1979

Chester E. Farrow v. Health Services Corporation, A Corporation, Salt Lake Clinic, A Professional Corporation, Louis J. Schricker, M.D. And Louis J. Moench, M.D. : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CHESTER E. FARROW,

Plaintiff and Appellant,

vs

HEALTH SERVICES CORPORATION, a corporation, SALT LAKE CLINIC, a professional corporation, LOUIS J. SCHRICKER, M.D. and LOUIS J. MOENCH, M.D.

Defendants and Respondents.

No. 15458

REPLY BRIEF OF APPELLANT

Appeal from Judgment of Third District
Court of Salt Lake County

Honorable Stewart M. Hanson, Jr., Judge

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The importance of this case and the fact that the law of Utah regarding medical malpractice has undergone a significant advance since appellant filed his initial brief in this case necessitates a further brief and a reply to the material filed by defendants and respondents.

Swan v Lamb, 584 P2d 814, (Utah 1978)

On August 16, 1978, this Court decided the case of Swan v Lamb, 584 P2d 814, (Utah 1978). Until the decision in the Swan case it was virtually impossible to get a medical malpractice case to the jury in this state. Local doctors will not testify concerning the work of a fellow doctor, except to applaud that work. We see an example of this in the two psychiatrists from the University Hospital testifying for Dr.

Moench. When docotors are brought in from out of state to render an opinion in a malpractice case, almost without exception, their opinions are not admitted because they are unable to say that they are familiar with the standard of care practiced in this community. This so-called "locality rule" as announced by the Utah cases cited in the Swan case was interpreted and applied by the trial judges of this state with rigid inflixibility.

The "locality rule" hung over this case like a dark cloud from its very inception. It denied to the plaintiff the benefit of the opinions of Dr. Sydney Walker, a neuropsychiatrist, practicing in the LaJolla - San Diego area. Dr. Sydney Walker is well qualified to testify as an expert witness in this case. He entered the Boston University Medical School in 1960, and graduated in 1964. After that, he spent a year at the Presbyterian St. Luke's Hospital in Chicago as surgical intern, a year as a President and Teaching Fellow in psychiatry at the University of Pittsbury School of Medicine, 18 months residence in Psychiatry at UCLA, and two years as a resident in Neurology at the L.A. County Hospital. (TR 685-6) He is currently on the staff of five hospitals. (TR 688)

His name was given to the defendants as an expert witness that would testify on the part of plaintiff. The defendants thereupon took his deposition in California. For the most part, defense counsel solicited his opinions relative to the negligence of the hospital, the attending neuro

surgeon and the attending psychiatrist. His opinion was that all three were culpable. However, the defendants were careful to first establish that the doctor was not familiar with how things were done in Salt Lake City. They knew that if plaintiff attempted to use the deposition of Dr. Walker or have him testify in person in court that objections to his opinions would be, as indeed they were, sustained. This is amply demonstrated by reference to the transcript at page 1939.

> "Mr. Hanson: Defendant Salt Lake Clinic moves the Court to strike all of the testimony of Dr. Sydney Walker upon the grounds that the jury may not consider it upon the grounds there is no foundation laid for his testimony and specifically to show that he is familiar with the standards applicable to the field of psychiatry in Salt Lake City in this community. I have argued that before, Your Honor, so there's no reason to prolong that.
>
> The Court: The motion is denied. And just for the record--and I think I did this--I did sustain the objection to his actual opinion each time the question was asked, and in denying your motion I am not in any way reversing my ruling, my earlier ruling sustaining your objection to his opinion." (TR 1939)

NOTE: In the brief of Dr. Moench, it is claimed that the locality rule is not before the court because the transcript of the testimony of Dr. Walker was not included in the designation of record. It was not included because the entire deposition was made part of the record. Portions of the deposition were read to the jury. However, in each instance where the opinion of Dr. Walker was about to be elicited the defendants objected and the objections were sustained. This is shown by the portion of the transcript quoted above. The portion of the

deposition read to the jury was not included in the reporter's transcript because it was felt that it would simply overburden the record. If the Court feels that that portion of the transcript is necessary, it will be reproduced. However, appellant believes that the testimony is properly before the Court in the deposition of Dr. Walker and that deposition is part of the record.

The importance of the testimony of Dr. Walker to the case of the plaintiff - appellant must not be underestimated. Shortly before the trial commenced, the lower court granted summary judgment to Dr. Schricker and Health Services Corporation. This error in granting summary judgment would not have occurred had the court given due consideration to the opinions of Dr. Walker.

Under examination by counsel for defendant Health Services Corporation, Dr. Walker stated that the hospital failed to first recognize the problem and then to take proper steps to protect the plaintiff.

> "Q. That is generalized statement. I would like you to tell me precisely, based on your review of the record, what the nursing staff of the LDS Hospital failed to do in the treatment of the patient.
>
> A. I feel they failed to recognize the emotional problem, in terms of this man's acute toxic psychosis, number one, and then exercise the care of watching him prior to, during and after psychiatric evaluation." (TR 765-6)

Dr. Walker then said, "I stated it as a fact, if he had been

properly managed and placed in the psychiatric ward, he would not have jumped out of the window." (TR 800) Plaintiff has clearly made out of a prima facie case of medical malpractice on the part of the hospital. Certainly Health Services Corporation produced contrary affidavits (which, of course, were not open to cross examination by the plaintiff.) However, it was up to the jury to determine the weight to give the testimony produced by the witnesses, not to the trial judge on a motion for summary judgment. The motion for summary judgment was, therefore, improperly granted and the case must be remanded for trial.

As to the negligence of Dr. Schricker, we find that during the course of the deposition his counsel elicited the following excerpt from an opinion letter written by Dr. Walker. It reads:

> "It would appear that Mr. Farrow's acute psychotic reaction went unidentified by the hospital personnel or attending physicians who, if they had taken appropriate measures for diagnosis and correction of the situation, would have avoided the patient's catostrophic action." (TR 713)

Dr. Walker further stated that Mr. Farrow's acute psychotic reaction "would be a warning that if this proceeds this was going to be something that should not be handled on the surgical floor but should be handled in a closed ward where there is some more supervision and maybe a locked ward, as far as bars in the window." (TR 714)

Additionally, Dr. Branch in his deposition testified:

> "And I think that the symptoms as they are described in there, Dr. Schricker would have been well advised to not just ask Mr. Farrow's permission, or whatever,

> to call in a psychiatrist. I think he would have been justified in telling him that he needed psychiatric consultation and was going to get it. I think his relationship with Mr. Farrow would have made this quite acceptable." (TR 877)

Other evidence in the record indicates that the psychiatric social worker felt strongly enough about the matter to request a psychiatric consult. Dr. Schricker failed to respond to this question in a timely and effective manner.

In view of the Swan case, plaintiff - appellant who is already the victim of medical malpractice should not also be the victim of judicial error.

Some comments are in order on the brief filed by Dr. Moench and the Salt Lake Clinic in order to correct certain legal misstatements. This brief raises forensic legal arguments that are inaccurate and do not dispel the error committed by the lower court in its instructions or the exclusion of the opinions of Dr. Walker.

The theory advanced by Dr. Moench and the Salt Lake Clinic at the time of trial, was that plaintiff was an attempted suicide and therefore they were not liable. This theory is embodied in Instruction No. 19.

This instruction was requested by defendants. No where in the brief filed by these defendants is it contended that Instruction No. 19 is a correct statement of the law. It is not a correct statement of the law

because a psychiatrist has a legal duty to a patient to prevent that patient from harming himself is such harm is foreseeable. Defendants now admit that this duty exists. (Brief of Dr. Moench and Salt Lake Clinic, Page 39.) Instruction No. 19 essentially directed a verdict against the plaintiff. In order for the instruction to correctly state the law, it should have contained a proviso which would have stated in substance that the psychiatrist would be liable, nonetheless, if the evidence showed that there was a likelihood that the plaintiff would harm himself and that reasonable medical procedures were not undertaken to prevent such action.

Although admitting that the instruction is not a correct statement of the law, defendants seek to sustain the verdict by stating in effect that since the plaintiff denies that his actions were suicidal in nature he has no reason to complain about an erroneous instruction. Defendants cite numerous Utah cases on the general subject of court instructions covering the facts of the particular case. None of those cases are in point. Frequently, the legal theories of parties will diverge. It is elementary law that the court has a duty to instruct the jury on the theories advanced by the parties and consistent with the facts of the case. It is also elementary law that when the court instructs on the theory of a party it must do so in a legally correct manner. Failure to do so is error and a party is not precluded from asserting and relying on that error simply because he advances a different legal theory.

The opinions of Dr. Walker were excluded from consideration by the jury. Defendants say that this point cannot be reached by the Court because those portions of the deposition read to the jury were not transcribed and submitted as a part of the record. In fact, the deposition itself is in the record and as pointed out above, a motion to strike those portions of the deposition was made to the court and the court responded quite clearly to the fact that the opinions were excluded. There should be no question in counsel's mind on that point. The fact that this material was not put in the record was simply to avoid over-burdening the record. The deposition is before the Court.

Defendants next complain that the testimony and opinions of Dr. Walker were cumulative. The complete answer to that argument is that defendants never objected on that ground. Defendants seem to have forgotten that they produced two psychiatrists (Dr. Clark and Dr. Bliss) on behalf of Dr. Moench. Defendants go on to say that the opinion of Dr. Branch was adequate and that plaintiff did not need the additional testimony of Dr. Walker. However, when the testimony and opinions of Dr. Walker are compared with those of Dr. Branch, we see that although they arrive at the same conclusion, namely, that Dr. Moench was negligent, they nonetheless have a different approach to that matter and the plaintiff was entitled to have both opinions and the background for both opinions go to the jury.

CONCLUSION

Plaintiff has not commented on the briefs filed by Health Services Corporation or Dr. Schricker because both briefs merely restate the facts

relied upon and to support the summary judgment. They do not discuss the facts submitted by plaintiff in argument on summary judgment and they do not discuss the opinions of Dr. Walker. Suffice to say that there are conflicting claims based upon substantial evidence. That, together with the fact that the court should have considered the opinions of Dr. Walker under the Swan case, precludes summary judgment.

Plaintiff has commented extensively on the brief filed by Dr. Moench and the Salt Lake Clinic because of the misstatements of law therein contained.

This very complex medical malpractice case must be examined and analyzed by this Court in detail. All of the depositions, transcript of testimony, and medical records must be examined in depth. When that is done, there can be no question but that the action of the trial court be reversed and a new trial granted as to all defendants.

Respectfully submitted,

Edward M. Garrett

I hereby certify that I hand delivered a copy of the within Reply Brief to the following counsel of record at the addresses shown this 6th day of April, 1979.

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