

1995

Matthew S. Kellogg vs. Stan J. Christensen and Robert Anthony Apgood : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Matthew S. Kellogg v. Stan J. Christensen*, No. 950441 (Utah Court of Appeals, 1995).
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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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MATTHEW S. KELLOGG,	:	
	:	
Plaintiff and Appellant,	:	Case No. 950441-CA
	:	
vs.	:	Priority No. 15
	:	
STAN J. CHRISTENSEN and	:	
ROBERT ANTHONY APGOOD,	:	
	:	
Defendants and Appellees.	:	

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BRIEF OF APPELLANT
MATTHEW S. KELLOGG

Appeal from Summary Judgment entered by the Honorable
William A. Thorne, Third Judicial District Court,
on April 25, 1995

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BRIEF OF APPELLANT
MATTHEW S. KELLOGG

Appeal from Summary Judgment entered by the Honorable
William A. Thorne, Third Judicial District Court,
on April 25, 1995

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Annotated §78-2-2(4). This case was assigned from the Utah Supreme Court to the Utah Court of Appeals on or about June 23, 1995 [R 179].

DETERMINATIVE AUTHORITY

In addition to the relevant case law cited hereinafter, the Appellant in the above-entitled case believes the following authority to be determinative of this dispute on appeal:

Utah Code Annotated §78-12-25

Utah Code Annotated §78-12-29

Rule 15, Utah Rules of Civil Procedure

Rule 56, Utah Rules of Civil Procedure

STANDARD OF REVIEW

When reviewing a summary judgment, the appellate court affords no deference to the legal conclusions of the trial court. Walker v. Brigham City, 856 P.2d 347 (Utah 1993). Furthermore, in making the determination as to whether or not the summary judgment below was appropriate, the appellate court will review the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. K & T, Inc. v. Koroulis, 254 Utah Advance Report 3 (Utah 1994).

STATEMENT OF ISSUES

1. Whether the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William A.

Thorne presiding, abused its discretion in granting the Defendants' and Appellees' Motions to Amend their Complaints, in order to add the statute of limitations for the Plaintiff's First Cause of Action for assault, as an affirmative defense, after the Defendants had failed to plead this affirmative defense in their original Answers, and after they had failed to plead this affirmative defense for over two (2) years thereafter [R 42, R 70]. In reviewing the lower court's ruling on a motion to amend, a primary consideration for the appellate court should include a determination as to whether any party received an unfair advantage or disadvantage thereby. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

2. Whether the trial court erred, as a matter of law, in granting the Defendants' Motions for Summary Judgment, as to both of the Plaintiff's Causes of Action of assault and negligence against the Defendants, by applying the year (1) year statute of limitations for assault, which was only the Plaintiff's First Cause of Action, to the entirety of the Plaintiff's claim [R 137]. By necessity, this issue includes a determination as to whether the trial court erred, as a matter of law, in ruling that the Plaintiff and Appellant could not maintain an assault, or

intentional cause of action, contemporaneously with a negligence cause of action, arising out of the same fact situation [R 137; see Standard of Review, supra].

3. Whether there are genuine issues of material fact remaining in this case relative to the Appellant's negligence cause of action and with respect to equitable issues pertaining to the injury suffered by the Plaintiff and Appellant as the result of the Defendants' and Appellees' delay and failure, for over two (2) years, to plead the affirmative defense of statute of limitations [R 137; see Standard of Review, supra].

STATEMENT OF THE CASE

This is an appeal from a Summary Judgment entered in favor of the Defendants and Appellees Stan J. Christensen and Robert Anthony Apgood in this personal injury case [R 172]. The case was originally assigned to the Third Judicial District Court, the Honorable James S. Sawaya presiding [R 2], and was then reassigned to the Honorable Tyrone E. Medley [R 21]. The case was ultimately transferred on or about February 24, 1995, to Judge William A. Thorne [R 158], and was heard before Judge Thorne on March 30, 1995 [R 170]. The subsequent Order granting the Defendants' and Appellees' Motions for Summary Judgment was signed and entered by

the Court on April 25, 1995 [R 172]. The Plaintiff and Appellant filed his Notice of Appeal on May 3, 1995, which was received by the Utah Supreme Court of the State of Utah on May 10, 1995 [R 174]. On or about June 23, 1995 this case was assigned by the Utah Supreme Court to the Utah Court of Appeals [R 179].

STATEMENT OF FACTS

1. On or about August 5, 1991, at approximately 8:00 p.m., the Plaintiff was assaulted and injured, through the negligent and intentional actions of the Defendants, at the Glenmoor Golf Course located at 9800 South 4800 West, West Jordan, Utah [R 3 - R 7], where the Defendants made an unprovoked attack.

2. As a result of this attack by the Defendants and Appellees upon the Plaintiff and Appellant, the Plaintiff's and Appellant's lips were sutured, and an x-ray taken of the Plaintiff and Appellant indicated that there was a hairline fracture to the Plaintiff's and Appellant's cheek bone [R 3 - R 7].

3. The Defendants' and Appellees' attack upon the Plaintiff and Appellant caused him to incur medical expenses, and in addition the Plaintiff and Appellant suffered great pain and mental anguish as the result of the Defendants' and Appellees'

conduct [R 3 - R 7].

4. On or about September 21, 1992, the Plaintiff and Appellant filed his Verified Complaint, alleging the intentional tort of assault, and also alleging negligence against the Defendants and Appellees [R 2; also see copy of Verified Complaint, attached hereto as Exhibit "A"]. The Defendants' and Appellees' conduct and attack upon the Plaintiff was done knowingly and intentionally, as set forth within the First Cause of Action of the Plaintiff's and Appellant's Verified Complaint [see Exhibit "A"]. The Defendants' and Appellees' conduct was also negligent, as set forth within the Second Cause of Action of the Plaintiff's and Appellant's Verified Complaint [see Exhibit "A"], in light of the potential for harm to the Plaintiff and Appellant under said circumstances, and the lack of regard for the safety of the Plaintiff. Therefore, the Plaintiff and Appellant made a claim against the Defendants and Appellees for punitive damages in the amount of \$50,000.00 [R 4; also see Exhibit "A"].

5. In their respective Answers to the Plaintiff's and Appellant's Verified Complaint, the Defendants and Appellees Stan J. Christensen and Robert Anthony Apgood failed to assert the affirmative defense of statute of limitations [R 9, R 19].

6. It is undisputed by the parties that for a period of over two (2) years, from September of 1992 until December of 1994, the Defendants and Appellees Stan J. Christensen and Robert Anthony Apgood, who both made the election to act as pro se litigants, did not attempt to assert this affirmative defense, either in an amended answer or otherwise [R 137].

7. The Plaintiff and Appellant relied upon this failure to assert the affirmative defense of statute of limitations, and conducted discovery and otherwise directed his legal counsel to proceed with his case, incurring thousands of dollars of expense for costs and legal fees over the last two (2) years [R 137].

8. The Defendant and Appellee Stan J. Christensen finally retained counsel to represent him, which counsel filed a Notice of Appearance on or about November 1, 1994 [R 29], and the Defendant Robert Anthony Apgood finally retained counsel to represent him, which counsel filed a Notice of Appearance on or about December 5, 1994 [R 55, R 67].

9. Counsel for these respective Defendants and

Appellees immediately moved the Court to amend their clients' Answers, purportedly to correct technical errors, inasmuch as the Defendants and Appellees had acted pro se throughout these proceedings. The Defendants' counsel did not disclose the fact that they intended to forthwith assert the affirmative defense of statute of limitations [R 47, R 59].

10. The Plaintiff and Appellant, in his Memoranda in Opposition to the respective Motions to Amend, expressed his concern about the ability of the Defendants and Appellees to assert affirmative defenses at that late date, and therefore also objected to an amendment of the Defendants' and Appellees' Answers for that purpose [R 42, R 70].

11. Nevertheless, the lower court granted the Motions to Amend of the Defendants [R 84, R 170]. The Defendants then conveniently claimed, in their Amended Answers and in their Memoranda in Support of their Motions for Summary Judgment, that *all of the Plaintiff's claims* were barred, based upon the affirmative defense of statute of limitations [R 31, R 99].

12. The lower court then granted the Defendants' and Appellees' Motions for Summary Judgment as to all of the

Plaintiff's claims, based solely upon the one-year statute of limitations corresponding only to the Plaintiff's First Cause of Action for assault [R 170]. The Court ruled that it was not possible to contemporaneously assert a cause of action for assault and a cause of action for negligence, and thus applied the shorter of the two statutes of limitations in barring completely the Plaintiff's and Appellant's claims [R 170, R 172].

13. The Plaintiff and Appellant filed his Notice of Appeal on May 3, 1995 [R 174]. On or about May 31, 1995, the Appellee Christensen filed a Motion for Summary Disposition, and on or about June 7, 1995, the Appellee Apgood filed a Motion for Summary Disposition, which Motions were denied on or about July 19, 1995. The case was transferred by the Utah Supreme Court to the Utah Court of Appeals on or about June 23, 1995 [R 179].

SUMMARY OF ARGUMENTS

The Third Judicial District Court, the Honorable Judges William A. Thorne and Tyrone E. Medley presiding, clearly abused its discretion in granting the Defendants' Motions to Amend their Answers, and the Defendants' Motions for Summary Judgment. A party should not be permitted to amend its pleading, in order to add an affirmative defense which was previously omitted, if the

result will be to unfairly disadvantage the nonmoving party.

In addition, the Utah appellate courts have ruled unequivocally that causes of action for assault and for negligence are not necessarily mutually exclusive. Therefore, the lower court should not have granted the Defendants' Motions for Summary Judgment, based solely upon the application of the one-year statute of limitations for the Plaintiff's assault claim, as a complete bar to the Plaintiff's and Appellant's claims for negligence.

Finally, there are genuine issues of material fact remaining in this case, to be heard and determined by the trier of fact, with respect to the Plaintiff's and Appellant's negligence and equitable estoppel claims. Therefore, this case should be remanded for such a determination on said genuine issues of material fact.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTIONS TO AMEND THEIR ANSWERS, PURSUANT TO RULE 15, UTAH RULES OF CIVIL PROCEDURE

In accordance with Rule 15(a), Utah Rules of Civil Procedure, leave to amend pleadings shall be freely given by the Court when justice so requires. Although the Plaintiff and Appellant does

not dispute this general rule, the Plaintiff and Appellant also refers to Rule 8(c) and Rule 12(h), Utah Rules of Civil Procedure, which pertain to affirmative defenses. The Utah Supreme Court has held that is affirmative defenses are not plead in a defendant's answer, they are waived:

Because an affirmative defense raises matters outside the scope of plaintiff's prima facie case, matters constituting such defenses must be pleaded, and are not put in issue by a denial pursuant to Subdivision (b) of this rule [Rule 8, Utah Rules of Civil Procedure]; **failure to so plead constitutes waiver of the defense pursuant to Rule 12(h)** [emphasis added].

Moreover, Utah courts have held that in general, even when a defendant has been permitted to amend his answer, he is not entitled to amend in order to cure a defect by adding affirmative defenses which were not plead in his original answer, and which were therefore waived. Goeltz v. Continental Bank & Trust Co., 299 P.2d 832 (Utah 1956). Meyer v. Deluke, 457 P.2d 966 (Utah 1969).

Furthermore, the above rule and case law apply even when pro se litigants are involved. Defendant Robert Anthony Apgood asserted, in his Memorandum of Points and Authorities in Support of Defendant Apgood's Motion to File Amended Answer, that "the prior answer was filed pro se by the defendant individually who is not knowledgeable with respect to disputes in litigation and before he had consulted with counsel" [R 61]. Nevertheless, the

Utah Supreme Court has held that, in general, "a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar," and thus that party must pay the consequence of his actions. Wurst v. Department of Employment Security, 818 P.2d 1036 (Utah App. 1991), citing Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983) [the court is not required to interrupt the course of proceedings to translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of a party's decision to function in a capacity for which he is not trained].

The Appellees made the decision not to retain counsel, they voluntarily acted pro se throughout these proceedings, and they put off hiring legal counsel until a mere three months prior to the previously scheduled trial before the lower court. The Appellees must therefore pay the consequences of their decision, and the Appellant should not have been prejudiced or inconvenienced by the Appellees' own failure to retain counsel.

It has been held by the Utah Supreme Court that in considering motions to amend pleadings, primary considerations include without limitation whether parties have adequate notice to meet new issues and whether any party receives an *unfair advantage or disadvantage*. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

Therefore, to the extent that the Defendants and Appellees sought to assert any affirmative defenses which were not included in their original Answers, the Appellant maintains that the Appellees should not have been given permission by this Court to amend their Complaints. These amendments clearly placed the Appellant at a significant disadvantage, and in fact ultimately resulted in a disposition of the entire case before the trial court.

II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN RULING THAT THE PLAINTIFF'S CAUSES OF ACTION FOR ASSAULT AND FOR NEGLIGENCE WERE MUTUALLY EXCLUSIVE

Utah Code Annotated §78-12-25, and §78-12-29 set forth respectively the statute of limitations for negligence and for assault causes of action. Section 78-12-25(3) provides that a claim for an action for relief not otherwise provided for by law, namely a claim for negligence, must be made within four years, whereas Section 78-12-29(4) provides that a claim for assault must be made within one year.

The Defendants and Appellees, in sole support of their Motion for Summary Disposition of this appeal before the Utah Supreme Court [a copy of which is attached hereto as Exhibit "B"], previously made the argument that:

The Appellant missed filing his Verified Complaint within the statute of limitations period for assault and battery and could not then attempt to convert an

intentional tort into a negligence claim in order to fall within the four year statute of limitations period applicable to a negligence cause of action [emphasis added; see Exhibit "B" at Page 4].

It is important to include the above quotation within the Appellant's principal Appellate Brief, inasmuch as it serves to demonstrate and epitomize the line of reasoning of the Defendants and Appellees, and indeed of the lower court, with respect to the Plaintiff's and Appellant's two causes of action of assault and negligence. It is undisputed by and between the parties herein that the Plaintiff and Appellant, within his Verified Complaint, set forth two causes of action, the intentional tort of assault, and the tort of negligence [see Exhibit "A", beginning at Page 3] Therefore, the Plaintiff and Appellant logically could not have, and indeed did not need to "convert" his claim of an intentional tort into one of negligence.

The Defendants and Appellees, as well as the trial court below, have apparently made the assumption, which is erroneous as a matter of law, that a cause of action for an intentional tort, and a cause of action for a tort involving negligence, when arising from the same conduct, are mutually exclusive. Nevertheless, the Utah Supreme Court recently held, in Doe v. Doe, 878 P.2d 1161 (Utah App. 1994), that:

An individual's acts can simultaneously give rise to a claim for negligence and a claim for an intentional tort.

The two doctrines are not necessarily mutually exclusive, but rather may overlap and coexist on a continuum [emphasis added].

In Doe, the trial court had granted the defendant's motion for summary judgment, and the Utah Court of Appeals, using the above rationale, held that the trial court improperly granted this motion on the Plaintiff's negligence claim, and remanded the case for resolution of the **fact-sensitive issue** of whether John Doe's acts constituted negligence.

Furthermore, the Utah Supreme Court, in the case of Strange v. Ostlund, 594 P.2d 877, 881 (Utah 1979), further clarified this point by holding:

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. Terms such as willful negligence, gross negligence, and willful misconduct fall on that line of culpability somewhere between simple negligence and clearly intentional conduct and involve elements of both. A finding of gross negligence does not preclude a finding of intent, and a finding of willful misconduct does not preclude elements of negligence [emphasis added].

In reference to the above language in the Strange case, the Utah Court of Appeals in Doe, supra, stated that, "the trial court appears to have misunderstood this continuum in holding that defendant's actions could not, as a matter of law, constitute negligence since they were intentional."

Pursuant to the language and reasoning of the Utah courts, the Appellant Matthew S. Kellogg was entitled to plead both an intentional and a negligence tort, arising from the Appellees' conduct. Thus, the Third Judicial District Court erred, as a matter of law, in assuming that the two causes of action were mutually exclusive, and summarily applying the shorter of the two applicable statutes of limitations in precluding the entirety of the Appellant's claims against the Appellees.

Although the actions of the Appellees were clearly intentional, the Appellees may not have intended the actual injuries which were sustained by the Appellant, and to the extent that they were sustained by the Appellant. See Matheson v. Pearson, 618 P.2d 321 (Utah 1980) [The Utah Supreme Court reversed a summary judgment and remanded to the trial court, holding that the defendant's intentional acts could have constituted reckless misconduct or reckless disregard for the safety of the plaintiff, and the Court further noted that reckless misconduct is a form of negligence and is distinguishable from an intentional tort].

Thus, the Plaintiff's and Appellant's claims for negligence, in addition to his claims for an intentional tort, were appropriate and permitted in this case. The trial court could have merely dismissed the Appellant's intentional cause of action of assault and battery on the basis that the limitations period

had expired therefor. However, the trial court should have preserved the Plaintiff's and Appellant's negligence cause of action, the limitations period for which had *not yet expired* at the time the Plaintiff and Appellant filed his Verified Complaint against the Defendants and Appellees.

III. THERE ARE GENUINE ISSUES OF MATERIAL FACT REMAINING IN THIS CASE, AND THE DEFENDANTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, PURSUANT TO RULE 56, UTAH RULES OF CIVIL PROCEDURE

Rule 56 of the Utah Rules of Civil Procedure permits the disposition of a case by way of summary judgment if the following three elements are established by a moving party: (1) It must be shown that no genuine issue of material fact exists; (2) The moving party is entitled to judgment as a matter of law; (3) This showing must preclude, as a matter of law, *all reasonable possibilities* that the losing party could win, if given a trial.

See Thorn Cook v. Cook, 604 P.2d 934 (Utah 1979); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988).

Furthermore, the remedy of summary judgment should be invoked very reluctantly, inasmuch as it denies the non-winning party the chance to prove its case to the finder of fact. "Because a summary judgment prevents litigants from fully presenting their case to the court, courts are and should be reluctant to invoke

this remedy." Brandt v. Springville Banking Co., 353 P.2d 460 (Utah 1960).

It has been held that it only takes one sworn statement to dispute averments on the other side of the controversy and create issues of fact precluding summary judgment. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975). The Plaintiff and Appellant submitted a Verified Complaint, setting forth the facts which he claimed amounted to causes of action for assault and for negligence against the Defendants and Appellees. The Defendants, before the lower court, argued that in accordance with the holding in the case of Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983), allegations within pleadings are not a sufficient basis for opposing summary judgments.

However, the obvious exception to this rule is when there is a *verified* pleading, which "can be considered the equivalent of an affidavit for purpose of defeating a motion for summary judgment." Pentecost v. Harward, 699 P.2d 696 (Utah 1985). Therefore, there is a sufficiently verified dispute as to the material facts in this case with respect to the Plaintiff's and Appellants negligence cause of action, and this would disallow the granting of a motion for summary judgment. Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238 (Utah 1977).

Furthermore, there are genuine issues of material fact

remaining with respect to the Appellant's and Plaintiff's claims of equitable estoppel. There was no evidence permitted, nor findings made, before the lower court with respect to the Plaintiff's claims that the Defendants were equitably estopped from asserting the defense of statute of limitations after failing to do so for more than two (2) years after they filed their Answers to the Plaintiff's Verified Complaint.

The Utah Supreme Court, in CECO v. Concrete Specialists, Inc., 772 P.2d 967, 969-70 (Utah 1989) set forth the elements of equitable estoppel as follows:

- (i) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted;
- (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and
- (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act [emphasis added].

In the present case, the Defendants made the decision to refrain from hiring legal counsel to represent them, and the Plaintiff had absolutely no control over this decision. The Defendants attempted to defend against the Plaintiff's claims for more than two (2) years, failing to assert the affirmative defense of statute of limitations.

The Plaintiff, in reasonable reliance upon this failure to act, took the appropriate action and proceeded with discovery,

accruing attorney fees and costs in this case. The Defendants should not now be able to amend their Answers, after two years of failing to do so, merely because they were acting by their own voluntary election without legal counsel, and in fact should be equitably estopped from so doing. In any event, the lower court should have permitted a trier of fact to determine these issues.

It is undisputed that the lower court granted the Defendants' Motions for Summary Judgment based upon the application of the one-year statute of limitations corresponding to the Plaintiff's and Appellant's cause of action of assault. However, there are genuine issues of material fact remaining in this case with respect to the Plaintiff's and Appellant's cause of action for negligence, the supporting facts for which have been set forth within the Plaintiff's Verified Complaint, and with respect to the Appellant's claims of equitable estoppel. Therefore, the Defendants and Appellees were not entitled to judgment as a matter of law, and the granting of their Rule 56 Motions for Summary Judgment was inappropriate and amounted to a clear abuse of discretion by the Third Judicial District Court.

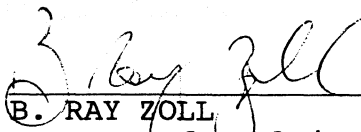
CONCLUSION

The Third Judicial District Court clearly abused its discretion in granting the Appellees' Motions to Amend their

Answers, as argued above. Furthermore, the Third Judicial District Court clearly abused its discretion, as a matter of law, in granting the Appellees' Motions for Summary Judgment, apparently laboring under the misapprehension and erroneous assumption that the Appellant's two causes of action were mutually exclusive. Finally, there are genuine issues of material fact involved in this case with respect to the Plaintiff's and Appellant's Cause of Action for Negligence, and with respect to the Plaintiff's and Appellant's claims of equitable estoppel, which issues should be remanded for such a determination to the Third Judicial District Court trier of fact.

For the foregoing reasons, the Plaintiff and Appellant respectfully requests that the Utah Court of Appeals examine this case and reverse the lower court's Summary Judgments in favor of the Defendants and Appellees, and properly remand this case to the trier of fact.

DATED this 4 day of October, 1995.

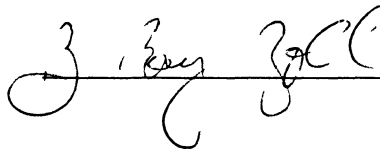

B. RAY ZOLL
Attorney for Plaintiff and Appellant
Matthew S. Kellogg

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing, with postage prepaid thereon, on this 4 day of October, 1995, to the following:

CARMAN E. KIPP
KIPP & CHRISTIAN
City Center I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314
Attorney for Appellee Robert Anthony Apgood

ANDREW M. MORSE
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Attorney for Appellee Stan J. Christensen



B. RAY ZOLL (3607)
Attorney for Plaintiff
5300 South 360 West
Suite 360
Salt Lake City, Utah 84123
Telephone (801) 262-1500

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

MATTHEW S. KELLOGG,

Plaintiff,

vs.

STAN J. CHRISTENSEN, ROBERT
ANTHONY APGOOD, TROY A. COX and
ERIC TODD STRAIN,

Defendants.

VERIFIED COMPLAINT

Civil No. _____
Judge _____

Plaintiff for a cause of action against Defendants alleges as follows:

COUNT I

1. Plaintiff is a resident of Salt Lake County, State of Utah.

2. Defendants are residents of Salt Lake County, State of Utah.

3. The incident which is the subject matter of this Complaint took place in Salt Lake County, State of Utah.

4. On or about the 5th day of August, 1991 at approximately 8:00 p.m. at the Glenmoor Golf Course located at 9800 South 4800 West, West Jordan, Utah, Defendants, without just cause and with a malicious intent to injure Plaintiff, committed an assault and battery upon the Plaintiff by striking Plaintiff.

5. As a result of the Defendants' unjustified attack upon the Plaintiff, Plaintiff's lips were sutured and an x-ray taken discovered that there was a hairline fracture to Plaintiff's cheek.

6. Defendants' malicious attack upon Plaintiff caused Plaintiff to incur medical expenses of \$585.92 plus additional medical damages as will be shown at trial.

7. In addition to the special damages suffered by Plaintiff, Plaintiff has suffered great pain and mental anguish as a result of Defendants' malicious conduct.

8. Because Defendants' acts of attacking Plaintiff was knowingly done by Defendants without regard for the safety of

Plaintiff, Plaintiff is entitled to an award for punitive damages in the amount of \$50,000.00.

9. Plaintiff is entitled to interest on the subject damages as allowed by law.

WHEREFORE, Plaintiff prays judgment against Defendants as follows:

A. Judgment in the amount of \$585.92 in special damages plus any additional amounts that are shown at trial;

B. Judgment in the amount of \$50,000.00 in punitive damages;

C. Costs of Court;

D. Interest as allowed by law; and

E. Any other relief as the Court may deem just in the premises.

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1. Plaintiff incorporates the allegations set forth in

paragraphs 1 and 2 of Plaintiff's Count I as though fully set forth in this paragraph 1 of Count II of Plaintiff's Complaint.

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3. During said argument, Defendants negligently hit Plaintiff causing a laceration to Plaintiff's lip and a hairline fracture to his cheek.

4. As a result of Defendant's negligent acts, Plaintiff has incurred medical bills of \$585.92 plus additional expenses as will be shown at trial.

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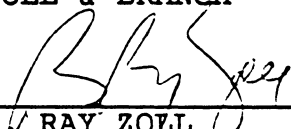
C. Costs of Court;

D. Interest as allowed by law; and

E. Any other relief the Court may deem just in the premises.

DATED this 13th day of Aug, 1992.

ZOLL & BRANCH



B. RAY ZOLL
Attorney for Plaintiff

VERIFICATION


STATE OF UTAH)
 : SS
COUNTY OF SALT LAKE)

Matthew S. Kellogg, being first duly sworn under oath, deposes

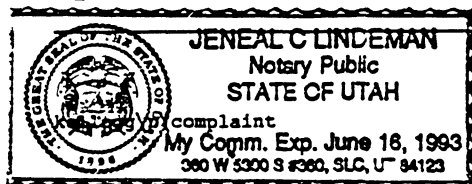
and says that he is the Plaintiff in the above-entitled matter, that he has read the foregoing Complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be on information and belief and as to those matters, he believes them to be true.


MATTHEW S. KELLOGG

Subscribed and sworn to before me this 18th day of ~~April~~^{Sept.}, 1992.


NOTARY PUBLIC
Residing at: S.L.C. UT

My Commission Expires:



CARMAN E. KIPP, #1829
SANDRA L. STEINVOORT, #5352
KIPP AND CHRISTIAN, P.C.
175 East 400 South, #330
Salt Lake City, Utah 84111-2314
(801) 521-3773
Attorneys for Appellee Stan J. Christensen

IN THE SUPREME COURT OF THE STATE OF UTAH

MATTHEW S. KELLOGG,	:	MEMORANDUM IN SUPPORT
	:	OF MOTION FOR SUMMARY
Appellant,	:	DISPOSITION
	:	
vs.	:	Docket No. 950198
	:	
STAN J. CHRISTENSEN and	:	
ROBERT ANTHONY APGOOD,	:	
	:	
Appellees.	:	

Appellee Stan J. Christensen hereby submits the following
Memorandum in support of his Motion for Summary Disposition.

FACTS

1. On August 5, 1991, a fight occurred between the Appellees
and Appellant at the Glenmoor Golf Course in West Jordan, Utah.
(Plaintiff's Verified Complaint, Paragraph 4)

2. Appellant claims to have suffered injuries as a result of
the fight. (Plaintiff's Verified Complaint, Paragraph 5)

Exhibit "B"

3. On September 21, 1992, Appellant filed his Verified Complaint in Third District Court alleging two causes of action, assault and battery and negligence. (See Attachment A)

4. On January 31, 1995, Appellee Christiansen filed his Motion for Summary Judgment arguing that the statute of limitations for assault and battery had expired prior to the filing of the Complaint. Appellee Christensen further argued the Appellant could not conceptually convert the alleged intentional tort to a claim of negligence to avoid imposition of the assault statute of limitations.

5. On April 25, 1995, Summary Judgment was entered on behalf of Appellees dismissing Appellant's Complaint with prejudice and on the merits. (See Attachment B)

STANDARD OF REVIEW

In granting the Appellee's Motion for Summary Judgment, the trial court ruled as a matter of law that the statute of limitations as to assault and battery had expired prior to the filing of the Complaint and there was no negligence cause of action. Legal conclusions are afforded no deference. Walker v. Brigham City, 856 P.2d 347 (Utah 1993).

In reviewing whether Summary Judgment is appropriate, the Appellate Court reviews the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. K & T, Inc. v. Koroulis, 254 Utah Advance Report 3 (1994).

BACKGROUND

In order to demonstrate that the Appellant's grounds for review are so insubstantial as not to warrant further proceedings and consideration by this Court, Appellee Christiansen addresses each issue raised by Appellant in his Docketing Statement.

ARGUMENT

- A. Did the trial court abuse its discretion in allowing the Appellees to amend their Answers and plead the affirmative defense of statute of limitations to the Plaintiff's First Cause of Action.

Rule 15 of the Utah Rules of Civil Procedure states that a party will be freely given leave to amend his pleading when justice so requires. The Verified Complaint was filed on September 21, 1992. Appellee Christiansen responded pro se. He was unaware of his duty to assert an affirmative defense and proceeded with the litigation. Once Appellee Christiansen retained counsel, counsel immediately requested permission from the trial court for leave to file an Amended Answer.

The trial court is under a directive to freely grant a requesting party leave to file an amended pleading. So long as leave is granted and the affirmative defense is then raised, the defense is not waived. Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188, 1190 (Utah 1983). The trial court did not abuse its discretion in allowing the Appellee an opportunity to amend his Answer because Rule 15 favors a liberal grant of leave to amend pleadings. If filing an Amended Answer allowed the Appellee

to raise an affirmative defense which summarily resolved the case, equity and justice required the leave to be granted, and trial court's entry of Summary Judgment as a matter of law was appropriate.

B. Did the trial court err in granting Appellee's Motion for Summary Judgment as to the entirety of the Plaintiff's Complaint?

The Verified Complaint alleged two causes of action: (1) assault and battery and (2) negligence. Appellant argued that he was negligently hit by the Appellees in this fight. The trial court considered the Appellee Christiansen's argument on both causes of action when it entered judgment in favor of Appellees. The Appellant missed filing his Verified Complaint within the statute of limitations period for assault and battery and could not then attempt to convert an intentional tort into a negligence claim in order to fall within the four year statute of limitations period applicable to a negligence cause of action.

The Court considered the Memorandum filed in support of Appellee's Motion for Summary Judgment in which Appellant confirmed that the altercation between the parties was an assault and that he was intentionally struck. (See Attachment C) In Matheson v. Pearson, 619 P.2d 321, 322, this Court stated that if an individual engages in an intentional act but without the requisite intent of causing harm, the individual is not guilty of an intentional tort but of negligence. Here the Appellant agreed that he was

intentionally assaulted. The trial court did not err in dismissing the negligence cause of action.

- C. Are there genuine issues of material fact remaining in the case, including but not limited to, equitable issues?

The Appellant has failed to comply with Rule 9(c)(5) of the Rules of Appellate Procedure in that he has not expressed this issue in the terms and circumstances of the case. In reading the issue, Appellee Christensen is unable to adequately respond because the broad statements are applicable to any case involving the entry of Summary Judgment.

CONCLUSION

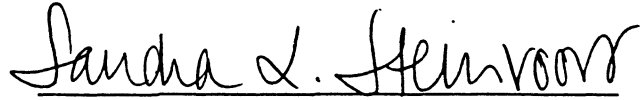
Based upon the foregoing, the grounds for review cited by Appellant are so insubstantial as not to merit further proceedings and consideration by this Court. Therefore, this Court should grant Appellee's Motion for Summary Disposition and affirm the Order of the trial court which forms the basis of this Appeal.

ATTACHMENTS

- A. Complaint
- B. Summary Judgment
- C. Memorandum in Support of Defendant Apgood's Motion for Summary Judgment

DATED this 31st day of May, 1995.

KIPP AND CHRISTIAN, P.C.



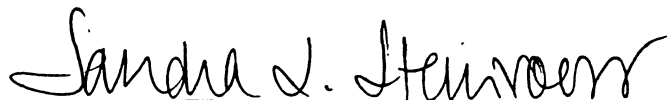
Carman E. Kipp
Sandra L. Steinvoort
Attorneys for Appellee
Stan J. Christensen

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION was mailed,
postage prepaid, this 31st day of May, 1995 to the following:

B. Ray Zoll
Zoll & Branch
5300 South 360 West
Suite 360
Salt Lake City, Utah 84123

Andrew M. Morse
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000



B. RAY ZOLL (3607)
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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ANTHONY APGOOD, TROY A. COX and
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VERIFIED COMPLAINT

Civil No. _____
Judge _____

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ZOLL & BRANCH



BY RAY ZOLL
Attorney for Plaintiff

VERIFICATION


STATE OF UTAH)
 : SS
COUNTY OF SALT LAKE)

Matthew S. Kellogg, being first duly sworn under oath, deposes

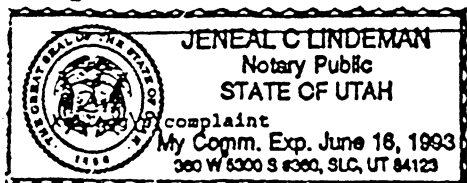
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MATTHEW S. KELLOGG

Subscribed and sworn to before me this 18th day of ~~April~~^{Sept.}, 1992.


NOTARY PUBLIC
Residing at: S.L.C. Ut

My Commission Expires:



ANDREW M. MORSE (A4498)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Apgood
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MATTHEW S. KELLOGG,

Plaintiff,

vs.

STAN J. CHRISTENSEN and
ROBERT ANTHONY APGOOD,

Defendants.

MEMORANDUM SUPPORTING
MOTION FOR SUMMARY JUDGMENT

Case No. 920905255

Judge Tyrone E. Medley

Defendant Apgood submits this Memorandum supporting his Motion for Summary Judgment.

INTRODUCTION

This is an assault and battery case, arising from a fight between the plaintiff and the defendants. Plaintiff pleads two counts: assault and battery, and negligence. The one-year statute of limitations bars the assault and battery claim; the negligence claim fails because it is undisputed that no negligence was involved.

FACTS

1. This defendant joins in and adopts the Statement of Undisputed Facts contained in the Memorandum supporting Defendant Christensen's Motion for Summary Judgment, dated 1-31-95.

2. The plaintiff testified: "And the next thing I know, I get grabbed from my left side, which is where Christensen was, spun around and hit in the side of the face by Apgood with a right hook and dropped me to my knees." (Plaintiff's deposition p. 18, attached as Exhibit A).

3. Plaintiff admitted that the blow struck by Mr. Apgood was not accidental:

Q. Would you say that Mr. Atwood meant to hit you?

A. Atwood or Apgood?

Q. I'm sorry, Apgood?

A. I believe his name is Apgood. Yeah, I would definitely say he meant to hit me. As a matter of fact, after he hit me, he was standing over top of me doing his Hulk Hogan imitation screaming at me like he was King Kong. I remember looking up and seeing that. (Plaintiff's depo, p. 51, attached as Exhibit B).

ARGUMENT

Plaintiff's assault and battery claim is barred by the one-year statute of limitations. U.C.A. § 78-12-29 (1953 as amended). This defendant joins in and adopts Defendant Christensen's Memorandum supporting his Motion for Summary Judgment.


Plaintiff's negligence claim also fails. He admits that defendant Christensen intended to strike him. [Statement of Facts, ¶¶ 2 & 3]. This testimony refutes his own verified allegation that "[d]efendants negligently hit plaintiff" (Verified Complaint ¶ 3, attached as Exhibit C). Plaintiff's attempt to avoid the one-year assault and battery statute by alleging negligence fails, because the undisputed facts are that defendants were not negligent.

CONCLUSION

Summary judgment should issue for the reasons stated above.

DATED this 2 day of February, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By 
Andrew M. Morse
Attorneys for Defendant
Robert Anthony Appgood

1 because I thought he was going to shove me again.

2 Q You're showing me your hands up kind of level
3 with the ground and out in front of you?

4 A Right, both of them. Both of my hands were
5 where his shoulders were so that he didn't swing at me
6 again. He shoves me, and this all happened really fast.
7 He shoves me hard. I took a step back. I put my hands
8 out like this, about his shoulder-length high, and I
9 believe my hands were on his shoulders like this.

10 And the next thing I know, I get grabbed from
11 my left side, which is where Christensen was, spun around
12 and hit in the side of the face by Apgood with a right
13 hook and dropped me to my knees. And I put my hand up
14 like this, and I had blood going everywhere.

15 Q You're showing me your hand to your face?

16 A Right.

17 Q Your right hand?

18 A I had blood going all over, and the next thing
19 I know, the people from the golf course are there
20 breaking it up. My friend Darren, he's probably not
21 going to admit this, but he was scared to death. First
22 thing he did is run to the cart, which was 10 yards back,
23 and grab a golf club and start swinging a golf club; not
24 at them, from a distance. Yelling, "Come on."

25 Because I could tell -- I mean, there's four

1 A Asks me about what?

2 Q Your scar.

3 A No.

4 Q Would you say that Mr. Atwood meant to hit

5 you?

6 A Atwood or Apgood?

7 Q I'm sorry, Apgood.

8 A I believe his name is Apgood. Yeah, I would

9 definitely say he meant to hit me. As a matter of fact,

10 after he hit me, he was standing over top of me doing his

11 Hulk Hogan imitation screaming at me like he was King

12 Kong. I remember looking up and seeing that.

13 Q What did he say?

14 A He was just -- he was pumped up, adrenaline.

15 I don't know what he said. He was pumped up standing

16 over top of me like he just took me out, and he had.

17 Q But you don't remember what he said?

18 A I can't remember exactly what he said, no.

19 Q Do you remember generally what he said, or

20 have you told me everything you remember about it?

21 A Generally, I believe he was just kind of

22 yelling at me, whatever. I do not know what he said

23 exactly.

24 Q Did he threaten to hit you again?

25 A I don't think he needed to. I wasn't going

B. RAY ZOLL (3607)
Attorney for Plaintiff
5300 South 360 West
Suite 360
Salt Lake City, Utah 84123
Telephone (801) 262-1500

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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vs.

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Civil No. _____
Judge _____

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DATED this 13th day of Aug, 1992.

ZOLL & BRANCH



By RAY ZOLL
Attorney for Plaintiff

VERIFICATION


STATE OF UTAH)
 : SS
COUNTY OF SALT LAKE)

Matthew S. Kellogg, being first duly sworn under oath, deposes

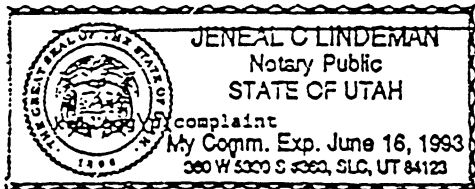
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NOTARY PUBLIC
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MATTHEW S. KELLOGG,

Plaintiff,

vs.

STAN J. CHRISTENSEN and
ROBERT ANTHONY APGOOD,

Defendants.

SUMMARY JUDGMENT

Case No. 920905255

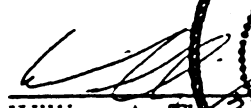
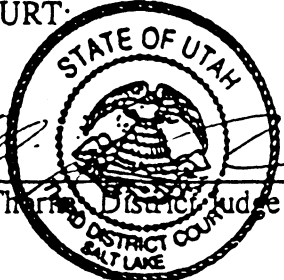
Judge William A. Thorne

The defendants' Motions for Summary Judgment came on for regularly scheduled hearing on March 30, 1995. The Court heard argument from all parties. Based upon the Memorandum filed with the Court, and the parties' oral argument, and for cause appearing, the Court grants defendants' Motions for Summary Judgment and

ORDERS that the plaintiff's Complaint be dismissed with prejudice and on the merits.

DATED this 25 day of April, 1995.

BY THE COURT:


William A. Thomas, District Judge


Approved as to form:

ZOLL & BRANCH

By 

B. Ray Zoll
Attorneys for Plaintiff

KIPP AND CHRISTIAN, P.C.

By 

Carman E. Kipp
Attorneys for Defendant
Christensen