Askew v. Gillingham

1997 | Cited 0 times | Court of Appeals of Washington | May 12, 1997

COX, J. -- Willie Askew and 27 other King County corrections officers (collectively, Askew) appeal the trial court's orders on cross-motions for summary judgment. The order granting summary judgment dismisses legal malpractice claims against Paul Gillingham and Kenneth Jennings. Askew first claims that genuine issues of material fact precluding summary judgment remained as to the facts of Askew's employment. Second, he claims that the trial court abused its discretion by considering legal opinions expressed in a lawyer's deposition that was submitted in support of Gillingham's motion for summary judgment.

Askew also argues that the trial court should have granted him summary judgment on causation. He claims that Gillingham was collaterally estopped here from denying the merits of certain claims adjudicated in other cases.

We affirm both orders on the respective motions.

In the early 1980s, Gillingham, an attorney whose practice included a substantial proportion of employment cases, met Kenneth Jennings and hired him as an intern. Jennings was then a law student and part-time counselor at the King County Department of Youth Services (DYS). Jennings felt that he and others at DYS had been mistreated. The department had a practice of hiring so-called "on call" or extra-help workers who actually worked full-time but received less compensation than workers designated full-time.

Gillingham commenced an action against King County, claiming that the difference in pay and benefits violated a King County ordinance guaranteeing equal pay for equal work. [1] After the trial court granted partial summary judgment to the workers in the case, the County settled the claims.

Other on-call county workers contacted Gillingham, who commenced two other actions on their behalf, Gates v. King County [2] and Alexander v. King County. [3] The cases were consolidated. The Gates plaintiffs included a small number of Department of Adult Detention (DAD) workers. Unlike the plaintiffs in the other actions and most of their co-plaintiffs in Gates, the DAD workers were covered by a collective bargaining agreement (CBA) with King County. The trial court granted summary judgment to the Gates claimants, and the County eventually settled those claims.

In July 1988, Askew and his co-plaintiffs, on-call DAD workers represented by Jennings and Gillingham, commenced an action, Anderson v. King County. [4] Although Gillingham disputed below whether he was Askew's attorney, he does not challenge here the trial court's ruling that he was. On

October 28, 1988, the Anderson trial court granted summary judgment to the County because plaintiffs [Askew and co-plaintiffs] failed to exhaust their remedies under the applicable collective bargaining agreement, and plaintiffs' complaint is hereby dismissed with prejudice and with costs, provided that plaintiffs may refile their claim that the classification as applied violates the equal protection clauses of the state and federal constitutions at such time as they exhaust their remedies under the collective bargaining agreement.

The court also determined that the County's payment of overtime did not violate federal, state or local law, and that the CBA's distinctions between on-call and other job descriptions did not constitute a facial equal protection violation. Approximately one month later, the trial court denied Askew's motion for reconsideration. The court noted that there were remedies under the CBA.

Shortly after the Anderson decision, Gillingham contacted Jared Karstetter, the union's business and legal advisor. Karstetter told him that the union's position was that Askew and his co-plaintiffs had no actionable grievance. Under the CBAs, "no individual may, without Union concurrence, make use of the provisions of this [grievance procedure]." Gillingham took no further action in the case.

Askew and his co-plaintiffs here are 28 of the plaintiffs in Anderson. Several of them met with Gillingham in March 1992 to discuss the status of the litigation. In September 1993, Askew and his co-plaintiffs commenced this legal malpractice action, alleging that Gillingham and Jennings had handled their claims negligently after the October 1988 dismissal. In April 1995, the trial court granted Askew's motion for partial summary judgment. The court ruled that Gillingham and Askew had an attorney-client relationship that gave rise to four duties. They included the duty (1) to file a grievance under the CBA, (2) to request a stay of the Anderson trial court's dismissal order pending resolution of the grievance process, (3) to appeal the dismissal if the stay was not granted, and (4) to pursue the action in superior court if the grievance process generated no relief. Almost three months later, the trial court entered an order on cross-motions for summary judgment, dismissing Askew's claims. A letter that accompanied the motion informed counsel that the basis of the dismissal was the Judge's conviction that Askew could not win the underlying case i.e., the Anderson case.

Askew appeals.

I

Deposition Testimony

Askew argues that the trial court abused its discretion by considering legal opinions in Jared Karstetter's deposition transcript. Both Askew and Gillingham submitted the deposition to the trial court for purposes of the summary judgment motion. The record shows that Askew excerpted only a portion of the deposition for submission. We conclude that the trial court did not rely on inadmissible deposition testimony.

Admission of evidence lies "largely within the sound discretion of the trial court. . . ." [5] We review evidentiary decisions for abuse of discretion. [6] An abuse of discretion occurs only where the "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." [7]

In response to the evidentiary challenge, Gillingham argues that Askew's submission of portions of the deposition in support of his motion for partial summary judgment required that the other portions be admitted as well. Gillingham finds support in the rule of completeness embodied in ER 106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." As Askew notes, however, the Judicial Council Comment to ER 106 states that under CR 32(b), the rules of evidence apply to admission of depositions. Therefore, for example, irrelevant portions of the deposition would be inadmissible. [8] ER 106 does not preclude Askew's challenge.

Gillingham also suggests that the doctrine of invited error defeats Askew's objection to admitting portions of Karstetter's deposition. For support, Gillingham cites the general statement in Davis that "[a] party cannot properly seek review of an alleged error which the party invited." [9] Here, Askew moved to strike portions of Karstetter's deposition testimony. Askew did not invite the alleged error.

Our Supreme Court has stated that legal opinions are impermissible in expert testimony. [10] A trial court should disregard an affidavit to the extent it contains legal Conclusions. [11] Appellate courts presume that the trial court has ignored inadmissible portions of an affidavit where it contains factual evidence that the court could properly consider. [12]

Askew's challenge to the trial court's consideration of Karstetter's deposition appears to rest on the assumption that the only basis for the court's ruling on summary judgment was Karstetter's opinion. Askew also seems to assume that the trial court did not disregard inadmissible portions of the testimony. Askew states that Gillingham's memorandum in support of his summary judgment motion relies exclusively on Karstetter's deposition testimony for its analysis of the CBA. But even if Gillingham relied on Karstetter's analysis, the trial court stated in its summary judgment order that it considered the CBAs themselves, as well as the relevant King County ordinances. The construction of the contract and the ordinances, both matters of law, [13] were properly before the trial court on summary judgment.

In any case, review of Gillingham's argument in his motion for summary judgment reveals that he relied on Karstetter's deposition to establish the union's grievance procedure and what Karstetter told Gillingham regarding

Askew's claims. These are factual matters peculiarly within Karstetter's personal knowledge as the union official responsible for handling grievances. Askew has not established that the trial court impermissibly relied on Karstetter's deposition testimony.

II

Summary Judgment

Askew also argues that the trial court erred by granting summary judgment because genuine issues of material fact about the conditions of his employment were in dispute. We disagree.

When we review an order granting summary judgment, we engage in the same inquiry as the trial court. [14] CR 56(c) permits the trial court to grant summary judgment "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." "All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo." [15] A material fact is one upon which the outcome of the litigation depends. [16] Summary judgment is not proper if reasonable minds could draw different Conclusions from undisputed facts or if all of the facts necessary to determine the issues are not present. [17]

An attorney malpractice claim has four elements:

(1) the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff, (2) an act or omission by the attorney in breach of the duty of care, (3) damage to the plaintiff, and (4) proximate causation between the attorney's breach of duty and the damage incurred. [18]

Here, the trial court's April 7, 1995, order granted Askew partial summary judgment that Gillingham was Askew's attorney in the Anderson case and that Gillingham therefore had a duty of care to Askew. That satisfies the first element of Askew's claim. In the same order, the trial court denied Askew's motion on the issues of breach of that duty and causation of Askew's damages, stating that material issues of fact remained on both issues. The court's June 27, 1995, order granted Gillingham's motion for summary judgment and dismissal. The court also sent a letter to the parties stating that it was "convinced that [Askew] could not prevail in (his] underlying 'case within a case.'" If Askew could not have prevailed in the underlying action, he cannot establish causation, regardless of Gillingham's breach, if any. This issue, therefore, is one of causation.

Askew first claims that all factual issues in a legal malpractice case are jury questions where they are in dispute. He cites this court's statement in Brust v. Newton [19] that in most cases, causation in fact in attorney malpractice cases is a jury question. But in Daugert v. Pappas, [20] our Supreme Court articulated a different rule for evaluating causation where the attorney allegedly failed to perfect an appeal:

In cases involving an attorney's alleged failure to perfect an appeal, however, the burden of proving causation takes on a different light. The cause in fact inquiry becomes whether the frustrated client

would have been successful if the attorney had timely filed the appeal. Specifically, the client must show that an appellate court would have (1) granted review, and (2) rendered a judgment more favorable to the client. Not surprisingly, numerous other courts confronted with making this causation determination have not delegated it to the jury. Rather, they have consistently recognized that these latter two determinations are within the exclusive province of the court, not the jury, to decide.

The court reasoned that whether the client would succeed depends on an analysis of the law and that a Judge is in a much better position than a jury to undertake that analysis. [21] Accordingly, the court held that "the determination of what decision would have followed if the attorney had timely filed the petition for review is a question of law for the Judge, irrespective of whether the facts are undisputed." [22]

Here, the issue is whether Askew would have prevailed in either an appeal or a grievance proceeding under the CBA. Under Daugert, whether Askew would have prevailed on appeal is a question of law. Thus, it could be properly decided on summary judgment. Askew does not argue that appealing the Anderson trial court's decision would have been successful.

Instead, he asserts that genuine issues of material fact as to the officer's employment conditions preclude summary judgment. Askew thus gives us no basis to conclude that, absent Gillingham's alleged malpractice, Askew would have prevailed on appeal--one of two routes to satisfy the causation element of his claim.

The remaining way for Askew to have demonstrated causation was by showing that, but for Gillingham's alleged malpractice, he could have obtained relief through the CBA's grievance procedure. To the extent Askew's ability to gain relief in that procedure depends on construction of the CBA, it is likewise a question of law for the court and therefore subject to resolution on summary judgment. [23]

The grievance procedure in each of the CBAs in the record here provides that a worker must file a grievance within 14 calendar days of the event giving rise to the grievance. Under the parties' factual stipulation, the last date that any of Askew's co-plaintiffs was an on-call officer was July 31, 1988. They would therefore have had to file their grievance by August 14, 1988, in order to comply with the CBA. The trial court signed the summary judgment order on October 28, 1988, and on November 21, 1988, denied the motion for reconsideration.

Even if Askew had valid challenges, they would have been untimely. In any event, our review of the CBAs indicates that Askew was compensated according to its provisions, as the parties stipulated. Furthermore, the Anderson trial court's order, which Askew does not appear to challenge directly, concludes that the overtime provisions and job classifications of the CBAs do not violate applicable federal, state, or local law. The order also rules that the distinctions between the on-call and regular

officers' job responsibilities and benefits do not facially violate the equal protection clauses of the federal and state constitutions.

The trial court correctly concluded that Askew could not have established the causation element of his legal malpractice claim.

III

Collateral Estoppel

Askew claims that the Gates, Smith, and Alexander cases collaterally estopped Gillingham from arguing that Askew could not have prevailed in his underlying case. Gillingham argues that Askew failed to raise this issue before the trial court and therefore did not preserve it for review on appeal. [24] We agree with Gillingham.

There are two brief references to collateral estoppel in this record. First, Blumberg, Askew's attorney expert witness, states in his declaration that "the doctrine of collateral estoppel could and should have been used . . . because the issues were 'identical' to the issues decided in Gates and Alexander." Second, Gillingham's memorandum in response to Askew's second summary judgment motion speculates that "perhaps plaintiffs are attempting to urge utilization of the doctrine of collateral estoppel." Askew did not make such an argument to the trial court. He therefore failed to preserve the issue for review.

Askew also claims that the trial court erred by failing to grant summary judgment that Gillingham breached his duty, but that issue is moot because of the court's correct ruling on the causation issue.

Gillingham requests attorney fees on appeal under RAP 18.1(a) and (b), based on CR 11 and RCW 4.84.185. Although Askew has not prevailed here, we do not view his appeal as frivolous or lacking all merit. [25] We therefore deny Gillingham's request.

After oral argument here, Askew submitted a statement of additional authorities. Gillingham moved to strike that submission, claiming that the statement of authorities contained argument in addition to the authority cited, in violation of RAP 10.8. [26] He also argues that the statement raises a new issue not previously briefed or argued.

We disapprove of the inclusion of argument in a statement of additional authorities because that violates the clear provisions of RAP 10.8. In any event, the additional submission does not affect our Disposition.

Askew has not argued that the Anderson trial court erred by dismissing his claims under our state minimum wage act. As a result, he cannot, for the first time, argue in a supplemental submission that

state law claims survive. To the extent that Askew's submission stands for the proposition that a claim based on King County Ordinances was available, that argument fails. K.C.C. sec. 3.12.360 provides that CBAs adopted as ordinances, like the one here, override ordinances to the contrary. Askew was compensated in accordance with the CBA.

We affirm the summary judgment orders.

WE CONCUR:

William W. Baker

Mary K. Becker

1. King County Code 3.12.170.

2. No. 84-2-18036-6.

3. No. 86-2-02936-2.

4. No. 88-2-12236-9.

5. Davis v. Globe Mach Mfg. Co., 102 Wash. 2d 68, 76, 684 P.2d 692 (1984).

6. Davis, 102 Wash. 2d at 76.

7. Davis, 102 Wash. 2d at 77.

8. ER 402.

9. Davis, 102 Wash. 2d at 77.

10. Orion Corp. v. State, 103 Wash. 2d 441, 461, 693 P.2d 1369 (1985).

11. Orion, 103 Wash. 2d at 462; Hiskey v. Seattle, 44 Wash. App. 110, 113, 720 P.2d 867, review denied, 107 Wash. 2d 1001 (1986).

12. Orion Corp., 103 Wash. 2d at 462.

13. Mayer v. Pierce County Med. Bureau, Inc., 80 Wash. App. 416, 420, 909 P.2d 1323 (1995) (contracts); Health Ins. Pool v. Health Care Auth., 129 Wash. 2d 504, 507, 919 P.2d 62 (1996) (statutes).

14. Mountain Park Homeowners Ass'n v. Tydings, 125 Wash. 2d 337, 341, 883 P.2d 1383 (1994).

15. Mountain Park Homeowners, 125 Wash. 2d at 341 (citations omitted).

16. Ruff v. County of King, 125 Wash. 2d 697, 703, 887 P.2d 886 (1995).

17. Ward v. Coldwell Banker/San Juan Props., Inc., 74 Wash. App. 157, 161, 872 P.2d 69, review denied, 125 Wash. 2d 1006, 886 P.2d 1133 (1994).

18. Trask v. Butler, 123 Wash. 2d 835, 839-40, 872 P.2d 1080 (1994).

19. 70 Wash. App. 286, 292, 852 P.2d 1092 (1993), review denied, 123 Wash. 2d 1010 (1994).

20. 104 Wash. 2d 254, 258, 704 P.2d 600 (1985).

21. Daugert, 104 Wash. 2d at 258-59.

22. Daugert, 104 Wash. 2d at 259.

23. Mayer, 80 Wash. App. at 420.

24. RAP 2.5(a). See, e.g., State v. Scott, 110 Wash. 2d 682, 685, 757 P.2d 492 (1988).

25. See State v. Parada, 75 Wash. App. 224, 235, 877 P.2d 231 (1994) (appeal is frivolous only "'if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists'") (citation omitted)).

26. See Frank v. Fischer, 46 Wash. App. 133, 141, 730 P.2d 70 (1986) (declining to consider claim raised for the first time in statement of additional authorities), aff'd, 108 Wash. 2d 468, 739 P.2d 1145 (1987).