was King Kong. I remember looking up and seeing that. R. 126

Kellogg also cites to Doe v. Doe, 878 P.2d 1161, 1163 (Utah App. 1994) and Matheson v. Pearson, 619 P.2d 321, 322-323 (Utah 1980) to support his argument for a negligence claim. However, the cases are distinguishable because the appellate court noted in both cases that the facts of each gave rise to an argument of reckless misconduct which is a form of negligence and distinguishable from an intentional tort.

In Doe, a ten-year old boy had engaged in sexual misconduct with his seven-year old neighbor. The boy had argued that he was not liable under a negligence theory because his repeated acts were committed intentionally. In Matheson, a child had thrown a "Tootsie Pop" out a second floor window which had hit a man on his head and injured him. The supreme court noted in Matheson, which was also cited in Doe:

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm

may result, even though he hopes or even expects that his conduct will prove harmless.

Matheson at 322-323.

In cases where conduct can be interpreted as intentional but also negligent, it is appropriate to apply the reasoning of the supreme court in Strange v. Ostlund, 594 P.2d 877, 881 (Utah 1979) in which the court stated:

The line of culpability between that conduct which is simply negligent and that conduct which is clearly intentional is a matter of degree. And at some point along that line, accumulated aggravation of negligence amounts to willful misconduct.

Kellogg confuses his theory of recovery with cases which have found that it is possible to have an intentional tort and negligence cause of action simultaneously when an actor intends the conduct but not the consequence of it. There is no question in Kellogg's mind that he was intentionally hit by Apgood. He states so in his deposition. If Apgood and Christensen had pushed Kellogg or thrown a golf ball at him, and Kellogg moved to avoid contact and was injured, Kellogg could have an argument that a negligence cause of action was also appropriate. The facts in this case *only* give rise to an assault cause of action. There was no negligence because the conduct and the injuries were intended. If one accepts Kellogg's own statement during his deposition, Apgood was not acting recklessly when he allegedly struck Kellogg; he intended to punch him and did.

The trial court was correct in determining that there was only one cause of action; assault and battery. Kellogg did not present facts to support a negligence cause of action. Kellogg's second cause of action was appropriately dismissed. The trial court correctly granted Christensen

and Apgood's joint Motion for Summary Judgment by applying the statute of limitations for assault and battery and concluding that they were entitled to judgment as a matter of law.

### CONCLUSION

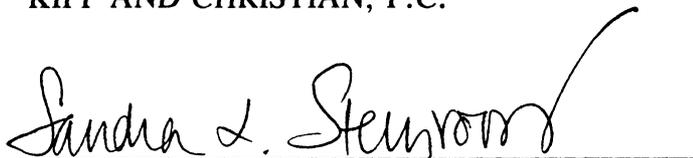
The trial court's decision to allow Christensen to amend his Answer was within its discretion and consistent with the directive contained within Rule 15(a) of the Utah Rules of Civil Procedure.

Further, the statute of limitations for assault which applied to Kellogg's complaint conclusively resolved the case. Christensen and Apgood were entitled to summary judgment as a matter of law and the trial court correctly so concluded.

This court is respectfully requested to affirm the trial court's grant of summary judgment in favor of Christensen and Apgood.

DATED this 4<sup>th</sup> day of December, 1995.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE STAN J. CHRISTENSEN was mailed, postage prepaid, this 4<sup>th</sup> day of December, 1995, to the following:

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