4-14-2009

Craig v. Gellings Appellant's Brief Dckt. 35231

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEANN CRAIG, Plaintiff, Appellant, vs. STEVEN JOHN GELLINGS, DEVERL WATTENBARGER, BART WATTENBARGER, CAROL WATTENBARGER, AND WATTENBARGER FARMS, Defendants/Respondents.	Supreme Court No. 35231 APPELLANT'S BRIEF

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APPELLANT'S OPENING BRIEF

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APPEAL FROM THE DISTRICT COURT of the
SEVENTH JUDICIAL DISTRICT OF THE STATE of IDAHO,
in and for the COUNTY OF BONNEVILLE, the Honorable
Gregory S. Anderson, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE

1. Nature of the Case:

This is an appeal from an order by the Honorable Gregory S. Anderson granting Defendants Motion to Dismiss this tort action due to the death of the plaintiff.

On May 12, 2004, plaintiff was driving her vehicle northbound on Ammon Road, in Idaho Falls, Idaho. At the same time, Defendant/Respondent STEVEN JOHN GELLINGS, while in the course and scope of his employment with Co-defendants/Respondents, was traveling northbound on US Highway 26. At the intersection of Ammon Road and US Highway 26, STEVEN JOHN GELLINGS failed to stop at the stop light controlling his direction of travel, proximately causing this accident and plaintiff's injuries.

On May 4, 2006, plaintiff timely filed a complaint for damages. During the course of proceedings, and before trial and judgment, plaintiff died due to reasons not claimed to be accident related.

2. Course of Proceedings and Disposition:

After defendants received notice that the plaintiff had died, on January 25, 2008, they filed a Motion to Dismiss the action, alleging that, "pursuant to common law", all of an individual's claim for personal injury damages do not survive the plaintiff's death.

The matter was briefed and argued. On March 13, 2008, the Court issued an order dismissing plaintiff's case concluding that the common law does not support survival of any part of personal injury actions.

This appeal followed.

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3. Statement of Facts:

The motor vehicle accident that is the subject of this action is described above. As a result of this action, plaintiff has alleged non-economic damages and economic damages including medical bills and substantial wage loss. Plaintiff died during the course of these proceedings, and the matter was dismissed in its entirety by the lower court, agreeing with defendants that by law plaintiff's personal injury action did not survive her death by other causes.

ISSUE PRESENTED ON APPEAL

DOES PLAINTIFF'S PERSONAL INJURY CLAIM, OR ANY PORTION THEREOF, SURVIVE HER DEATH, WHEN THAT DEATH IS NOT RELATED TO THE UNDERLYING ACCIDENT?

STANDARD OF REVIEW

The standard in ruling on a Motion to Dismiss is that an action shall not be dismissed unless there are no facts upon which a recovery can be had.

The "trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." This standard is similar as to other 12(b) motions. *Murphy v. Schneider Nat'l Inc.*, 362 F.3d 1133 (9th Cir. 2004) (citing *McNatt v. Apfel,* 201 F.3d 1084, 1087 (9th Cir. 2000) ("favorably" viewing the pleaded facts in the context of a Rule 12(b)(1) (subject matter jurisdiction); *Dole Food Co. v. Watts,* 303 F.3d 1104, 1107 (9th Cir. 2002) The court is to take as true the allegations of the non-moving party and resolve all factual disputes in its favor. *Summit Health Ltd. v. Pinhas,* 500 U.S. 322, 325 (1991) (in the context of a Rule 12(b)(6) motion, all material facts as pled in the complaint are assumed to be true.)

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ARGUMENT

In it's order granting Defendants' Motion to Dismiss, the lower court relied primarily on the cases of *Steele v. Kootenai Medical Center,* 142 Idaho 919; 136 P.3d 905, (2006) and *Evans v. Twin Falls County,* 118 Idaho 210; 796 P.2d 87, (1990) for the proposition that "unless modified by statute, the common law is in effect in Idaho" and "Under common law, a cause of action for personal injuries ceased to exist upon the death of the person injured." *Steele,* 142 Idaho at 920, 136 P.3d at 906. [Clerk's Record on Appeal, p. 53] The text of the *Steele* case referred to cites *Doggett v. Boiler Engineering & Supply Co.,* 93 Idaho 888, 477 P. 2d 511 (1970) as it's authority for the above proposition that at common law all of plaintiff's claims do not survive the death of the plaintiff.

Appellant respectfully contends that *Doggett* does not support such a blanket statement, and, in fact, rules otherwise. As such, the *Steele* court's (and, hence the lower court's) reliance is misplaced.

Doggett cited with approval *Publix Cab Company v. Colorado National Bank of Denver*, 338 P.2d 702 (Colo. 1959) that explained "the rule of non-survival is a *vestige of the ancient* concept of violent torts and owes its existence to historical accident and blind adherence to precedent."[1] 93 Idaho at 890.

Publix Cab Company v. Colorado National Bank of Denver, 338 P.2d 702 (Colo. 1959) involved an injury on May 18, 1954, to William H. Anderson as a pedestrian on the streets of Denver. The Bank, as Conservator for Mr. Anderson, filed a personal injury action on September 16, 1954, seeking both special and general damages, including "pain and suffering." 338 P.2d at 704. Mr. Anderson died seven months later on December 31, 1954, never having

[1] All emphasis and *italics* in this Brief have been added unless otherwise noted.

awakened from the accident-caused coma.

The lower court held that the Bank had the right to proceed — the injury action did not abate. The defense appealed, arguing the claim died with Mr. Anderson under the common law rule of non-survivability.

In affirming the Bank's right to proceed as a substituted party for Mr. Anderson the Colorado Supreme Court recognized the issue "has not received full consideration" in its "previous decisions." *Publix* then spoke to "the history of the non-survival rule as it existed at common law" explaining that "the non-survival rule is *a vestige of the ancient concept of violent torts*, and owes its existence to *historical accident and blind adherence to precedent*" — "The lack of historical validity of the rule that tort actions die with the person and considering the rule's affinity to intentional torts" was finally recognized. 338 P.2d at 707-708, 711. It further explained that, to the extent the "rule" had any validity at all, the rule's "historical application was to violent and intentional torts" and not negligence. 338 P.2d at 708.

Other early Idaho cases recognized the survival of injury and negligence actions at common law. *Muir v. City of Pocatello*, 36 Idaho 532, 212 P2d 345, 346 (1922) specifically held that a personal injury claim is a community property claim that does not expire upon the death of one spouse.

Kloepfer v. Forch, 32 Idaho 415, 184 Pac 477, 478 (1919) involved an action against a supplier of chemicals to treat clover pests who negligently furnished sodium arsenite rather than sodium arsenate and "destroyed" the plaintiff's crops. The Idaho Supreme Court reversed dismissal following the death of Jacob Forch despite the erroneous belief that at common law there was no "survival of causes of action" in negligence.

Careful reading of the *Doggett* case actually finds that the alleged "common law" rule as to non-survival of causes of action for tort applied to "serious intentional wrongs" and "criminal acts" and the tort based on the *negligence* of the wrongdoer was not recognized until the 19th century. [*Doggett* at 890] The *Doggett* Court pointed out that "it seems illogical that a rule laid down in the earliest common law to prevent continuation of actions in the case of violent and deliberate acts should be applied to acts of negligence for which no action existed until the mid-19th century." *Id.* Said Court cites approvingly Professor Alvin E. Evans, then Dean of the University of Kentucky Law School, in 29 Michigan Law Review 969, that "it is almost "inconceivable" that we should continue to deny survival of actions where the estate of the injured person has been lessened and states there should be no difference in the principles involved, regardless of whether intentional or negligent injuries are involved." *Id.*

The *Doggett* Court further stated, at the bottom of page 890, that:

> "Respondent cites *Norton v. City of Pomona*, Cal.App., 43 P.2d 586 (1935); *Munchiando v. Bach*, 203 Cal. 457, 264 P. 762 (1928), and *Bortle v. Osborne*, 155 Wash. 585, 285 P. 425 (1930), all as authority for the rule of non-survivability of a cause of action following the death of a plaintiff. We do not find the "careful review of common law history" in *Norton* as suggested by the respondent." (underline added)

The *Doggett* Court went on to rule in favor of the Plaintiff/Appellant on grounds of community property laws, the plaintiff having been married at the time of the tort. Hence, this appellant contends that the reliance of the *Steele* court for the proposition that *Doggett* holds that at common law all claims for personal injuries abate on the death of the plaintiff is not supported. The *Doggett* Court was not required to rely on that finding, being able to correct the injustice in defendant's claims by relying on the community property statutes.

In the present case, not only did the plaintiff suffer "pain and suffering" and other general damages from the underlying accident, but she also suffered medical bills and wage loss.

[Clerk's Record on Appeal, pages 6 – 10] *Vulk v. Haley*, 736 P.2d 1309, (1987) addressed pain and suffering. However, except for *Steele,* discussed above, a plaintiff's claim for economic damages, for example for medical bills and wage loss, have not been clearly and directly addressed by this Court.

Doggett clearly left the door open for a court to rule that common law did not preclude a claim for economic damages by the estate of a plaintiff who died prior to judgment. The *Doggett* Court recognized the inherent inequity and manifest injustice in such a rule, and concluded as follows:

> "We have examined the precedents and the reasons for the rule of non-survivability of causes of action following the death of a plaintiff. We find the precedents unclear and unsatisfactory and the purported reasons for the rule virtually non-existent. We suggest that a continuation of such a rule serves no purpose." *Doggett*, at page 892.

Just prior to stating the above, the *Doggett* Court cited approvingly the following quote from *Haney v. Lexington*, 386 S.W.2d 738 (Ky.1964):

> "The reason the courts have denied their logical impulses and have continued to enforce an unfair rule of law is because they have been nurtured and sustained by another ancient and firmly fixed doctrine, that is, stare decisis et non quieta movere – to adhere to precedents and not to unsettle things which are established. But when established things are no longer secure in a fast changing world, the court should re-examine the precedents and determine if they provide a proper standing under present conditions."

The above two quotes succinctly state the appellant's position in this case.

CONCLUSION

It is manifestly unjust and patently unfair that, merely because the plaintiff was unfortunate enough to die before her case had reached a judgment, the defendant/respondent, who was clearly responsible for her substantial damages, walks away with no accountability or responsibility for it's negligent actions. There is sufficient ambiguity in the common law that,

coupled with the manifest injustice in the outcome in the lower court and the lack of controlling statute, this appeal is justified for express clarification of the law on the issue presented.

Plaintiff/appellant respectfully asks the Court to consider the lower court's ruling in this matter, and reverse it to the extent that it is not consistent with justice or early precedent, particularly as stated in the *Doggett* ruling.

Dated: April 13, 2009

Paul T. Curtis

PAUL T. CURTIS
Attorney for Plaintiff/Appellant
Leeann Craig

Certificate of Service

I hereby certify that on the 13 day of April, 2009, two copies of the foregoing **APPELLANT'S OPENING BRIEF** were served upon the following attorneys of record by the method indicated:

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