

2009

Larry Roth v. Peder J. Pedersen, M.D. : Reply Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David E. Ross II; Attorney for Plaintiff/Appellant.

Dennis C. Ferguson; Williams and Hunt; Attorney for Defendant/Appellee.

Recommended Citation

Reply Brief, *Roth v. Pedersen*, No. 20090139 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1517

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LARRY ROTH,

Appellant,

vs.

PEDER J. PEDERSEN, M.D.,

Appellee.

Appellate Case No. 20090139-CA

Trial Court Case No. 080917484

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court
The Honorable Denis P. Lindberg

Dennis C. Ferguson
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678

David E. Ross II
1912 Sidewinder Drive, Suite 209
Park City, Utah 84060

Attorneys for Defendants/Appellee

Attorney for Plaintiff/Appellant

FILED
UTAH APPELLATE COURTS
AUG 07 2009

IN THE UTAH COURT OF APPEALS

LARRY ROTH,

Appellant,

vs.

PEDER J. PEDERSEN, M.D.,

Appellee.

Appellate Case No. 20090139-CA

Trial Court Case No. 080917484

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court
The Honorable Denis P. Lindberg

Dennis C. Ferguson
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678

David E. Ross II
1912 Sidewinder Drive, Suite 209
Park City, Utah 84060

Attorneys for Defendants/Appellee

Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF

AUTHORITIES.....iii

SUMMARY OF THE

ARGUMENTS.....1-4

ARGUMENTS.....5-14

**A. Dr. Pedersen’s initial argument at pgg 8 – 10 misses the “mark,”
as Roth argues that critical findings were made by the trial court
that are not found in either the Complaint or Answer and that
such argument was preserved upon appeal.....5-6**

**B. The trial court committed error in determining that Roth’s claim
against Dr. Petersen is barred by the statute of limitations.....6-8**

**C. The Complaint made sufficient allegations of fraudulent
concealment to withstand dismissal upon the Pleadings.....8-10**

**D. Roth clearly establishes in his Complaint Dr. Pedersen’s fiduciary
duty to disclose his mistakes to Roth and his failure to do so
amounts to fraudulent concealment under Utah law.....10-14**

CONCLUSION14-15

TABLE OF AUTHORITIES

CASES

<u>D’Elia v. Rice Development, Inc.</u> , 147 P.3d 515, 526 (Utah App. 2006),	13
<u>Foil v. Ballinger</u> , 601 P.2d 144, 148 (Utah 1979).....	7, 12
<u>Garcia v. Presbyterian Hospital Ctr.</u> , 593 P.2d 487, 490 (N.M. Appl. 1979).....	14
<u>Jensen v. IHC Hospitals, Inc.</u> , 944 P.2d 327, 339 (Utah 1997).....	13
<u>Kern v. St. Joseph Hospital</u> , 697 P.2d 135, 139 (N.M. 1985).....	14
<u>McDougal v. Weed</u> , 945 P.2d 175 (Utah App. 1997).....	8,13
<u>Nixdorf v. Hicken</u> , 612 P.2d 348, 354 (Utah 1980).....	12,14
<u>Tuttle v. Olds</u> , 155 P.3d 893 (Utah App.2007).....	5

STATE STATUTES

U.C.A. §78B-3-404(1).....	7,8,15
U.C.A. §78B-3-404(2)(b).....	7,11,15
U.C.A. §78-14-1.....	7
U.C.A. §78-14-4.....	7,8

RULES

Utah R. Civ. P. R12(c).....	5
Utah R. Civ. P. R 9(b).....	4, 11

PUBLICATIONS

AMA Code of Medical Ethics, E-8.12.....	12
---	----

SUMMARY OF THE ARGUMENTS

Dr. Pedersen first argues that the trial court properly considered information presented in Dr. Pedersen's Answer and Roth failed to preserve for appeal the issue that the trial court erroneously considered Dr. Pedersen's Answer and that the trial court did not consider issues outside the pleadings.

In support of his argument that the trial court properly considered information presented in his Answer, Dr. Pedersen does not point to what information he is referring to that was contained in his Answer and for which Roth presumably felt was erroneously considered by the trial court. Roth in his Brief actually points to the fact that the trial court in making its findings is limited to both the Answer and the Complaint. Dr. Pedersen's only reference in his Summary of Argument and his first argument beginning at page 8 of his Brief is an allegation that Roth in his Brief at p. 22 concedes he knew in May 2004 that Dr. Pedersen consulted with Dr. Voorhees during the colon surgery (p.5 Appellee Brief). There is no claim this information found in Roth's Brief was also contained in Dr. Pedersen's Answer. Roth in his Complaint states he was unconscious during the surgery and could not have been aware of Dr. Pedersen consulting with Dr. Voorhees during the surgery ¶41 Complaint [R. 6]. The second and only

other reference to information is that the *Complaint* contained information that Dr. Joseph advised Roth that Dr. Voorhees failed to remove the portion of infected colon (p 5 Appelle Brief).¹ (Emphasis added).

As for findings made outside the pleadings, the trial court found that on or about October 13, 2004 that Dr. Joseph “told Roth of the problem” p. 2 Order Granting Defendant judgment on the pleadings. [R 73] This information did not come from the Answer and it did not come from the Complaint, but was found in Dr. Pedersen’s “Introduction” in his Memorandum in Support of Defendant’s Motion for Judgment on the Pleadings at p. 2. [R 16] Thus, it obviously is a finding outside the pleadings.

As clearly reflected from the foregoing there was no issue to preserve for appeal. Roth in his Memorandum in Opposition to the motion for judgment on the pleadings did argue that he was unconscious when Dr. Pedersen performed his medical treatment/procedure on Roth and that Roth did not discover Dr. Pedersen’s negligence until the discovery process in his suit against Dr. Voorhees. [R. 54] Thus, Roth preserved argument against Dr. Pedersen’s attempt to include facts that are not found in the Answer or Complaint.

¹ This information is not in the Complaint.

Dr. Pedersen's second argument is that the trial court correctly determined that Roth's claims were barred by the statute of limitations. Dr. Pedersen's argument relies heavily on the two bits of information that he claims supports his argument, namely that Roth was aware of Dr. Pedersen during the May 24, 2004 surgery and that Dr. Joseph told Roth of the problem (pgg 10-11 Appellee Brief). Roth submits that the trial court could not have possibly factored in the alleged concession Roth makes in his Appeal Brief that Dr. Voorhees told him of Dr. Pedersen's involvement in the May 24, 2004 surgery and the finding made by the trial court that Dr. Joseph told Roth of the problem has already been addressed. Dr. Pedersen at p 11 Appellee Brief changes the information a bit to reflect that Roth was aware that the tattoo marks still remained on October 13, 2004. Dr. Pedersen does state in his Answer that the tattoo marks were still present when Dr. Joseph performed a follow up colonoscopy on October 13, 2004 and subsequently advised Roth of this claim. However, assuming this occurred, it does not establish Roth was aware of any problem on October 13, 2004. It is Roth's opposition to the trial court finding that he discovered his legal injury on October 13, 2004. Roth's legal injury consists of knowing of the injury and the negligence that caused the injury, which is Dr. Pedersen's negligence that is at issue and this was not known until much

later during the discovery phase of the arbitration action against Dr. Voorhees.

Dr. Pedersen argues that the Complaint fails to properly allege a claim of fraudulent concealment. The Complaint at ¶39 states that upon information and testimony within the year Dr. Pedersen concealed the fact he failed to properly consult with Dr. Voorhees during the May 2004 surgery, specifically the reasons the tattoos may not have been identified, reasons the site could not be seen and the area requiring surgery remained. Reference to “concealed” is Dr. Pedersen concealing his mistakes from Roth. Dr. Pedersen further argues that Rule 9(b) *URCP* requires that the circumstances forming the basis for the allegation of fraudulent concealment be stated with particularity. Roth in his Complaint sets forth several factual circumstances whereby Dr. Pedersen makes medical malpractice mistakes, all of which Dr. Pedersen was required to disclose as a fiduciary to Roth and his failure to speak is the fraudulent concealment. The “mistakes” are questions for the jury to determine whether they are material and if so, Dr. Pedersen was required and under a duty to disclose such to Roth.

As for Dr. Pedersen’s final argument and that is there was no affirmative act of fraudulent concealment. Roth submits that having a fiduciary duty to disclose and choosing not to disclose is an affirmative act.

ARGUMENTS

A. Dr. Pedersen’s initial argument at pgg 8 – 10 misses the “mark,” as Roth argues that critical findings were made by the trial court that are not found in either the Complaint or Answer and that such argument was preserved upon appeal.

There is no argument in Roth’s Brief that the Trial court “erroneously considered Dr. Pedersen’s Answer in ruling on the Motion for Judgment on the Pleadings.” In fact at page 15 of Roth’s Brief he states, “There was no oral argument or any discovery in this case. The findings herein are limited to the pleadings pursuant to Rule 12(c) *URCP*.....Thus, the Trial Court herein was limited to the Complaint and Answer for its findings.”

What Roth is arguing is that the trial court made findings such as one critical finding that is not found in either the Complaint or Answer and that is that “..on October 13, 2004, Dr. Joseph saw the tattoos, told Mr. Roth of the problem....” [R 73] Dr. Pedersen in his Appellee Brief at page 10 provides: “To constitute matters ‘outside the pleadings,’ the information considered by the trial court would have to include documentation or evidence submitted with a memorandum as opposed to information specifically set forth in the answer.” Citing for example, Turtle v. Olds, 2007 UT App 10 ¶¶ 8-9, 155 P.3d 893, 896. The “...told Mr. Roth of the

problem...” is not found in the pleadings, but originates from Dr. Pedersen’s Introduction in his Memorandum in Support of Defendant’s Motion for Judgment on the Pleadings at page 2. [R 16] and would therefore constitute a matter outside the pleadings.

As for any concession or admission that Roth was aware of Dr. Pedersen’s involvement as early as May 2004 or that Dr. Voorhees informed Roth that “...he and Dr. Pedersen removed the cancerous tumor site...” (Pg 22 Roth’s Brief), are again not reflected in the Complaint and Answer and certainly comments made in an appeal brief could not have been relied upon by the trial court in making its findings.

As for preserving these matters for appeal, Roth states in his Memorandum in Opposition to Defendant’s Motion for Judgment on the Pleadings at page 9 [R54] that he was unconscious when Dr. Pedersen provided medical treatment for Roth and that he did not discover Dr. Pedersen’s malpractice until during discovery in Roth’s action against Dr. Voorhees, which discovery included Dr. Voorhees deposition, his arbitration testimony and his filing an allocation against Dr. Pedersen, all within one year of the time Roth commenced his action against Dr. Pedersen.

B. The trial court committed error in determining that Roth’s claim against Dr. Petersen is barred by the statute of limitations.

Notwithstanding the fact that Roth brought his action pursuant to a claim of fraudulent concealment against Dr. Pedersen under §78B-3-404(2)(b) U.C.A. and not under §78B-3-404(1) U.C.A, which is the two year statute of limitations, there is nothing in the pleadings that indicate that Roth was aware of his injury on or about October 13, 2004. One could however assume that Roth must have known of his injury during this period of time because the pleadings do indicate Roth had a second surgery in January 2005 to remove the subject cancerous site and he subsequently sued Dr. Voorhees for failing to remove the subject cancerous site during the May 24, 2004 surgery. [R 1-10 & 25-45]. Although challenging a finding of fact, especially a material fact based upon an assumption has merit, the error lies in the trial court finding that Roth became aware of his legal injury on or about October 13, 2004 when he allegedly learned that the cancerous site remained. Assuming arguendo that Roth did learn on or about October 13, 2004 that the cancerous site was not removed, he still had not learned of the “injury” as that word is defined under *U.C.A.* § 78-14-1.² In Foil v. Ballinger 601 P.2d 144, 148 (Utah 1979) the Court stated: “We see no basis

² §78-14-4(1) is the Utah statute that existed at the time of the filing of the Notice to Commence an Action. The Court Order is based upon §78B-3-304(1) U.C.A., which was adopted in 2008, but is basically the same as the language used in the statute of limitations, §78-14-4, that was applicable during the relevant period herein. Since this is a non-issue and the trial court and parties have referred to the current statute, Roth will continue referring to the current statute to avoid confusion herein.

for making a legal distinction between having no knowledge of an injury, as was the case in *Christiansen*, and no knowledge that a known injury was caused by unknown negligence. Accordingly, we hold that the term discovery of ‘injury’ in § 78--14--4 means discovery of injury and the *negligence which resulted in the injury.*” Knowledge that the cancerous site remained and suspecting negligent acts on the part of Dr. Voorhees, which later turn out not to be negligent acts do not form the basis for concluding Roth discovered the “negligence which resulted in the injury.” And this is not a case where Roth named the wrong physician as Dr. Pedersen suggests with his recitation of the facts in the McDougal v. Weed, 945 P.2d 175. Dr. Pedersen’s negligence which resulted in the injury was not uncovered until during the discovery process in the Dr. Voorhees arbitration proceedings and within the four year cap as provided under § 78B-3-304(1) U.C.A. There were no specific findings that Roth knew or should have known of Dr. Pedersen’s negligence that resulted in the injury, only that he learned that the cancerous site remained after the May 24, 2004 surgery.

C. The Complaint made sufficient allegations of fraudulent concealment to withstand dismissal upon the Pleadings.

Dr. Joseph, Dr. Pedersen’s partner, performed a colonoscopy on Roth in April 2004 and during the procedure discovered a suspicious 2.5 cm polyp

and Dr. Joseph removed part of the tumor; however, the lab confirmed that at the margins where removed was still potentially cancerous and Roth was referred for surgery to remove the site. (¶¶11-15 Complaint) [R 2] During Roth's May 24, 2004 surgery to remove the cancerous site of Roth's colon, the surgeon Dr. Voorhees was unable to see the tattoo markings that were purportedly placed there by Dr. Joseph to assist the surgeon in locating the cancerous site. Dr. Pedersen was called to assist Dr. Voorhees in locating the surgical site and after going over Dr. Joseph's medical chart with Dr. Voorhees, Dr. Pedersen joined Dr. Voorhees in the OR to assist in Roth's operation. Prior to Dr. Pedersen arriving at the OR Dr. Voorhees removed 25 cm of Roth's distal sigmoid colon based upon the medical chart describing the tumor site in the distal sigmoid colon and then sutured the colon. (¶¶16-22 & ¶41 Complaint) [R 3 & 6] Dr. Pedersen inserted his sigmoid scope into Roth up to Dr. Voorhees suture line, which the scope measured at 20 cm. from the anal verge. (¶¶23-25 Complaint) [R3] Dr. Pedersen informed Dr. Voorhees that he could not locate the tattoo markings and then concurred with Dr. Voorhees that he had removed the cancerous site and the surgery was terminated. (¶33 Complaint) [R 5] Roth assigned as malpractice Dr. Pedersen's failure to inform Dr. Voorhees that he knew Dr. Joseph was experiencing fading problems with the tattoo product Dr. Joseph

was using at the time. (¶¶30-31 Complaint) [R 4-5] Had Dr. Voorhees had this knowledge he would have had less reason to believe the site had been resected. Roth also assigns as malpractice Dr. Pedersen's failure to inform Dr. Voorhees that the cancerous site location was indicated in Dr. Joseph's medical chart at 15 cm from the anal verge and that he had measured beyond this location to the suture line at 20 cm. (¶¶26 & 29 Complaint) [R 4] Roth further assigned as malpractice Dr. Pedersen's knowledge as an experienced gastroenterologist that surgeons measure surgical areas using anatomical description whereas gastroenterologists measure using the metric system. (¶¶27 & 29 Complaint) [R 4] Had Dr. Voorhees been made aware of the foregoing by Dr. Pedersen the surgery would likely have not been terminated and the actual surgical site at 15 cm from the anal verge resected and the cancerous site removed. [R 1-10]

D. Roth clearly establishes in his Complaint Dr. Pedersen's fiduciary duty to disclose his mistakes to Roth and his failure to do so amounts to fraudulent concealment under Utah law.

Dr. Pedersen begins his defense in stating that the Complaint fails to state that Dr. Pedersen failed to speak with him (Roth) or that he concealed any information from him. Dr. Pedersen refers to ¶39 of the Complaint [R 6]. Whether or not Dr. Pedersen ever spoke with Roth is irrelevant. What is

relevant is that Dr. Pedersen concealed his mistakes from Roth. That is the essence of the Complaint and is stated in ¶39 of the Complaint [R 6]. Roth is stating that Dr. Pedersen concealed from him (Roth) that he made the mistakes of not telling Dr. Voorhees of the fading tattoos or inform Dr. Voorhees the described surgical site at 15 cm from the anal verge remained even after Dr. Voorhees removed the distal sigmoid colon and that the surgical cancerous site was not in the distal sigmoid section that Dr. Voorhees removed.

Dr. Pedersen then argues that Roth did not plead fraudulent concealment with sufficient particularity as required under Rule 9(b) *URCP*. Dr. Pedersen highlighted Roth's use of the words "it appears that," although in Dr. Pedersen's Footnote 5 of Appellee's Brief at page 15, admits that this satisfies Rule 9(b), as long as it includes the facts. Roth did set forth sufficient facts that relate to Dr. Pedersen's mistakes as set forth above and in particular ¶¶21-36 & ¶41 Complaint [R. 3-6] This leads us to Dr. Pedersen's final argument against fraudulent concealment, arguing that there is no affirmative act of fraudulent concealment as required under § 78B-3-404(2)(b) U.C.A. Dr. Pedersen at page 17 Appellee's Brief argues that there was no affirmative act because failure to advise Dr. Voorhees of the fading ink is not a positive assertion and there was no affirmative act of

concealment because Dr. Pedersen did not speak with Roth after the surgery, because Dr. Voorhees did and there is no allegation that Roth or anyone for him spoke with Dr. Pedersen about the surgery or that there was any reason to speak with Roth (p. 17 Appellee Brief).

As indicated previously it is of no consequence whether Dr. Pedersen spoke with Roth or not. The fraudulent concealment emanates from Dr. Pedersen's fiduciary duty to speak to Roth and inform him of his mistakes. Dr. Pedersen's *choice* to remain silent and not comply with this duty is itself an affirmative act and fraudulent concealment. (Emphasis added).

It would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable. A rule that provides that the limitations period shall run from the date of the act or omission tends to foster that result. The law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damage ameliorated.

Foil v. Ballinger, at 148, *id.*

Dr. Pedersen had a duty to disclose his mistakes to Roth.³ In Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) the Utah Supreme Court found that the trial court "...erred in not submitting to the jury the plaintiff's second cause of action, concerning the doctor's failure to disclose the

³ AMA Code of Medical Ethics, E-8.12 Patient Information, requires a doctor where significant medical complications may have resulted from the doctor's mistake(s), the doctor is ethically required to inform the patient of all facts.

presence of the needle. The relationship between a doctor and his patient creates a duty in the physician to disclose to his patient any material information concerning the patient's physical condition. This duty stems from the fiduciary nature of the relationship" Dr. Pedersen cites McDougal v. Weed, 945 P.2d 175 (Utah App. 1997) indicating that mere silence is insufficient to form the basis of a claim. Roth does not argue that Dr. Pedersen's mere silence rises to the level of fraudulent concealment, but argues that Dr. Pedersen had a duty to disclose his mistakes which are material and that failure to disclose is a breach of the fiduciary duty and does rise to the level of fraudulent concealment. The McDougal Court at 179 citing Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 333 (Utah 1997) provided: "Fraudulent concealment requires that one with a legal duty or obligation to communicate certain facts *remain silent or otherwise* act to conceal material facts known to him." (Emphasis added). This Court in D'Elia v. Rice Development, Inc., 147 P.3d 515, 526 (Utah App. 2006) also citing Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 339 (Utah 1997) states, "To demonstrate constructive fraud in Utah, a party need only demonstrate 'two elements: (1) a confidential relationship between the parties; and, (ii) a failure to disclose material facts.'" The issue thus becomes whether the facts known to Dr. Pedersen were material or not. This is an issue for the jury.

The Court in Nixdorf at 354 stated, “The scope of the duty is defined by the materiality of the information in the decisional process of an ordinary individual. If a reasonable person in the position of the plaintiff would consider the information important.... the information is material and disclosure required.” Where the duty to speak by a medical provider to the patient exists in other jurisdictions, mere silence was found to be fraudulent concealment. See Kern v. St. Joseph Hospital, 697 P.2d 135, 139 (N.M. 1985) “Silence may sometimes constitute fraudulent concealment where a physician breaches his fiduciary duty to disclose material information concerning a patient’s treatment.” Garcia v. Presbyterian Hospital Ctr., 593 P.2d 487, 490 (N.M. Appl. 1979) also found mere silence where duty to speak exists as fraudulent concealment.

CONCLUSION

This Court will only affirm the trial court if as a matter of law, the plaintiff could not recover under the facts alleged. The facts alleged in the Complaint establish that there was a doctor patient relationship between Dr. Pedersen and Roth. The facts further demonstrate that Dr. Pedersen committed several medical mistakes and that he concealed this information from Roth. If a jury were to find these facts material, then Dr. Pedersen as a matter of law breached his duty to disclose his mistakes to Roth and such

amounts to fraudulent concealment under Utah law. As such the two year statute of limitation does not apply §78B-3-404(1) U.C.A. rather §78B-3-404(2)(b) U.C.A. applies and Roth's discovery of the fraudulent concealed malpractice mistakes of Dr. Pedersen discovered within one year of the Notice to Commence Action and his timely Complaint were improperly dismissed and this Court should not affirm.

Dated this 7th day of August, 2009.

David E. Ross II
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following by U.S. Mail, first class, postage prepaid, this 7th day of August 2009:

Dennis C. Ferguson, Esq.
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678
