

2006

Mark Robinson and Lori Robinson v. Mount Logan Clinic, L.L.C. : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT
STATE OF UTAH

MARK ROBINSON and LORI :
ROBINSON, :
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 Plaintiffs/Appellants, :
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 v. : Case No. 20061168
 :
 MOUNT LOGAN CLINIC, L.L.C, :
 :
 Defendant/Appellee. :
 :

Appeal from the Judgment of the First Judicial District Court, State of Utah
Honorable Gordon J. Low, District Judge
District Court No. 060100223

BRIEF OF APPELLEES

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UTAH APPELLATE COURTS

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that the applicable language of Utah Code Ann. § 78-14a-102(1), which states that “[a] therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient,” barred Plaintiffs’ negligence claims against the Mount Logan Clinic even if those negligence claims are characterized as arising from a negligent affirmative act rather than a failure to act.

The district court’s decision is reviewed for correctness in light of the undisputed facts as found by the district court, which facts are not challenged on appeal. Arnold Indus. v. Love, 2002 UT 133, 63 P.3d 721.

DETERMINATIVE STATUTE

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.

Utah Code Ann. § 78-14a-102(1) (1996).

STATEMENT OF THE CASE

A. References to Parties.

Plaintiffs/Appellants are Mark Robinson (“Robinson”), a Logan police officer, and his wife, Lori Robinson (collectively “Plaintiffs” herein). (R. 4 - 5.)

Defendant/Appellant Mount Logan Clinic, L.L.C. (“Mount Logan”) is a clinic employing therapists, including therapist Harris (“Ms. Harris”), who called the Logan Police department to transport a potentially suicidal patient from the clinic to a secure facility. (R. 5.)

B. Statement of Facts.

Plaintiffs do not challenge the following facts material to the district court’s decision, and they are undisputed:

1. On October 4, 2002, Mount Logan’s therapist, Ms. Harris, called Logan City dispatch in connection with a suicidal patient requesting police officers to escort the patient to a behavioral health unit at Logan Regional Hospital. (R. 5, 93.)
2. During the call, police dispatch asked, “He doesn’t have any weapons or anything like that?” And Ms. Harris responded, “No.” (R. 16, 93.) Plaintiffs do not allege Ms. Harris actually knew the patient had a weapon, but alleges she knew

enough that she should have “ascertain[ed] whether [the patient] was carrying a concealed weapon.” (R. 6-7.)

3. Logan City dispatch sent Robinson and Officer Nazer, another Logan City Policeman, to Mount Logan to escort the suicidal patient. (R. 5, 93.)

4. After Robinson and his partner arrived at Mount Logan, but before the physical confrontation with the patient began, Ms. Harris warned the officers that the patient might have a gun. (R. 6, 93-94.)

5. Robinson and his partner attempted to physically escort the patient out of the clinic, and a struggle ensued. During the struggle, a gun concealed in the patient’s waistband was either intentionally or unintentionally discharged, and the round struck Robinson in the foot. (R. 6-7, 94.)

6. Plaintiffs subsequently filed a Complaint asserting Mount Logan was negligent because it “breached its duty of care to Officer Robinson” in “failing to ascertain whether [the patient] was carrying a concealed weapon; failing to disclose to Logan City Police Department information which would have put the police on notice that [the patient] may have been carrying a gun; and affirmatively representing to the police that [the patient] did not have a gun.” (R. 7, 94.)

SUMMARY OF THE ARGUMENT

Plaintiffs' argument is premised upon a distinction between failing to act to protect another person and actually undertaking to act on another's behalf, which distinction may determine whether a duty of care arises at all under traditional tort law principles. Plaintiffs labor to explicate the distinction, and then baldly assert that § 78-14a-102(1) does not apply to a duty arising from the negligent performance of an affirmative act. Thus Plaintiffs argue that because Ms. Harris undertook to respond to the dispatcher's question about whether the patient had a gun, instead of failing to act at all, Ms. Harris could be found liable for negligence regardless of the limitations imposed by § 78-14a-102.

Plaintiffs' argument fails because the genesis of the alleged tort duty, whether allegedly arising from a failure to act or from the act of responding to a question in an allegedly negligent manner, is unimportant under the unambiguous terms of the controlling statute. The statute precludes, without limitation, any duty to take action which constitutes "precautions to provide protection from any violent behavior" of a patient. Because an alleged duty to ensure the completeness and accuracy of information provided to the police constitutes taking just such precautions to provide protection, the statute bars Plaintiffs' Complaint here. The

district court correctly dismissed Plaintiffs' Complaint against Mount Logan as a matter of law.

ARGUMENT

THE DISTINCTION PLAINTIFFS DRAW BETWEEN A FAILURE TO ACT AND AN ALLEGEDLY NEGLIGENT AFFIRMATIVE ACT IS NOT IMPORTANT UNDER PLAIN TERMS OF SECTION 78-14a-102, AND BY ITS UNAMBIGUOUS LANGUAGE THE STATUTE BARS PLAINTIFFS' NEGLIGENCE CLAIMS AGAINST MOUNT LOGAN.

In their brief, Plaintiffs describe at length the common-law distinction between a failure to act and an affirmative act allegedly performed in a negligent manner. Apts.' Br., 7-12. "[A] party who assumes a duty not otherwise owed must do so in a non-negligent manner." *Id.* at 12. "What plaintiffs [] claim is that, regardless of whether [Mount Logan] initially had any duty to act, when [Mount Logan] did act, it had duty to do so in a non-negligent manner." *Id.* at 7. According to Plaintiffs, therefore, § 78-14a-102 does not apply because "it addresses only the failure-to-act prong of negligence law, . . . it says nothing to exempt therapists from liability for negligently performing an affirmative act." *Id.* at 13.

Plaintiffs' bald assertion, that the statute does not apply to the particular duty they allege arose in this case, is not supported by the unambiguous terms of § 78-14a-102(1). The broad language, "no duty to . . . take precautions to provide

protection from any violent behavior from a client,” makes no distinction between a duty allegedly arising from a failure to warn or take other action and a duty arising from the affirmative act of undertaking to respond to a question and doing so in an allegedly negligent manner. The language precluding a duty “to take precautions to provide protection from any violent behavior” is plainly inclusive of alleged duties to accurately perform even some assumed obligation of protection.

Stated another way, the alleged duty “to ascertain whether [the patient] was carrying a concealed weapon” in order “not to affirmatively misrepresent a hazard,” which Plaintiffs assert Mount Logan owes, is simply a form or characterization of a duty to “take precautions to provide protection from any violent behavior,” which the statute obviates. Plaintiffs ask the Court to hold otherwise based upon their own *ipse dixit*, but provide no analysis whatsoever of the unambiguous statutory language.

Rather than relying on a party’s characterizations of its claims, this Court will look to the substance of what is alleged. *See, e.g., Jensen v. Sawyers*, 2005 UT 81, ¶ 34, 130 P.3d 325 (noting that “we pay little heed to the labels placed on a particular claim, favoring instead an evaluation based upon the essence and substance of the claim.”). The “essence and substance” of Plaintiffs’ claim here is that Ms. Harris should have taken precautions to protect Plaintiffs which she did not

take, “ascertain[ing] whether [the patient] was carrying a concealed weapon,” and responding accurately to the dispatcher’s question. A duty to take such precautions is precluded by § 78-14a-102, regardless of whether Plaintiffs claim the duty arises from an affirmative act rather than a failure to act.

Moreover, in Wilson v. Valley Mental Health, 969 P.2d 416 (Utah 1998), this Court expressly rejected such characterizations of claims to avoid the statutory bar. Plaintiffs in Wilson attempted to characterize the duty as something other than a duty to warn or take precautions to provide protection: “[t]he [plaintiffs] filed their complaint in this case, alleging that Valley Mental Health breached its duty by not properly treating [the patient].” Wilson, 969 P.2d at 417 (emphasis added).

See also id. at 418:

[T]he [plaintiffs] contend that even though the Code so limits the listed persons’ liability, under our case law, or a logical extension thereof, Valley Mental Health had a duty to properly treat or control [the patient]. They argue that because Valley Mental Health failed to treat [the patient] it failed to discover the threat to Jayleen and the children. Therefore, a duty to Jayleen and her children exists under the common law because Valley Mental Health should have known of the threat [the patient] posed based on the grounds that breached its duty by not properly treating [the patient].

However, the Court rejected the plaintiffs’ characterizations of the duty, holding that:

section 78-14a-101 exclusively defines the duty of a therapist in cases where it is alleged that a therapist had a duty to warn or take precautions to provide protection from the violent behavior of a client. There is no such duty unless there is an actual threat of physical violence against a clearly identified or reasonably identifiable victim communicated by the patient to the therapist.

Id. at 421 (emphasis added).

In their brief, Plaintiffs rely heavily on Boone v. Rivera, 80 Cal.App.4th 1322 (2000) (Aplts.' Br. pp. 7-10), which is both factually and legally distinguishable. In Boone, the defendant who called for police assistance "knew there was an M16 rifle and a gun safe in the house, and that [the perpetrator] had threatened to kill the first police officer that arrived at the residence." 80 Cal.App.4th at 1326 (emphasis added). Nevertheless, in calling for police assistance the defendant had informed police that the perpetrator was "not violent" and that "she did not know the type or number of guns in the house." Id. The plaintiff Boone was the first officer responding to the scene, and the perpetrator shot the officer precisely as he had threatened to do. Id.

Not surprisingly, the Boone court focused heavily on the extent the harm that befell the plaintiff was foreseeable to the defendant to distinguish other cases utilizing a common-law, special relationship analysis:

In Tilley, the Court concluded an attack on the officer was not a foreseeable result of the doctor's conduct. Here, both the

victim (Boone) and the harm (an immediate assault by an armed [perpetrator]) were foreseeable given [defendant's] affirmative misrepresentation that [the perpetrator] was not violent despite his known threats to kill an officer and other violent propensities. Based on the facts alleged, we conclude [the defendant] owed a duty of care to Boon not to misrepresent the nature of the hazard that he had encountered.

Id. at 1333. More significantly, the California court did not parse the language of a statute remotely akin to Utah Code Ann. § 78-14a-102, but interpreted a California statute it interpreted as “reimposing a ‘a duty of ordinary care which would otherwise be abrogated by the fireman’s rule.’” Id. at 1330 (citing Cal. Civil Code § 17149.9).

In this case, by contrast, Plaintiffs have not and cannot allege that Mount Logan’s patient made any threat to harm Robinson or any other police officer. He had threatened to harm only himself, and the therapist made the police aware of that threat. Although Plaintiffs characterize Ms. Harris’ statement that the patient did not have a gun as an “affirmative misrepresentation,” they cannot allege she actually knew that the patient had concealed a gun on his person. The harm that occurred in this case was not the result of the patient acting on any specific threat to harm a particular plaintiff, but resulted undisputedly during a struggle when the police were attempting to disarm him and may not have been an intentional act at all.

In light of these distinctions, the comments of the California court in a more factually analogous case rejecting Boone and finding no duty of care are more applicable, and also illustrate that applying § 78-14a-102(1) to bar claims in this case advances public policy. In Alvarez v. Jacmar Pacific Pizza Corp., 122 Cal.Rptr.2d 890, 907, 100 Cal.App.4th 1190, 1213 (Cal.App. 2002), the Court reviewed facts involving a defendant's alleged failure to inform police that a perpetrator of murder had threatened to return to the scene of a fight. The Court rejected the plaintiffs' citation of Boone, and noted in pertinent part as follows:

The analysis advanced by the dissent is not persuasive given its public policy implications. In a nutshell, the dissent would fasten liability upon a restaurant for a murder carried out by a third party because one restaurant employee did not provide information to the police which may have been pertinent to their deciding how to handle the situation. Guerrero (or any employee) cannot be faulted for failing to realize the significance the police would place on particular statements (i.e., the postulate we "would be coming back") or for not knowing what information the police need to determine the appropriate course of action. . . .

When the police arrived at the scene, it was their responsibility to conduct an investigation adequate to address the situation. The record certainly discloses there were numerous individuals, including the Alvarez group, who had pertinent information had the police contacted them. It was not the responsibility of the restaurant or its employees to ensure all relevant information was conveyed to the police. Indeed, they cannot be presumed to know what constitutes all relevant information. To impose that responsibility would require a

commercial enterprise to understand the subtleties or nuances of police procedure, an obligation supported neither by policy nor common sense.

Law enforcement is trained to investigate and prevent crime. This includes a proper investigation at the scene of an altercation such as that found in this case. To shift that burden to a pizza parlor is simply not good policy. In sum, to the extent the restaurant had any duty, it performed that duty when it called 911. To conclude otherwise impermissibly shifts the burden of effective law enforcement from the police to those who witness a problem and call for police intervention. Citizens would dial 911 at their peril.

122 Cal.Rptr.2d at 907, 100 Cal.App.4th at 1213.

Similarly, it would be poor policy to strain the language of § 78-14a-102(1) to impose a duty on the therapist calling for police assistance here. While there were allegedly indications the patient might have a gun, the patient had not threatened anyone specifically, besides himself, and requiring the therapist to institute a search or to question the patient to ensure the accuracy of information provided to dispatch might have had undesirable consequences. Rather, public policy is served when therapists needing assistance in potentially dangerous situations are encouraged to summon aid from police who are trained to deal with such situations, regardless of how the call for assistance might be characterized after the fact.

In short, Plaintiffs' argument that § 78-14a-101 does not apply here because "when [Mount Logan] did act, it had a duty to do so in a non-negligent manner"

fails to address the applicable statutory language and relies upon cases that are inapposite. The applicable language of the Utah statute precludes any duty to take action which constitutes “precautions to provide protection from any violent behavior” of a client. Because the actions Plaintiffs allege Mount Logan should have taken to prevent their injuries constitute just such precautions to provide protection, whether by failing to act or by acting in a different manner, the district court correctly held that the statute bars Plaintiffs’ Complaint.

CONCLUSION

For the reasons stated above, Mount Logan respectfully requests that this Court affirm the district court’s judgment and order dismissing Plaintiffs’ Complaint against Mount Logan.

RESPECTFULLY SUBMITTED this 19th day of April, 2007.

WILLIAMS & HUNT

By 

Robert C. Keller
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2007, two (2) true and correct copies of the foregoing **Brief of Appellees** were mailed by first class mail, postage prepaid thereon, to:

Counsel for Plaintiffs/Appellants

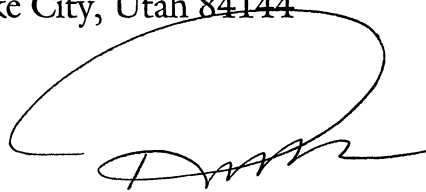
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