1986

Erling A. Roylance v. Lynn B. Rowe, Dean L. Bristow, J. R. Monnahan, and Mountain View Hospital : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERLING A. ROYLANCE, 860023	:	
Plaintiff-Appellant,	:	Ct. App. Case No. 860023-CA
vs.	:	Sup. Ct. Case No. 19928
LYNN B. ROWE, DEAN L. BRISTOW, J. R. MONNAHAN, and MOUNTAIN VIEW HOSPITAL,	:	Category 13
Defendants-Respondents.	:	

REPLY BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR WRIT OF CERTIORARI

REVIEW OF DECISION OF THE UTAH COURT OF APPEALS

THE HONORABLE JUDITH M. BILLINGS, R. W. GARFF, AND NORMAN H. JACKSON, APPELLATE JUDGES, PRESIDING

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Pursuant to the Rules of the Utah Supreme Court, plaintiff-appellant files this reply brief in support of his Petition For a Writ of Certiorari to the Utah Supreme Court. The petition was filed in accordance with Rule 43(2) and (3) of the Utah Supreme Court and is, therefore, appropriate for review by a Writ of Certiorari to this honorable Court.

ARGUMENT

POINT I

THE FACTS OF THIS CASE ALLOW PLAINTIFF TO UTILIZE THE RES IPSA LOQUITUR DOCTRINE.

Defendant-respondents contend "that the plaintiff did not meet the burden of proving the first element of the doctrine of res ipsa loquitur: That the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed." Plaintiff does not dispute that in medical

malpractice cases, expert testimony is sometimes needed to establish a standard of care. The argument advanced by defendants in this case was, however, considered and addressed by this Court in Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980). The Court therein reaffirmed Utah's recognition of "certain exceptions to the general rule requiring expert testimony." Id. at 352. The Court continued:

> . . . expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.

Id.

It is within the layman's knowledge and experience to ascertain whether surgery should be performed to remove a sponge that was not inside the plaintiff. A surgery such as this does not occur in "the ordinary course of events [and] would not have happened had due care been observed." Expert testimony is not needed to tell a jury this.

Secondly, respondents cite Loos v. Mountain Fuel Supply Company, 99 Utah 496, 108 P.2d 254 (1940), claiming that appellant did not plead the doctrine of res ipsa loquitur and by reason of that failure was precluded from presenting the doctrine to the jury. The Utah Supreme Court has, in fact, specifically stated that the failure to plead res ipsa loquitur will not prevent the case from being submitted to the jury on that theory. Furthermore, the Utah Supreme Court so ruled after the Loos case and even referred to the Loos case by way of footnote.

In Joseph v. W. H. Groves Latter-day Saints Hospital, 10 Utah 2d 94, 348 P.2d 935 (1960), plaintiff, at the conclusion of the evidence, requested the submission of the case on the theory of res ipsa loquitur. The trial court declined to so submit the case, assigning three reasons: (1) That it had not been pleaded; (2) that plaintiffs had elected to rely on specific acts of negligence; and (3) that the evidence did not provide a proper foundation for the application of that doctrine.

The Utah Supreme Court summarily dismissed the first basis for the ruling of the trial court that failure to plead res ipsa loquitur would preclude the submission of the case to the jury on that doctrine. The court also dismissed the trial court's second basis for ruling regarding the election of the plaintiff to rely on specific acts of negligence. Agreeing with the plaintiff, the Court stated:

> Conceding the plaintiffs' argument that under proper circumstances neither the failure to expressly plead res ipsa loquitur, nor the fact that specific acts of negligence are proved, would preclude the submission of the case on that doctrine, we proceed to consider the more fundamental proposition: whether the evidence here would have justified submission of the case upon that theory.

348 P.2d at 936.

In other words, the controlling question is whether or not the evidence justifies the utilization of the theory of res ipsa loquitur. Failure to plead the doctrine at the initial stages of the litigation is neither controlling nor dispositive of the issue.

Finally, defendants argue that plaintiff's theory of "negligence against the doctors was that they should have taken more x-rays before doing further surgery." Plaintiff would have preferred additional x-rays to determine the exact location of the sponge. The fact that additional x-rays were not taken is just one element or factor that could have prevented the second surgery. It was the second surgery to look for a sponge in the plaintiff's body cavity when no sponge was inside the plaintiff that constitutes the negligence for which the plaintiff has suffered.

There is no dispute that the x-rays showed a sponge marker, that the subsequent operation failed to disclose the sponge, and that the operation was therefore unnecessary. The evidence did not reveal, however, the location of the sponge which appeared on the x-rays. Plaintiff was not able to fully explain the cause of his injury. An instruction on res ipsa loquitur should have been given, and the Court of Appeals' failure to so hold is contrary to existing Utah law.

POINT II

AN ISSUE RAISED IN PROPOSED JURY INSTRUCTIONS IS SUFFICIENTLY RAISED FOR APPELLATE REVIEW.

Defendants contend that plaintiff is raising for the first time a claim that defendants were negligent as a matter of law. Plaintiff's Requested Jury Instructions No. 3 and [4] dated December 27, 1983, read as follows:

> You are instructed that the Court has found the defendant, Dr. Lynn B. Rowe [and Dr. Dean

L. Bristow] negligent as a matter of law. . .

The foregoing Requested Jury Instructions evidence plaintiff's claim that defendants were negligent as a matter of law.

Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for a New Trial dated January 11, 1984, at page 7, along with plaintiff's Docketing Statement dated May 18, 1984, at page 2, further documents plaintiff's prior bringing of this claim.

CONCLUSION

The facts of the case at bar present the circumstances that give rise to the plaintiff's right to use the theory of res ipsa loquitur. Plaintiff has complied with the procedural as well as the substantive prerequisites. The trial court's failure to so instruct the jury constituted reversible error.

DATED this 2nd day of July, 1987.

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Attorneys for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 2nd day of July, 1987.

Mr. David W. Slagle, Esq.
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