

1976

Carrie M. Carter v. Raymond D. Kingsford and Transnational Insurance Co. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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CARRIE M. CARTER, :
 :
 Plaintiff and :
 Appellant, :
 :

vs. :

Case No. 14516

RAYMOND D. KINGSFORD and :
 TRANSNATIONAL INSURANCE :
 COMPANY, :
 :
 Defendants and :
 Respondents. :

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BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an action by the appellant Carrie M. Carter against the respondent, Raymond D. Kingsford, to set aside a release of liability entered into between appellant and a representative of respondent, Transnational Insurance Company, and to recover damages allegedly resulting from an automobile accident between appellant and the respondent.

DISPOSITION IN THE LOWER COURT

Appellant filed a Complaint on April 27, 1975 seeking to set

aside the release entered into between appellant and respondent, Transnational Insurance Company, and to recover damages allegedly resulting from the accident between appellant and respondent, Raymond D. Kingsford. Respondent moved for Summary Judgment and this Motion was granted by the Honorable John F. Wahlquist by Judgment dated November 28, 1975. Appellant's Petition for Rehearing on the Motion for Summary Judgment was denied by Order dated February 18, 1976. Appellant then prosecuted her appeal.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the Order of the District Court granting respondent's Motion for Summary Judgment affirmed.

STATEMENT OF FACTS

Appellant, Carrie M. Carter, and respondent, Raymond D. Kingsford, were involved in an automobile accident in Ogden, Utah, on April 26, 1971 (R. 17, 114). Mrs. Carter was injured in the accident and sought treatment from her private physician, Dr. David P. Jahsman, on the day of the accident (R. 28). Dr. Jahsman diagnosed her injuries as a cervical strain, strain of the left shoulder and superficial abrasions (R. 120). Mrs. Carter was hospitalized on the day following the accident until June 6, 1971 (R. 28), and was subsequently hospitalized again (R. 27-28). During this entire period, she was under the treatment of her private physician and other physicians who assisted her physician by means of consultation (R. 27). On July 14,

1971, appellant executed a Release of Liability with a representative of respondent, Transnational Insurance Company (R. 112) and received the settlement of \$3,334.09 (R. 135). Approximately one year later, appellant noticed a recurrence of numbness in her right arm and sought the aid of her physician (R. 112). She continued to be treated by Dr. Jahsman until November of 1974 when she was seen by Dr. C. D. Van Hook (R. 121). Dr. Van Hook discovered that Mrs. Carter was suffering from a cervical herniated disc (R. 14). In January of 1975 surgery was performed involving a fusion of the C-5 and 6 discs (R. 32, 121).

ARGUMENT

POINT I

THE UTAH SUPREME COURT HAS RULED THAT A
RELEASE CANNOT BE SET ASIDE BASED UPON THE
UNKNOWN CONSEQUENCES OF A KNOWN INJURY

Reynolds v. Merrill, 23 Utah 2d 155, 460 P. 2d 323 (1969), is the leading case in Utah on the issue of the grounds necessary to set aside a Release. The facts of that case are extremely important to the disposition of the instant case. That case also involved an automobile collision, wherein the plaintiff was injured and sought the treatment of his private physician. His physician diagnosed the plaintiff's injuries as a recurrence of bursitis. Almost two months after the accident, at the request of the defendant's insurance adjuster, the physician signed an Attending Physician's Report, wherein he diagnosed the plaintiff's

condition as traumatic bursitis of the right shoulder and traumatic myositis posterior neck muscles. One month later, the plaintiff signed a release and received \$655.56. Subsequently, the plaintiff's shoulder pains grew more severe and approximately six months following the accident, he was hospitalized and tests revealed a herniated disc. A spinal fusion was performed resulting in a permanent partial disability. The plaintiff then brought suit to set aside the release. The trial court held that the plaintiff had lost all rights against the defendant by reason of the release and granted a summary judgment dismissing the complaint. This court reversed the trial court's decision. In doing so, this court distinguished between an unknown injury and unknown consequences of a known injury. This court stated that the unknown injury can be a mutual mistake of fact and, consequently, can be the basis for setting aside a release. The unknown consequences of a known injury are only a mistake of opinion and will not provide grounds for setting aside a release. The plaintiff had raised a material issue of fact which should have been presented to the jury and this was the reason for reversing the trial court's decision granting the Motion for Summary Judgment. It should be particularly noted that in the Reynolds case, the plaintiff's physician diagnosed his injury as a recurrence of bursitis, obviously a preexisting condition. Thus, the latter discovery of a herniated disc was quite different from the original diagnosis.

In the instant case, the injuries suffered by the appellant are clearly unknown consequences of a known injury. The appellant's physician did not diagnose her injuries as a recurrence of any pre-existing condition, nor did he make an incorrect diagnosis. He simply was not aware of the severity of the injuries which he did diagnose. The Affidavit of appellant's physician, Dr. Jahsman, reveals that his impression at the time he first saw the appellant following the accident was that she had suffered a cervical strain, strain of the left shoulder and superficial abrasions (R. 120). Dr. Jahsman also states in his Affidavit that x-rays and analysis as of 1971 indicated a slight degenerative disc disease at C-5-6, but that he was confident that the appellant would respond to non-surgical treatment (R. 121). Thus, he clearly knew and so informed the appellant that she was suffering from neck injuries and injuries to her shoulder. Appellant states in her Affidavit that at the time she entered into the release she was aware of the permanent nature of the injury, believed the injury was merely a severe neck strain, but was not aware of the nature and extent of her injury (R. 112). What Dr. Jahsman and the appellant did not know was the ultimate severity of those injuries. Thus the later discovery of the degenerative disc and the resulting surgery was not an unknown injury, but merely the unknown consequences of the known injuries to the plaintiff's neck and upper back. The appellant's own Affidavit in this case, and that of her physician, clearly show that the appellant has

failed to raise a material issue of fact. Both Affidavits clearly reveal that the only thing unknown to the appellant and her physician would be the extent of the consequences of her known injuries and not any later discovered unknown injury (R. 112, 121). The trial judge correctly made this finding. In his memorandum decision, he stated:

There can be no question that after the accident she knew and was informed that she had an injury to her neck. . . . This is without a doubt a case in which a release has been given for a known neck injury, the future of which was speculative, and in the general belief that the plaintiff was recovering, but that the monies were paid for the risk of known recovery. The case is clearly distinguishable from Reynolds v. Merrill, 23 Utah 2d, 155, where the injury was not noted and not considered in its true light at the time. . . . If a release is good at all this release must be recognized. . . . Unquestionably, from Dr. Jahsman's report to attorney Keith Henderson in the file, this is a "known injury where the result was not foreseeable" and settled on that basis. (R. 114-115)

The trial judge's determination on this issue is correct and this court should affirm its decision.

POINT II

SUMMARY JUDGMENT IS THE PROPER DISPOSITION WHERE A PLAINTIFF'S OWN EVIDENCE REVEALS THAT THERE IS NO MATERIAL ISSUE OF FACT IN THE CASE

As noted above, the respondents in this case are relying on the appellant's own evidence to support their position. The Affidavits of the appellant and her physician clearly reveal that the

injuries discovered subsequent to the release being executed were merely consequences of the injuries known to the appellant and her physician prior to the time that the release was executed. Thus, the appellant has failed to raise a material issue of fact which would preclude the trial court from granting respondents' Motion for Summary Judgment. The standard by which a summary judgment by the trial court is reviewed by this court was set forth in the case of Frederick May & Company v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962). That case involved a brokerage company suing to recover a broker's commission for the sale of a business concern. The trial court granted a summary judgment to defendant and the plaintiff appealed. This court upheld the trial court's action in granting the summary judgment and articulated the following standard to be used in reviewing such an action by the trial court:

[1] To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the lower, must show that there is no genuine issue of material fact, and that the winner is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial.

This court's affirmance in that case was based largely on evidence produced by the plaintiffs, much as in the instant case. Here, the respondents are relying on the evidence produced by the appellant in her Affidavit. Since those Affidavits conclusively show that there is

no material issue of fact, it is obvious that the appellant could not have prevailed in a trial. Therefore, the trial court's action in granting respondents' Motion for Summary Judgment was correct and should be affirmed by this court.

That the trial court's action was correct becomes even more apparent after focusing on the purpose of the summary judgment. As announced in Dupler v. Yates, 10 Utah 2d 251, 269, 351 P. 2d 624 (1960). That case dealt with an action by purchasers of interests in oil wells to recover damage for alleged fraud and deceit and breach of a fiduciary⁹ relationship by defendant. Defendant in support of motion for summary judgment produced admissable evidence that purchasers were induced to purchase their interests in reliance upon false representations made by the sellers and not by the defendant. The trial court granted the motion for summary judgment and the Utah Supreme Court affirmed on the following basis:

[4] The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law.

[5] It is apparent here that the defendant has produced evidence that pierces the allegations of the complaint. The plaintiffs have not controverted, explained or destroyed that evidence by counteraffidavit or otherwise. They have relied upon their amended complaint and their proposed amendment to the amended complaint.

This court went on to say that even though Rule 56, Utah Rules of Civil Procedure is not intended as a substitute for regular trial when there are disputed issues of fact, and that summary judgment should be invoked with caution; nevertheless,

. . . where the moving party's evidentiary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at the trial.

Here, appellant's own Affidavits have pierced the allegations of their pleadings. There is no genuine issue of material fact. The evidence is sufficient to warrant summary judgment. It is apparent that appellant, having failed to produce any evidentiary matter in contradiction of respondents' case, would not be able to present a genuine issue of fact at trial. Therefore, respondents being entitled to judgment as a matter of law, the trial court was correct in granting respondents' Motion for Summary Judgment and should be affirmed by this court.

CONCLUSION

The District Court was correct in granting respondents' Motion for Summary Judgment in that there is no genuine issue of material fact and respondents are entitled to judgment as a matter of law.

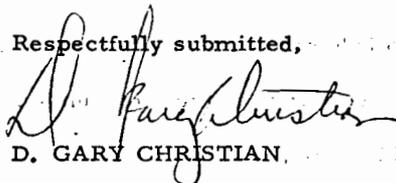
Appellant's own Affidavits establish that: (1) at the time of

the release, both appellant and her physician were cognizant of the fact that she was suffering from neck and shoulder injuries; and (2) that the injury of which appellant now complains, and by which she's attempting to set aside the release, is simply an unknown consequence of a known injury.

This court has stated often that summary judgment is the proper disposition where a plaintiff's own evidence reveals that there is no material issue of fact in the case. This court has also ruled that a release cannot be set aside based upon the unknown consequences of a known injury.

Based upon the foregoing, the respondents urge this court to affirm the Order of the District Court granting respondents' Motion for Summary Judgment.

Respectfully submitted,



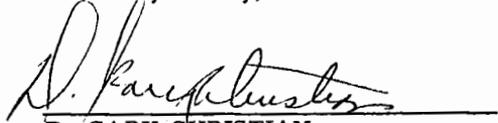
D. GARY CHRISTIAN,

KIPP AND CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111

Attorney for Respondents

MAILING CERTIFICATE

I hereby certify that I mailed three copies of BRIEF OF RESPONDENT to J. Keith Henderson, attorney for plaintiff and appellant, Carrie M. Carter, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, this 23rd day of July, 1976.

A handwritten signature in cursive script, appearing to read "D. Gary Christian", written over a horizontal line.

D. GARY CHRISTIAN
Attorney for Defendants and
Respondents, Raymond D. Kingsford
and Transnational Insurance Co.