

2006

Mark Robinson and Lori Robinson v. Mount Logan Clinic : Brief of Appellant

Utah Court of Appeals

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2011-2-17

1 of 3

IN THE UTAH SUPREME COURT

MARK ROBINSON and LORI
ROBINSON,
Husband and wife,

Plaintiffs / Appellants,

vs.

MOUNT LOGAN CLINIC, LLC.,

Defendants / Appellees.

Case No. 20061168

APPEAL FROM AN ORDER
HONORABLE GORDON J. LOW
FIRST JUDICIAL DISTRICT COURT IN AND FOR
CACHE COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are identified in the caption on appeal.

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3 (2)(j).

ISSUE PRESENTED FOR REVIEW

Did the trial court err in ruling that the limitation of a therapist's duty to warn under Utah Code Ann. § 78-14a-102(1) barred all claims against the defendant arising out of an injury caused by the violent behavior of a patient, including claims arising out of negligent performance of an affirmative act?

Preservation: This issue was addressed in defendant's memorandum and reply memorandum in support of its motion to dismiss (R. 15; R. 70), and in plaintiffs' memorandum in opposition to the motion to dismiss. (R. 36.)

Standard of review: The motion was filed and briefed as a motion to dismiss under U.R.Civ.P. 12(b)(6). "A trial court's decision granting a rule 12(b)(6) motion to dismiss a complaint . . . is a question of law that we review for correctness, giving no deference to the trial court's ruling." *Oakwood Vill. L.L.C. v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

In its memorandum decision, the trial court stated, "As it is necessary for the Court to analyze facts not found in the pleadings, Defendant's motion will be treated as a motion for summary judgment." (R. 109.) The court did not specify the facts to which it

referred, but presumably it was the call to dispatch that forms the basis of the complaint. Plaintiffs are not certain that listening to a call that is referenced and incorporated in the complaint converts a motion to dismiss into one for summary judgment. In any event, however, when reviewing a grant of summary judgment, the Court analyzes the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. The trial court's decision is reviewed for correctness. *Swan Creek Village Homeowners Ass'n v. Warne*, 2006 UT 22, ¶ 16, 134 P.3d 1122.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 78-14a-102(1):

A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty shall be discharged if the therapist makes reasonable efforts to communicate the threat to the victim, and notifies a law enforcement officer or agency of the threat.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This action arose when Officer Mark Robinson was shot by a patient while at the defendant clinic. Plaintiffs filed their action on January 30, 2006, alleging that plaintiff Mark Robinson was injured because defendant affirmatively misstated during a telephone call that the patient had no weapons. (R. 4.)

Defendant filed a motion to dismiss under U.R.Civ.P. 12(b)(6) on February 14, 2006, arguing that the defendant had no duty to protect Officer Robinson. (R. 12.)

Before plaintiff's response was due, defendant filed a Supplemental Citation of Authority in support of its motion to dismiss, citing the trial court to *Fordham v. Oldroyd*, 2006 UT App 50, 131 P.3d 280, in which the Court of Appeals adopted the professional-rescuers' rule ("fireman's rule") in Utah. (R. 32.) Plaintiffs subsequently filed an opposing memorandum (R. 36), and defendant filed a reply. (R. 70.) No discovery has been undertaken in the case.

The trial court heard oral argument on May 22, 2006. During the oral argument process, the dispatch call referenced in the complaint was made available to the court.

On July 18, 2006, the trial court issued a memorandum decision granting the defendant's motion to dismiss. (Because it had considered "facts outside the complaint," presumably the dispatch call, the court stated that it was treating the motion as one for summary judgment.) "The issue before the Court is whether Utah Code Annotated ('UCA') § 78-14a-102(1) absolves Defendant of any liability by removing Defendant's duty to warn the officers or protect them from violent behavior by the patient," the court stated. (R. 94.) The court held that it did, because the plaintiffs alleged only a negligent, not intentional, misrepresentation. (R. 96-97.)

After the memorandum decision was issued, the defendant submitted a proposed order that included an additional ground not contained within the trial court's ruling. The defendant's proposed order included language purporting to hold that "the duty of a citizen seeking assistance from a peace officer is limited by public policy," and incorporating all arguments in defendants' memoranda. (R. 104.) Plaintiffs objected to

the proposed order on the grounds that it went beyond the court's reasoning, which was limited to the effect of Utah Code Ann. § 78-14a-102(1). (R. 105.) On November 27, 2006, the trial court signed the order proposed by plaintiffs, which eliminated the "public policy" argument raised by defendant. (R. 111-113.)

Plaintiffs filed a notice of appeal on December 21, 2006. (R. 115.)

Statement of Facts

The facts alleged by plaintiff, and reasonable inferences therefrom, may be summarized thus:

On October 4, 2002, plaintiff Mark Robinson was on duty in his capacity as an officer with the Logan City Police Department. (R. 5, ¶ 7.) Defendant Mount Logan Clinic called dispatch and asked for officers to transport a suicidal patient, Craig Garrett, from the clinic to a behavioral health unit at Logan Regional Hospital. In response to the request, plaintiff Mark Robinson and fellow Officer Shand Nazer were dispatched to escort Mr. Garrett. (*Id.*, ¶ 8.)

Charlotte Harris, a therapist at Mount Logan Clinic who was treating Mr. Garrett, knew, or should have known, that Mr. Garrett had a criminal history that included use of firearms and a domestic violence conviction. (R. 5, ¶ 9.) Harris also had the following information at the time of the Clinic's call to the police department:

- Mr. Garrett had waved a gun around in front of his wife and children at home, while making threats to kill himself.

- Mr. Garrett sometimes kept a gun in his truck and, before going into the clinic on the date of the shooting, October 4, 2002, he said he needed to go back to his truck.
- Mr. Garrett was asked by Harris if he had a weapon and refused to deny that he was carrying a gun. Rather, he replied, “Maybe I do, maybe I don’t.”

(R. 5, ¶ 10.)

In spite of this knowledge, when the dispatcher specifically requested information regarding whether Mr. Garrett possessed a weapon, defendant said that he did not. (R. 6, ¶ 11.)¹ The Clinic acknowledges that this statement was incorrect. (R. 76.)

When plaintiff and Officer Nazer entered Mr. Garrett’s room, he immediately became confrontational. (R. 6, ¶ 12.) It was only after the officers had entered Mr. Garrett’s room that Harris finally told them that, contrary to her earlier representation, Mr. Garrett might have a weapon. She then left the room. (*Id.*, ¶ 13.)

Mr. Garrett then tried to leave the room by charging past Officer Nazer. In the ensuing scuffle, Nazer realized that Mr. Garrett had a handgun. (R. 6, ¶ 14.) In the attempt to disarm Mr. Garrett, plaintiff Robinson was shot in the foot, causing him severe and permanent injuries. (R. 7, ¶ 15.)

¹ The trial court’s decision appears to quote the dispatch call when it relates the exchange as: Dispatcher: “He doesn’t have any weapons or anything like that?” A: “No.” (R. 93.)

SUMMARY OF ARGUMENT

There is a fundamental difference in the law between a failure to act and an affirmative act. As a general rule, a person has no duty to warn or protect others unless a special relationship exists between them. An affirmative act, however, inherently carries with it a duty of reasonable care.

Plaintiffs' claims are based on an affirmative act by the defendant Clinic, *i.e.*, making a critical misstatement that the patient the Clinic wanted transported did not have any weapons. When summoning police or firefighters to a scene, individuals have a duty not to mislead officials about the nature of the hazard. This concept is so well entrenched in the law that it has long been recognized as an exception to the "firefighter's rule" that limits liability to professional rescuers.

Utah Code Ann. § 78-14a-102(1) says that, except in specified circumstances, a therapist owes no duty to warn or take precautions to protect others from violent patients. In relying on Utah Code Ann. § 78-14a-102(1) to dismiss the plaintiffs' claims, the trial court erroneously assumed that plaintiffs' theories were based upon an alleged failure to act (warn, protect), rather than on a negligently performed affirmative act. The statute has no application to the plaintiffs' claims, and the judgment should be reversed.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING THAT UTAH CODE ANN. § 78-14a-102(1) BARS PLAINTIFFS' CLAIMS BASED UPON THE ALLEGEDLY NEGLIGENT PERFORMANCE OF AN AFFIRMATIVE ACT, RATHER THAN UPON AN ALLEGED FAILURE TO ACT.

Defendant's motion to dismiss was based on the sole ground that Mount Logan did not owe plaintiffs a duty of care. (R. 12.) In particular, the Clinic argued that it had "no duty to warn or take precautions to provide protection from any violent behavior of his client or patient" (citing Utah Code Ann. § 78-14a-102), and that "[a] person generally has no duty to protect another from harm inflicted by a third person" under the common law. (R. 19-29.)

Before addressing this issue, it is important to clarify what plaintiffs are claiming as a basis for recovery, and what they are not. Plaintiffs do not claim that the Clinic breached a duty to warn or take precautions to protect Officer Robinson from the patient's violent behavior, or from harm inflicted by the patient. What plaintiffs do claim is that, regardless of whether it initially had any duty to act, when it did act, it had a duty to do so in a non-negligent manner.

The California Court of Appeal has found similar allegations sufficient to state a claim for negligence. In *Boon v. Rivera*, 96 Cal.Rptr.2d 276, 80 Cal.App.4th 1322 (2000), the defendant summoned police to her residence when her husband barricaded himself within their home. The defendant affirmatively misstated to the police that her husband "was not violent," even though she knew that he had access to guns and had

threatened to kill the first police officer who arrived. Relying on the representation that the husband was not violent, the plaintiff officer “responded with nonlethal force. If he had been told the true facts about the threat, he would have responded with different tactics and with lethal force.” Instead, the husband was able to pull a gun and shoot the plaintiff before surrendering. 80 Cal.App.4th at 1326.

The trial court granted the defendant’s motion to dismiss. On appeal, the parties disagreed on whether the court’s ruling was based on the so-called “firefighter’s rule,” or rather on the absence of a duty. Accordingly, the appellate court addressed both issues. The court first held that the firefighter’s rule would not bar the plaintiff’s claims because the claims were not based on conduct that necessitated calling the police in the first place, but rather “on misrepresentation of a known hazard to which emergency personnel were summoned.” *Id.* at 1328; *see also id.* at 1329 (firefighter’s rule did not bar claims that defendant “misstated material facts” to officer). The firefighter’s rule has never immunized defendants from liability in that circumstance, the court noted.

The court next addressed the issue of whether the defendant owed a duty to the plaintiff police officer. The court first noted that all persons have a general duty to use due care to avoid injury to others. *Id.* at 1330. (Although the duty is set forth in statute, it is essentially just a codification of the common law.) The court then noted that one section of the statute expressly “reimpos[es] a duty of ordinary care . . . which would otherwise be abrogated by the firefighter’s rule.” *Id.* Thus, the court noted, a duty of reasonable care was owed to the police officer the same as to other individuals.

Accordingly, the court then proceeded to examine the plaintiff's claim under ordinary duty principles.

Like the Clinic in this case, the defendant in *Boon* argued that she had no duty to protect the police officer from the actions of a third party (her husband) absent the existence of a "special relationship" between the parties. *Id.* at 1331. The Court of Appeal rejected that contention, concluding that the defendant was confusing a claim based on failure to warn with one based on affirmative misrepresentation. *Id.* ("plaintiffs contend Milagro not only failed to warn, she made a materially false statement when she said her husband was not violent"). Whether the defendant had a special relationship or other affirmative duty to warn was irrelevant to plaintiff's claim, the court noted: The requirement of a special relationship "has no application where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person." *Id.* at 1332.

"One who negligently or intentionally misrepresents the nature of a hazard to public safety officers may be held liable in damages for injuries sustained as a result of such misrepresentation," the court held. *Id.* at 1333, citing *Lipson v. Superior Court*, 31 Cal.3d 362, 644 P.2d 822 (1982) (defendant who misrepresented that chemical boilover was not toxic was liable to firefighters who arrived unprepared for toxic chemicals); see also *Daas v. Pearson*, 319 N.Y.S.2d 537, 540 (Sup.Ct. 1971) (party reporting occurrence to police has common law duty to report facts with reasonable care).

As a final matter, the court considered an argument by the defendant that, under the circumstances, “it was not unreasonable for Milagro to fail to provide complete and accurate information to the police,” and that “Plaintiff would have the Court believe that a reasonable person placed in Ms. Rivera’s shoes would have the presence of mind to relate all incidents that might or might not be helpful to them, to the police within seconds of arriving on the scene.” *Id.* at 1334, quoting the defendant’s brief. The court summarily dispensed with that contention, noting that “whether or not certain conduct was unreasonable” is normally a question of fact. *Id.* The trial court’s order granting summary judgment to the defendant was reversed.

In this case, plaintiffs allege that defendant performed a negligent act in misstating a critical fact, namely that the patient did not have any weapons. As recognized in *Boon*, the approach taken by an officer is quite different depending on whether the third party is believed to be armed. The Clinic knew that the police would rely on its reassurance, and plaintiff did so to his detriment.

The court below, however, held that Utah Code Ann. § 78-14a-102 barred all of plaintiffs’ claims, stating: “Because there was no intentional misrepresentation by the employee, Defendant’s duty to warn the officers was removed by UCA § 78-14a-102(1).” (R. 96.) In so holding, the trial court misapprehended the nature of plaintiffs’ claims, which are not based upon an alleged failure to warn. Rather, the court blurred the critical distinction between “acts” and “omissions” under Utah law. As this Court recently stated,

[t]he court of appeals correctly observed that as a general proposition of tort law, the distinction between acts and omissions is central to assessing whether a duty is owed a plaintiff. In almost every instance, an act carries with it a potential duty and resulting legal accountability for that act. By contrast, an omission or failure to act can generally give rise to liability only in the presence of some external circumstance—a special relationship.

Webb v. University of Utah, 2005 UT 80, ¶ 10, 125 P.3d 906.

In the court below, the Clinic repeatedly characterized plaintiffs' complaint as alleging a failure to protect, which, had it been true, would fall into the failure-to-act category. *See Webb*, 2005 UT 80, ¶ 15 ("Generally, the duty to protect is allied with the failure-to-act element of general negligence law. The duty of a private citizen to act in aid of another, the duty to protect, arises only where a special relationship is found to exist.") But that is not the theory by which plaintiffs claim a right to recover. As this Court has pointed out, "[U]nder ordinary negligence principles, the duty-to-protect concept has no application where a duty arises from an affirmative act." *Id.* (emphasis added.)

The common law has always distinguished between acting and failing to act. The *Restatement* provides some historical background:

The origin of the rule [that generally there is no duty to protect others] lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the

parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Restatement (Second) of Torts, § 314 cmt. c.

Every person who performs an affirmative act owes a duty not to injure others by performing the act negligently:

In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.

Id., § 302 cmt. a.

These observations are consistent with the well-established principle that a party who assumes a duty not otherwise owed must do so in a non-negligent manner. “The common law recognizes a duty of due care on the part of an individual or entity that undertakes, whether gratuitously or for consideration, to perform a duty. . . . ‘Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care.’” *Nelson v. Salt Lake City*, 919 P.2d 568, 573 (Utah 1996) (stating that court did not have to decide whether city had duty to erect fence in waterway; once it chose to do so, city had duty to use reasonable care), *quoting Am.Jur.2d Negligence* § 208, at 255 (1989); *Atkinson v. Stateline Hotel Casino & Resort*, 2001 UT App 63, ¶¶ 17-18, 21 P.3d 667 (stating that court need not decide whether defendant casino owed plaintiff duty to

prevent harm from third party, because once defendant undertook such a duty, it had to act reasonably).

The trial court's reliance upon Utah Code Ann. § 78-14a-102(1) to bar plaintiffs' claims was thus erroneous, because that statute addresses only the failure-to-act prong of negligence law, which is not at issue. It says that a therapist has no duty to warn or protect; it says nothing to exempt therapists from liability for negligently performing an affirmative act.

Although the trial court did not adopt it, one final argument raised by the defendant warrants consideration. In its citation to supplemental authority, the Clinic directed the trial court to the Court of Appeals' ruling in *Fordham, supra*, which adopted the professional rescuers' rule in Utah. The Clinic acknowledged that the rule would not bar the plaintiffs' claims, claiming that "the rule is cited only for purposes of the public policy considerations that have convinced other states to adopt the rule as a broad statement of duty[.]" (R. 81.) In light of the defendant's concession that the rule would not apply to the circumstances of this case, the issue of whether it is the law in Utah is not before the Court.

However, the policy underpinnings of the professional rescuers rule actually support plaintiffs' position. Although varying rationale have been cited for adopting the rule, courts have consistently recognized that the policy considerations underlying the rule do not extend to situations in which the rescuer has been misled about the nature of the hazard, or the conditions for which he was summoned. *See Boon, supra* (holding that

fireman's rule did not apply where defendant misrepresented to police that her husband was not violent, after which husband shot plaintiff); *Thomas v. Pang*, 72 Haw. 191, 811 P.2d 821, 825 (1991) (recognizing that fire fighter's rule would not apply if plaintiff alleged "that defendants misled the fire fighters regarding the condition of the building"), and cases cited; *Calvert v. Garvey Elevators, Inc.*, 236 Kan. 570, 694 P.2d 433, 439 (1985) (indicating that fireman's rule would not bar claim "for misrepresenting the nature of the hazard when such misconduct causes the injury to the fire fighter"); *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984) (recognizing exception to fire fighter's rule if defendant misrepresents nature of the hazard).

In adopting the professional-rescuer's rule, the Court of Appeals "emphasize[d] the doctrine's narrowness; it 'bars only recovery for the negligence that creates the need for the public safety officer's service.' Therefore, the policy underlying the professional-rescuer doctrine, even if valid, 'does not apply to negligent conduct occurring after the police officer or firefighter arrives at the scene or to misconduct other than that which necessitates the officer's presence.'" *Id.*, quoting *Moody v. Delta Western, Inc.*, 28 P.3d 1139, 1141 (Alaska 2002).

None of the allegations in the complaint involve any negligence that necessitated plaintiff's presence at the clinic. For example, plaintiff does not allege that defendant misdiagnosed the patient or committed some other error that caused the patient to become suicidal, thereby creating the need for police to transport him to another facility. Claims based upon such acts might well fall within the professional-rescuer rule (if ultimately

adopted by this Court), because such acts would have created the need for the officer to come to the scene.

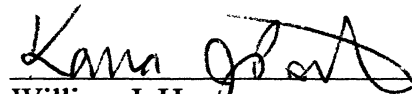
The misconduct at issue in this case was independent of, and subsequent to, the acts necessitating plaintiff's presence. **It also continued after the police arrived, as the defendant perpetuated its earlier misrepresentation (that the patient did not have any weapons) until the officers had already entered the patient's room, when it was too late.**

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request the Court to reverse the trial court's judgment, remanding the case for trial.

RESPECTFULLY SUBMITTED this 23rd day of March, 2007.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read 'Karra J. Porter', is written over a horizontal line.

William J. Hansen

Karra J. Porter

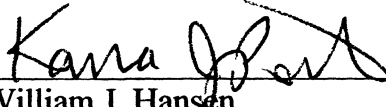
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CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of March, 2007, two true and correct copies of the foregoing **BRIEF OF APPELLANTS** were mailed, first-class postage prepaid, to:

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ADDENDUM

Memorandum Decision, July 18, 2006

Order, November 27, 2006

JUL 15 2008

IN THE FIRST DISTRICT COURT IN AND FOR
CACHE COUNTY, STATE OF UTAH

MARK ROBINSON and LORI
ROBINSON, husband and wife,

Plaintiffs,

vs.

MOUNT LOGAN CLINIC, LLC,

Defendant.

MEMORANDUM DECISION

Civil No: 060100223 PI

Judge: Gordon J. Low

THE ABOVE MATTER is before the Court pursuant to the Defendant's Motion to Dismiss. In preparation of its decision, the Court reviewed the Defendant's Motion with its accompanying memorandum, Plaintiffs Memorandum in Opposition, Defendant's Reply Memorandum, Plaintiffs' Complaint, and the applicable caselaw and statutory provisions.

According to the undisputed facts, the case involves an incident that occurred on October 4, 2002. On that date, Mark Robinson, acting in his capacity as a Logan City Policeman, was dispatched to Mount Logan Clinic. A certain employee of the Defendant ("Defendant's employee") called Logan City dispatch in connection with a suicidal patient, requesting officers to come escort the patient to a behavioral health unit at Logan Regional Hospital. During the call, Defendant's employee was asked by police dispatch, "He doesn't have any weapons or anything like that?" The employee responded, "No." After Robinson and his partner, Officer Nazer, arrived at Mount Logan, but before the physical confrontation with the patient began, Defendant's

employee warned the officers that the patient may have a gun. The officers then attempted to physically escort the patient. A struggle resulted and a gun concealed in the patient's waistband was, intentionally or unintentionally, discharged and struck Robinson in his foot. Plaintiffs then filed a Complaint against Defendant alleging negligence, personal damages, and loss of consortium.

As it is necessary for the Court to analyze facts not found in the pleadings, Defendant's motion will be treated as a motion for summary judgment. Utah Rule of Civil Procedure 12(c) provides, "...If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56..."

The issue before the Court is whether Utah Code Annotated ("UCA") § 78-14a-102(1) absolves Defendant of any liability by removing Defendant's duty to warn the officers or protect them from violent behavior by the patient.

Rule 56(c) of the Utah Rules of Civil Procedure states:

...The judgment sought shall be rendered if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

When dealing with statutory interpretation the Utah Court of Appeals gave the following guidance:

In construing a legislative enactment, the court's primary responsibility is to give effect to the intent of the legislature. Where statutory language is clear and unambiguous, we will not look further to divine legislative intent, but will construe the statute according to its plain language.

State v. Singh, 819 P.2d 356, 359 (UT App. 1991).

UCA § 78-14a-102(1) states:

A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty shall be discharged if the therapist makes reasonable efforts to communicate the threat to the victim, and notifies a law enforcement officer or agency of the threat.

Plaintiffs argue that the statute does not have application in this case because there is no claim that Defendant owed Plaintiffs a general duty to warn or protect Robinson. Instead, Plaintiffs allege that Defendant had a duty not to affirmatively misrepresent the nature of the hazard when summoning police and an obligation to act reasonably upon assuming a duty. Plaintiffs argue that Defendant's employee affirmatively misrepresented the hazard when she responded, "No" to the dispatcher's question, "He doesn't have any weapons or anything like that?" Plaintiffs further claim that, even if initially Defendants did not owe Robinson a duty, once Defendant assumed the duty by contacting law enforcement, it had the obligation to exercise reasonable care.

In contrast, Defendant argues that UCA § 78-14a-102(1) removes any duty it may have had to warn the officers because the only threat made by the patient was that he intended to kill himself. To Defendant, there were no other clearly identified or reasonably identifiable victims, and Defendant's employee informed law enforcement of the patient's suicidal tendencies. Thus, Defendant claims that any duty to warn it may have had was fulfilled by informing law enforcement of the patient's desire to commit suicide. Defendant also argues that public policy and the recently adopted "Fireman's Rule" favor imposing no liability for injuries sustained by law enforcement officers on those who summoned law enforcement.

Following the law stated in *Singh*, the Court must give effect to the intent of the legislature. The statute's language is clear and unambiguous in its removal of a therapist's duty to warn of a patient's violent behavior. The basis for Plaintiffs' claim rests entirely on the dispatcher's question and Defendant's employee's subsequent response. Plaintiffs classify Defendant's employee's response as an "affirmative misrepresentation." Plaintiffs made no clarification as to whether "affirmative misrepresentation" is equivalent to negligent or intentional misrepresentation. Negligent misrepresentation requires a mere duty to exercise reasonable care in giving information, and thus would not heighten the duty to the point of being outside of the confines of UCA § 78-14(a)-102(1). *Rawson v. Conover*, 20 P.3d 876, 883 (UT 2001). While situations of intentional misrepresentation may exist that remove a therapist's protection granted under UCA § 78-14a-102(1), in this factual situation, there is no evidence sufficient to support a claim for intentional misrepresentation. Consequently, Plaintiffs have not made such a claim. Therefore, Defendant owed Plaintiffs no duty to warn or provide protection from the patient. Furthermore, if the legislature intended a patient who makes a threat of suicide to be a clearly identified or reasonably identifiable victim, Defendant, through its communication to law enforcement that the patient was suicidal, fulfilled its duty to warn.

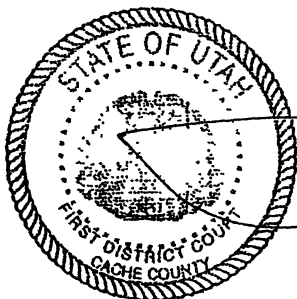
Additionally, the question asked by the dispatcher, "He doesn't have any weapons or anything like that?" is ambiguous. The question assumes that Defendant's employee knew with certainty whether the patient had a weapon. Defendant's employee's response cannot be classified as an intentional misrepresentation because of the ambiguous nature in which the question was asked. Because there was no intentional misrepresentation by the employee, Defendant's duty to warn the officers was removed by UCA § 78-14a-102(1).

Finally, it is undisputed that before the physical altercation between the Patient and Plaintiff occurred, Defendant's employee informed Plaintiff that the patient may have a weapon. Though the facts as now before the Court do not state how much time before the physical encounter took place that the warning was given, it is undisputed that the warning was made before Plaintiff physically encountered the patient. Thus, as plaintiffs' claim for relief is based on the argument that Officer Robinson would have acted differently had he known that the patient had a weapon, the warning by Defendant's employee granted Officer Robinson an opportunity to change his tactics before physically engaging the patient.

Therefore, as a matter of law, Defendant is absolved of liability, and its motion for summary judgment is granted. Counsel for Defendant is directed to prepare an order in accordance therewith.

Dated this 18 day of July, 2006.

BY THE COURT



A handwritten signature in black ink, appearing to read "Gordon J. Low", written over a horizontal line.

Judge Gordon J. Low
First District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060100223 by the method and on the date specified.

METHOD NAME

Mail	WILLIAM J HANSEN ATTORNEY PLA 50 S MAIN ST STE 1500 SALT LAKE CITY, UT 84144
Mail	ELLIOTT J WILLIAMS ATTORNEY DEF 257 E 200 S #500 PO BOX 45678 SALT LAKE CITY UT 84145-5678

Dated this 18 day of July, 2006.


Deputy Court Clerk

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IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

MARK ROBINSON and LORI ROBINSON,
Husband and wife,

Plaintiffs,

vs.

MOUNT LOGAN CLINIC, LLC.,

Defendants.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Civil No. 060100223

Judge Gordon J. Low

This matter came before the Court pursuant to the Defendant's Motion to Dismiss, which the Court treats as a Motion for Summary Judgment pursuant to Rule 12(c), Utah Rules of Civil Procedure. The Court heard oral argument on Defendant's Motion on May 22, 2006. In addition to oral argument, the Court has reviewed and considered the legal memoranda filed by the parties, applicable case law and applicable statutory provisions. The Court, being fully informed and having previously entered its Memorandum Decision on July 18, 2006, finds and rules as follows:

The following material facts are undisputed:

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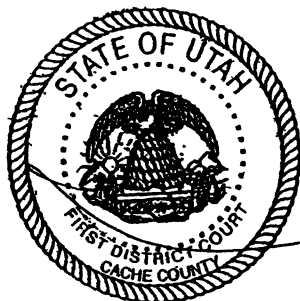
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On October 4, 2002, Mark Robinson, acting in his capacity as a Logan City Peace Officer, was dispatched to the Mount Logan Clinic as a result of a telephone call from an employee of the clinic (“Defendant’s Employee”) who had requested police assistance to escort a suicidal patient (“the patient”) to a behavioral health unit at Logan Regional Hospital. During the call, Defendant’s Employee was asked by police dispatch, “He doesn’t have any weapons or anything like that?” Defendant’s Employee responded, “No.” After Officer Robinson and his partner, Officer Nazer, arrived at Mount Logan Clinic, but before the subsequent physical confrontation with the patient began, Defendant’s Employee warned the officers that the patient may have a gun. Officers Robinson and Nazer attempted to physically escort the patient out of the clinic and a struggle ensued, during which a gun concealed in the patient’s waistband was either intentionally or unintentionally discharged. A round from the gun struck Officer Robinson in the foot resulting in personal injury. Plaintiffs subsequently filed a Complaint against Defendant alleging negligence based upon the allegations that Defendant “breached its duty of care to Officer Robinson” in “failing to ascertain whether [the patient] was carrying a concealed weapon; failing to disclose to the Logan City Police Department that Mr. Garrett had a history of violent behavior; failing to disclose to the Logan City Police Department information which would have put the police on notice that Mr. Garrett may have been carrying a gun; and affirmatively representing to the police that Mr. Garrett did not have a gun.” (Plaintiffs’ Complaint, ¶ 17.) Based upon these allegations, Officer Robinson seeks damages for personal injury and his spouse, Lori Robinson, seeks damages for loss of consortium.

Defendant seeks dismissal on the basis that there is no legal duty owed to Plaintiffs. The Court agrees. The Court holds that any duty of Defendant's therapist and related agents is statutorily limited by § 78-14a-102(1). The Court holds that there is no legal duty to warn that was breached and that Plaintiffs' claims for negligence and "affirmative misrepresentation" fails as a matter of law under the undisputed facts of this case. Accordingly, and for just cause appearing, the Court hereby

ORDERS AND DECREES that Plaintiffs' claims against Defendant be, and the same are, hereby dismissed with prejudice. Each of the parties shall bear his, her or its respective costs and attorney's fees incurred herein.

DATED this 27 day of November 2006.



BY THE COURT


Gordon J. Low
District Court Judge

Approved as to Form:

WILLIAMS & HUNT

Elliott J. Williams
Dennis C. Ferguson
Robert C. Keller
Attorneys for Defendant

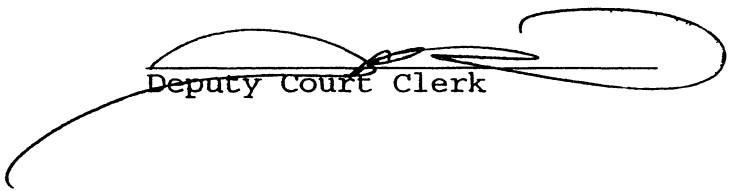
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Dated this 27 day of November, 2006


Deputy Court Clerk