2000

Susan E. Maxfield, as Guardian ad Litem for Laurie Ann Maxfield v. Kenneth O. Fishler : Response to Petition for Rehearing

Utah Supreme Court

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Worsley, Snow and Christensen; Attorneys for Respondent.

IN THE SUPREME COURT

OF THE STATE OF UTAH

SUSAN E. MAXFIELD, as
Guardian ad Litem for
LAURIE ANN MAXFIELD,

Plaintiff and Appellant,

vs.

Case No.
13955

KENNETH O. FISHLER,

Defendant and Respondent.

RESPONDENT'S BRIEF IN ANSWER TO PETITION FOR REHEARING

Appeal from the Order of
Dismissal of the District
Court of Salt Lake County,
Honorable Bryant H. Croft,
Judge

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FOR REHEARING

Case No. 13955

NATURE OF THE CASE

This is a medical malpractice action arising out of the alleged failure of the respondent physician to diagnose and treat a physical ailment of the appellant infant.

DISPOSITION ON APPEAL

The Court affirmed the ruling of the trial court dismissing appellant's complaint with prejudice for failure to prosecute pursuant to Rule 41(b), Utah Rules of Civil Procedure.

RELIEF SOUGHT

Respondent seeks a denial of appellant's petition for rehearing.

FACTS

The appellant has failed to state the material facts relevant to the Court's decision and a more complete and accurate statement is therefore necessary. The parties will hereinafter be designated as they appeared in the trial court.

In its opinion filed on August 1, 1975, this Court held that it was not an abuse of discretion to dismiss the plaintiff's claim for failure to prosecute when the record demonstrates that, due to inexcusable neglect, she was not prepared to prove her case on the date of trial. The Court found that the plaintiff "was not ready to proceed at the time the trial date arrived" and that the record showed that the plaintiff or her counsel "had been dilatory in responding to defendant's efforts at discovery and had resisted his efforts to resolve the issues by getting the case to trial." In light of these findings, the Court held that the trial court did not abuse its discretion and affirmed the dismissal of the plaintiff's claim.

The material facts relied upon in the Court's opinion are clearly shown in the record on appeal. On the basis of the record before it, the Court found that the plaintiff made no pretrial effort to discover evidence to support her case that

could have been admitted at trial. She did not schedule or take a single deposition (R. 14). She did not submit interrogatories to elicit information known to Dr. Fishler or to discover what testimony or opinions he would be expected to give at trial (R. 14). Most importantly, however, the record shows that the plaintiff failed to obtain any information from medical experts during the pendency of the action that tended to prove or support her case. Claiming to have been met with "pervasive silence" and antagonism whenever she informally consulted physicians, the plaintiff nevertheless failed to compel testimony by deposition or by requiring attendance at trial. As a result, the record indicates that she and her attorney had no information upon which to rely at the time of trial to reasonably anticipate what testimony could be elicited by either direct or cross-examination of adverse witnesses.

On the morning of trial, the one medical witness the plaintiff had hoped would lend some support to her claim did not appear because he had not been notified of the trial date, had not been asked to appear, and the plaintiff's attorney had failed to serve him with a subpoena (R. 13-14). Thus, the plaintiff and her attorney were not only unprepared to proceed

by virtue of their inattention to pretrial discovery needs, but they were also left without a single medical witness, except the defendant, who could offer vital testimony that the care offered by Dr. Fishler fell below required professional standards and that his treatment proximately caused injury to the plaintiff.

In an attempt to avoid the effect of her neglect, the plaintiff sought a continuance which, as plaintiff now concedes, was properly denied.

Viewing all of the circumstances known to the trial court, including the absence of any discovery efforts by plaintiff, the plaintiff's recalcitrance at each step undertaken by the defendant to move the case forward and the absence of any indication in the record that the plaintiff or her attorney were able to proceed, this Court held that the dismissal of the plaintiff's claim was not an abuse of discretion. The plaintiff's assertion on appeal that she was capable, prepared and willing to proceed on the date of trial was too hollow, too late, and too self-serving to be credible.

In support of her petition for rehearing, the plaintiff now asserts, without a single citation to the record or to legal authorities, that the Court misunderstood the facts and erred in

its judgment in this case.

ARGUMENT

POINT I

THE PETITION FOR REHEARING FAILS TO STATE ANY GROUND UPON WHICH REHEARING SHOULD BE GRANTED.

In ancient, but still vital, decisions this Court set forth the grounds required to justify a rehearing. In Brown v. Pickard, 4 Utah 292, 9 P. 512 (1886), the Court denied a petition for rehearing and stated:

> We long ago laid down the rule that, to justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing. Where a case has been fully and fairly considered in all its bearings, a rehearing will be denied. 9 P. at 512 (Citations omitted.)

Similarly, in the case of Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court in answer to an application for rehearing reaffirmed this view and stated:

> When this Court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied

> or overlooked something which materially affects the result. 129 P. at 624.

In the instant case, the petition fails to state any material fact that the Court previously overlooked in its consideration of the plaintiff's appeal.

The plaintiff alleges that a nonresident bond was purchased on December 29, 1972, but even if relevant to the ultimate result on appeal, the fact remains that the record contains no indication that the bond was ever filed.

Similarly, the plaintiff alleges that her counsel, despite due diligence, was unable to answer the defendant's seven interrogatories served on March 14, 1974, because she had withdrawn the case from her attorney during some portion of 1973 (R. 90-91). Nevertheless, these interrogatories were not answered until five days prior to trial and the plaintiff's attorney did so only after a court order had been issued (R. 69-71, 74).

The allegations contained in the petition relating to the plaintiff's attempts to contact medical experts are more relevant, but equally insubstantial in justifying a rehearing. The Court's opinion correctly states that "no medical experts had been deposed or even contacted for the purpose of testifying by plaintiff's counsel." Plain-

tiff's only challenge to that conclusion is the mere assertion that doctors were contacted "regarding the present matter," but that they were uncooperative. The fact that medical experts did not voluntarily appear on behalf of the plaintiff is self-evident, but does not excuse the obligation of plaintiff's attorney to secure the testimony needed to prove a case.

Finally, the petition reasserts plaintiff's argument made on appeal that she and her attorney were ready, willing and able to prosecute their case on the day of the scheduled trial. These assertions, however, are wholly unsupported by the record and are totally incredible in light of all the circumstances. The presence of the plaintiff's parents, plaintiff's attorney, completed jury instructions and availability of medical records are urged as indicia of this intention, but these arrangements were all made prior to the date of trial when the plaintiff and her counsel first discovered that they had no expert witness. More importantly, however, the Court has already thoughtfully considered and correctly rejected these contentions.

In summary, the plaintiff has failed to raise any material fact, statute or decision overlooked by the Court on

the original appeal which may affect the result reached by this Court. To the contrary, the plaintiff merely seeks a reconsideration of the points already decided upon appeal. Accordingly, plaintiff's petition for reconsideration should be denied.

POINT II

THE PETITION FAILS TO CONFORM TO THE REQUIREMENTS OF THE UTAH RULES OF CIVIL PROCEDURE AND, THEREFORE, SHOULD BE DENIED.

The plaintiff's petition for rehearing, in both substance and form, is merely a re-argument of the appeal upon its merits. Rule 76(e)(1), Utah Rules of Civil Procedure, sets forth the requirements for a petition for rehearing as follows:

> The petition shall state briefly the points wherein it is alleged that the appellate court has erred. The petition shall be supported by a brief of the authorities relied upon to sustain the points listed in such petition.

In Enright v. Grant, 5 Utah 400, 16 P. 595 (1888), the Court, in denying a petition for rehearing, called attention to the precise practice pursued by the plaintiff in this case and stated:

> The petition is an extended and elaborate argument in favor of a rehearing. This is not in conformity to the rule. The petition for rehearing is a pleading, and should not be an argument. If points and authorities are submitted, they should be in a separate instrument, and not as a part of the petition. 16 P. at 596.

Inasmuch as the plaintiff has failed to comply with these rules and has merely presented a re-argument of the appeal, the petition should be denied. In Gershenhorne v. Walter R. Stutz Enterprises, 306 P.2d 121 (Nev. 1957), the Nevada Supreme Court summarily denied a petition for rehearing which failed to conform with requirements identical to those applicable in this case. The Court stated:

> With increasing frequency counsel seem to be confusing the function of a petition for rehearing with the rehearing itself. In this case a "petition" of 34 pages has been filed by the appellants which, upon patient reading, is discovered to be in substance a re-argument of the appeal. For this reason, rehearing is denied. 306 P.2d at 121.

The Court has already given thoughtful consideration to the points raised by the plaintiff on her original appeal. The Court need not and should not grant a rehearing when the petition fails to conform with the relevant Rules of Civil Procedure and merely re-argues the identical points previously considered and resolved on appeal.

CONCLUSION

The plaintiff's petition for rehearing fails to raise any material fact or issue not previously considered by the Court at the time of the original hearing and no basis whatsoever has been shown upon which error can be found. Accordingly, it is patently clear that the plaintiff is simply dissatisfied with the judgment of the Court and merely seeks another opportunity to re-argue her case by petitioning for rehearing. For these reasons, the petition clearly lacks merit and should be denied.

Respectfully submitted,

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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Stan Rasmussen, being first duly sworn states that he personally delivered two copies of the Respondent's Brief In Answer To Petition For Rehearing in the matter of Maxfield v. Fishler to the offices of Fullmer & Harding, 540 East 500 South, Suite 203, Salt Lake City, Utah.

Stan Rasmussen
STAN RASMUSSEN

SUBSCRIBED AND SWORN to before me this 9th day of September, 1975.

Kim Nau
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:
5-29-78