

1979

Larry Cleghorn v. Dr. Schow et al : Brief of Defendant-Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Cleghorn v. Schow*, No. 16329 (Utah Supreme Court, 1979).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

LARRY CLEGHORN,)	
Plaintiff-Appellant,)	
v.)	Case No. 16329
DR. SCHOW, DR. WILFERT, T. KENNETH)	
ORTON, BOYD G. HOLBROOK, THOMAS D.)	
NOONAN, JOHN DOE and ST. MARK'S)	
HOSPITAL,)	
Defendants-Respondents.)	

BRIEF OF DEFENDANT-RESPONDENT T. KENNETH ORTON

Appeal From A Judgment Of The Third Judicial District Court
In And For Salt Lake County, Utah
Honorable G. Hal Taylor, Judge, Presiding

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FILED

JUN 13 1979

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BRIEF OF DEFENDANT-RESPONDENT, T. KENNETH ORTON

Appeal From A Judgment Of The Third Judicial District Court
In And For Salt Lake County, Utah
Honorable G. Hal Taylor, Judge, Presiding

NATURE OF THE CASE

This is an action brought by the plaintiff-appellant alleging medical malpractice on the part of defendant-respondent T. Kenneth Orton, among others.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, the Honorable G. Hal Taylor, Judge, granted the Motion for Judgment brought by respondent Orton.

RELIEF SOUGHT ON APPEAL

Respondent Orton seeks an affirmance of the Judgment dated December 20, 1978 granting his Motion for Judgment of Dismissal and ordering that appellant's Complaint be dismissed as to respondent Orton with prejudice.

STATEMENT OF FACTS

Appellant was injured in an automobile accident on January 25, 1976, as a result of which he was taken to St. Mark's Hospital in Salt Lake City on the same day. He was treated and then released. He returned to the hospital the next day complaining of pain at which time X-rays were taken, including X-rays of his cervical spine. The X-rays of the spine were interpreted by Dr. Orton on January 26, 1976. Appellant was admitted to the hospital for treatment of other injuries. Because of persisting neck pain another set of cervical spine X-rays was taken on January 31, 1976. These films were interpreted as showing a vertebral body displacement at the C-6, C-7 interspace and a fracture at the C-7 articular pillar. Subsequently, surgery was performed on appellant's cervical spine on February 3, 1976. Immediately following the surgery appellant experienced paralysis of his lower extremities. Other manifestations of a spinal cord lesion manifested themselves thereafter.

On January 24, 1978 the Complaint in the case at bar was filed. On January 27, 1978 a Notice of Intent to Commence Action was served on Dr. Orton accompanied by a summons and copy of the Complaint filed January 24.

On March 21, 1978 respondent Orton filed his Answer. On August 22, 1978 respondent Orton filed an Amended Answer pursuant to a Consent executed by Richard W. Giauque as attorney for appellant Larry Cleghorn on August 14, 1978.

On November 13, 1978 respondent Orton filed a Motion for Judgment pursuant to Rules 12 and 56(b), U.R.C.P. Hearing was had on said Motion on December 18, 1978 at which hearing the lower court granted the Motion. This appeal followed.

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY APPLIED THE UTAH HEALTH CARE MALPRACTICE ACT IN GRANTING RESPONDENT ORTON'S MOTION FOR JUDGMENT

The lower court correctly applied Sections 78-14-8 and 78-14-4 of the Utah Health Care Malpractice Act in granting respondent Orton's Motion for Judgment. Appellant Cleghorn discovered his injury no later than February 3, 1976. Appellant filed a Complaint on or about January 24, 1978. On January 27, 1978 Dr. Orton was served with a Notice of Intent to Commence Action along with a summons and a copy of the Complaint filed on January 24.

The lower court ruled that since the filing of the Complaint on January 24 was not preceded by the service of a Notice of Intent to Commence Action, the lawsuit against respondent and the other named defendants was not commenced according to the requirements of the Malpractice Act, and hence the statute of limitations applicable to this action continued to run. The statute of limitations ran out, appellant's cause of action was barred before his suit was properly commenced, and therefore respondent's Motion for Judgment was granted.

Appellant now asks this Court to reconsider its decision in Vealy v. Clegg, 579 P.2d 919 (1978), and overrule it. Appellant argues that Vealy should be overruled because it is based on a misinterpretation of the Malpractice Act. Respondent Orton respectfully submits that Vealy was properly decided and should stand.

Appellant is convinced that this Court improperly applied Section 78-14-8 of the Malpractice Act retroactively to causes of action which arose prior to April 1, 1976 but which were sued upon after that date. In so arguing, appellant ignores the clearly expressed intention of the Utah Legislature as well as familiar and widely applied rules of judicial construction of statutes.

Section 78-14-11 of the Malpractice Act provides:

Act not retroactive - Exception. -The provisions of this act, with the exception

of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act. (Emphasis added)

Even a cursory examination of Section 78-14-8 shows that said Section is so intimately connected with the statute of limitations as found in Section 78-14-4 that those two sections must be construed together.

Section 78-14-4 provides in pertinent part:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs. . . . (emphasis added)

Section 78-14-8 provides in part:

No malpractice action against a health care provider may be commenced unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action

* * *

Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to ninety days from the date of service of notice. (Emphasis added)

This Court recognized in the Vealy decision that the two sections quoted above must be construed together.

Furthermore, the use of the word "provisions" in Section 78-14-11 shows that the Legislature intended Section 78-14-8 as well as Section 78-14-4 to be applied to actions commenced after the effective date of the Malpractice Act. This intent is further emphasized by the fact that Section 78-14-4 itself provides that the section is to be applied retroactively. Subsection (2) thereof states:

The provisions of this section shall apply to all persons regardless of minority or other legal disability and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act. . . .(Emphasis added)

If Section 78-14-11 intended that only 78-14-4 was to be applied retroactively then Section 78-14-11 would thereby be rendered superfluous and redundant. As is stated in 73 AmJur 2d Statutes, Section 250:

In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose. Thus, it should not be presumed that any provision of a statute is redundant. A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. Indeed, it is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word. (Footnotes omitted)

This Court was following these rules when it stated in Horman v. Liquor Control Commission, 21 Utah 2d

The difficulty with the plaintiff's position is that it fails to give effect to the exceptions provided for in the language at the end of said Sec. 27 as emphasized above. This runs counter to a foundational rule of statutory construction which requires us to assume that all of the words in a statute were used advisedly and that an application of the statute is favored which will give effect to all of its provisions. (Footnote omitted)

Accord, Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1972); Totorica v. Thomas, 16 Utah 2d 175, 397 P.2d 984 (1965); Metropolitan Water Dist. of Salt Lake City v. Salt Lake City, 14 Utah 2d 171, 380 P.2d 721 (1963); Peay v. Board of Ed. of Provo County School Dist., 14 Utah 2d 63, 377 P.2d 490 (1962).

Coupled with the legislative intent shown above that Section 78-14-8 was to be applied retrospectively, is the general rule of statutory construction that a statute merely affecting a remedy or law of procedure applies to actions begun after it becomes effective, whether the cause of action arose before or after the effective date. See, e.g., 82 C.J.S., Statutes, Sections 417 and 421; 73 AmJur 2d, Statutes, Section 354; Bodine v. Department of Labor & Industries, 190 P.2d 89 (Wash. 1948); Ohlinger v. United States, 135 F.Supp. 40 (D. Idaho 1955)

This Court has followed the rule stated above in the cases of Boucofski v. Jacobsen, 36 Utah 165, 104 P.117 (1909), and Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948).

The Court in Boucofski, stated:

While it is true that a party's rights in a judgment, as a general rule, may not be affected by legislative acts passed or which become effective after the entry of a judgment, the rule does not apply to laws which are merely remedial, and which only affect matters of procedure or practice. (104 P. at 117)

In Petty, the Court stated:

. . . where a statute remedial in nature is amended providing a different remedy, all actions pending will be governed by the new statutory provisions. (192 P.2d at 593)

It is therefore respectfully submitted that the lower court correctly applied the law as found in the Utah Health Care Malpractice Act and Vealy v. Clegg. It is further submitted that Vealy was properly decided and there is no sound reason to now overrule it. Therefore the judgment of the lower court should be affirmed.

POINT II

THE 1979 AMENDMENT TO THE UTAH
HEALTH CARE MALPRACTICE ACT
CANNOT BE APPLIED RETROSPECTIVELY;
TO DO SO WOULD DEPRIVE RESPONDENT
AND OTHERS SIMILARLY SITUATED OF A
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AMENDMENT WAS PASSED, IN DEROGA-
TION OF RESPONDENT'S RIGHTS UNDER
ARTICLE I, SECTION 7 OF THE CON-
STITUTION OF UTAH

Article I, Section 7 of the Constitution of Utah provides:

No person shall be deprived of life, liberty or property, without due process of law.

Appellant Cleghorn argues that application of the 1979 Amendment to the Malpractice Act to the case at bar would not be violative of either the Utah or the United States Constitutions because to do so would not impair any vested or fundamental right. Appellant cites the case of Chase Securities Corporation v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945) in support of this proposition.

Citing the case of Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, the Supreme Court in Donaldson stated:

Where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment may repeal or extend a statute of limitations, even after right of action is barred thereby, restore the plaintiff his remedy, and divest the defendant of the statutory bar. (325 U.S. at 311-12)

While the Supreme Court declined to overrule Campbell in Donaldson, the Court stated:

We are reminded that some state courts have not followed it [Campbell] in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the Federal instrument which is amendable only with great difficulty and with the cooperation of many States. (Citing, inter alia, In re Swan, 95 Utah 408, 79 P.2d 999 (1938)) (325 U.S. at 312-13, including n. 9 at 312)

Since handing down the decision in the case of Ireland v. MacKintosh, 22 Utah 296, 61 P.901 (1900), the Utah Supreme Court has declined to follow the holding and rationale in Campbell. At Page 904 of Ireland, this Court held:

We are clearly of the opinion . . . that, when appellant's right of action on the note in question became barred under the previous statute, the respondent acquired a vested right, in this state, to plead that statute as a defense and bar to the action.

The result of the holding in Ireland was to forbid retrospective application of an amendment to the statute of limitations of Utah extending the period of limitations for suing on a written obligation from four years to six years.

Ireland was followed in In re Swan's Estate, which was cited by the United States Supreme Court in Donaldson.

Ireland was subsequently cited with approval by the Utah Supreme Court as late as 1975 in the case of Greenhalgh v. Payson City, 530 P.2d 799. In Footnote 14 at Page 802, Mr. Justice Crockett writing for the Court stated:

Here we note the cause of action against defendant Payson City accrued in Jan. 1970 and was barred after Jan. 1971, thus the 1973 amendment to Sec. 10-7-77, U.C.A. 1953 (Supp. 1973), which provides: ". . . If the person for whom the claim is made is a minor, then the claims covered by this section may be so presented within the time limit specified above or within one year after the person reaches the age of majority, whichever is longer," is not applicable in this case because as was held in Ireland v. MacKintosh, 22 Utah 296, 61 P.901, "The subsequent passage

of an act by the legislature increasing the period of limitation could not operate to affect or renew a cause of action already barred."

Mr. Justice Crockett, again writing for this Court, in the case of State v. Kelbach, 569 P.2d 1100, 1102 (1977), stated:

. . . the law should not be changed simply because the will or desire of judges as to what the law is or ought to be. Much less so, should it be so changed during the course of a particular proceeding to have a retroactive affect thereon. Notwithstanding the fact that the change the state advocates would vindicate the position taken in the dissent referred to, to so rule in this case retroactively would violate what we regard as a higher principle: that of honoring the established law. If there is to be such a change in the law, whether by legislative act or by judicial decision, it seems that it should have only prospective affect and that fairness and good conscience require that it should not be applied retroactively to adversely affect rights as they existed at the time a particular controversy arose. (Footnote omitted) (Emphasis added)

Of particular force with respect to the case at bar is the 1978 case of Del Monte Corporation v. Moore, 580 P.2d 224. Citing Chase Securities Corporation v. Donaldson, supra, Mr. Justice Crockett stated:

The general and well established principle of law is that statutes prescribing limitations relate to remedies; and that the legislature has power to increase the time in which an action may be brought. In that connection it should be observed that if the

statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension. (580 P.2d at 225) (emphasis added)

It is therefore clear that while appellant may be correct in characterizing statutes of limitations as relating to remedies rather than substantive law, it is likewise clear that the rule has long been and remains in Utah that if a defense based on the statute of limitations is available and invoked by a defendant, such defense becomes a vested right of which the defendant cannot be deprived without due process of law. Retrospective application of the 1979 Amendment to the Malpractice Act would act to divest respondent of his defense of statute of limitations which was good at the time the Amendment was passed.

It is therefore respectfully submitted that the Utah State Legislature could not impair respondent's statute of limitations defense by legislative enactment, and if this Court finds that it was the legislature's intention to so do, then the Amendment must be declared unconstitutional as violative of Article I, Section 7 of the Constitution of Utah. If the constitutionality of the Amendment is to be preserved, the Amendment must be construed as having prospective application only.

POINT III

RETROSPECTIVE APPLICATION OF THE 1979 AMENDMENT TO THE UTAH HEALTH CARE

MALPRACTICE ACT WOULD RENDER
SAID AMENDMENT UNCONSTITUTIONAL
AS VIOLATIVE OF ARTICLE VI,
SECTION 26 OF THE CONSTITUTION
OF UTAH.

Article VI, Section 26 prohibits the legislature from enacting special laws in particular cases and states:

No private or special law shall be enacted where a general law can be applicable.

The definition of "special laws" is found in Mr. Justice Maughan's opinion for this Court in Utah Farm Bureau Insurance Company v. Utah Insurance Guaranty Association, 564 P.2d 751, 754 (1977):

In State v. Kallas /97 Utah 492, 505, 94 P.2d 414 (1939)/ this court set forth the general definitions of general and special laws. A general law applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question. On the other hand, special legislation relates either to particular persons, places, or things or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied.

In People v. Western Fruit Growers /22 Cal. 2d 494, 140 P.2d 13, 19-20 (1943)/ the court stated a law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction. It is special legislation if it confers particular privileges or imposes peculiar disabilities, or burdensome conditions in the exercise of a common right; upon a class of persons arbitrarily selected, from the general body of those who stand in precisely the same relation to the subject of the law. (Emphasis added)

After analyzing the 1979 Amendment to the Malpractice Act, appellant Cleghorn at Pages 15-16 of his brief makes the following statement:

Cleghorn urges this Court to carefully discern and analyze this legislative intent. . . . Having done so, this Court will surely conclude that the Legislature intended to avoid the consequences which it deemed unfair, and to insure that all of the pending malpractice actions in which the causes of action arose before April 1, 1976, be spared the unconscionable fate suffered by the plaintiff in Vealy. (Emphasis added)

Counsel for Cleghorn elsewhere implies in his brief to this Court that the legislature had the cases pending before this Court which had issues relating to the Malpractice Act, in mind when it passed the 1979 Amendment to the Act. If this is true and the Amendment applied retrospectively, then the Amendment must be considered special legislation because it

relates either to particular persons, places, or things or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation be applied. (564 P.2d at 754)

If, on the other hand, the Amendment is construed to be of prospective application only, then it is obviously of general application and would not suffer the constitutional infirmity it would suffer if given retrospective application.

It is therefore respectfully submitted that this Court should construe the 1979 Amendment to the Malpractice Act as having prospective application only in order to save the Amendment from unconstitutionality.

POINT IV

THE FINAL CLAUSE OF SECTION
78-14-8 AS AMENDED BY THE
LEGISLATURE IN 1979 IS UNCON-
STITUTIONAL AS VIOLATIVE OF
ARTICLE VI, SECTION 22 OF THE
CONSTITUTION OF UTAH

Article VI, Section 22 provides in pertinent part:

* * * Except general appropriations bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. * * *
(This provision formerly found in Art. VI, Sec. 23)

In State v. Kallas, 97 Utah 492, 94 P.2d 414, 419 (1939), this Court stated the purpose of this constitutional provision as follows:

The constitutional provision is for a particular purpose and it is not a technical restriction on the legislature. That practical purpose is to inform the legislature and the public what legislation is proposed, and a title is sufficient that will lead to an inquiry into the body of the act to ascertain changes proposed in the original and existing law.

The title of H.B. 164 reads as follows:

AN ACT AMENDING SECTIONS 78-14-4 AND 78-14-8,
UTAH CODE ANNOTATED 1953, AS ENACTED BY
CHAPTER 23, LAWS OF UTAH 1976; RELATING TO

HEALTH CARE MALPRACTICE: PROVIDING THAT THE LEGAL DISABILITY OF AN INDIVIDUAL SHALL NOT ACT TO EXTEND THE STATUTE OF LIMITATIONS SET FORTH IN THAT SECTION; PROVIDING THAT NOTICES OF INTENT TO BRING MALPRACTICE ACTIONS BE SIGNED BY THE PLAINTIFF OR HIS ATTORNEY; PROVIDING THAT THE NOTICE MAY BE SERVED BY CERTIFIED MAIL; AND EXTENDING THE TIME FOR COMMENCEMENT OF ACTIONS WHERE THE NOTICE IS SERVED LESS THAN 90 DAYS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

The final clause of H.B. 164 is an amendment to Section 78-14-8 and reads as follows:

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counter-claims or crossclaims against a health care provider.

It is clear that the title of H.B. 164 makes no reference to this clause. While it is true that the title of an amendment is constitutionally proper if it refers to the section to be amended (see, e.g. Edler v. Edwards, 34 Utah 13, 95 P. 367 (1908)), it does not follow that when the legislature chooses to be specific in setting out those portions of a statute which are to be amended, the failure to specify an entire amendatory clause does not run afoul of the purpose of Article VI, Section 22. A legislator or a member of the public who read the title to the 1979 Amendment to the Malpractice Act was not led "to an inquiry into the body of the act to

ascertain changes proposed in the original and existing law," simply because of the specificity of the legislature in listing the other portions of the Act that were to be amended. Especially in the case of legislators who were working under the burden of a mountain of legislative proposals, the failure to mention the final clause in the title of the Amendment amounts almost to a deception and certainly renders the final clause unconstitutional as violative of Article VI, Section 22.

The fact that the final clause of the Amendment is constitutionally infirm does not imply that the entire Amendment be declared unconstitutional. As was pointed out by this Court in Riggins v. District Court, 89 Utah 183, 51 P.2d 645, 650 (1935):

However, a failure of a legislative enactment to comply with Art. VI, Sec. 22, does not render the act unconstitutional as to subject matters which are clearly expressed in the title of the act. The rule is thus stated in 1 Cooley's Constitutional Limitations (8th Ed.) p. 308: "Art. VI, Sec. 22 If, by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional. Art. VI, Sec. 22"

It is therefore respectfully submitted that the final clause of the H.B. 164 amendment of Section 78-14-8 is unconstitutional as violative of Article VI, Section 22 of the Constitution of Utah and so should be stricken from the Amendment.

POINT V

THE 1979 AMENDMENT TO THE UTAH HEALTH
CARE MALPRACTICE ACT CANNOT BE
APPLIED RETROSPECTIVELY SO AS TO
VALIDATE A PROCEEDING UNAUTHORIZED
BY THE ORIGINAL ACT.

As the analysis under Point I above has shown, the appellant's original malpractice action against this respondent was never commenced because of failure to comply with the requirements of the Malpractice Act. It would be anomalous if a subsequent amendment to that Act could be applied retrospectively to validate a proceeding which was unauthorized by the Act itself.

This issue was squarely faced by the Appellate Division of the New York Supreme Court in People v. Tax Commission, 26 N.Y.S. 2d 425 (1941). In that case, the court was faced with an amendment of the New York law relating to the requirement of a trial court to make findings of fact and conclusions of law.

At the time of the decision by the referee, he was required by law to "state separately the facts found and conclusions of law." (26 N.Y.S. 2d at 428) This he failed to do, but prior to the appeal of the matter, the law was changed to provide that:

the decision of the court may be oral or
in writing and. . . must state the facts
which it deems essential. (Ibid)

The referee had filed a written opinion, and the respondent contended that the change in the statutory procedure should be applied to the proceedings so that the opinion of the referee would suffice to constitute a "decision" and hence meet the requirements of the amended law.

The appellate Court stated:

It is unquestionably true that a statutory change in matters of procedure will affect pending actions and proceedings unless the language of the act excludes them from its operation. However, something more than the application of that proposition is involved here. This rule has been generally understood to refer only to those pending actions in which the procedural step changed by the new law has not yet been taken. The respondent contends, however, that the rule is so extensive that it may be used to validate a proceeding unauthorized by the prior statute. Such a construction, we think, is contrary to the necessity for consistent practice and has no support in authoritative decisions. Unless procedure is to be involved in chaos it must be governed by the law regulating it at the time the question of procedure arises. Southwick v. Southwick, 49 N.Y. 510; Lazarus v. Metropolitan Elevated Railway Co., 145 N.Y. 581, 40 N.E. 240; Matter of Reynolds, 202 N.Y. 430, 96 N.E. 87, 416. (Ibid.) (Emphasis added)

The New York case is directly in point here. Under the Malpractice Act as it was passed in 1976, a malpractice action could not be legally commenced unless and until a Notice of Intent to Commence Action was served on the prospective defendants. Therefore, the Complaint filed by appellant herein did not serve to commence a malpractice action against this

respondent; the attempted "action" was invalid from the beginning. The 1979 Amendment to the Malpractice Act cannot now be applied to validate that action.

POINT VI

APPELLANT CANNOT CLAIM THAT
RESPONDENT ORTON WAIVED ANY
DEFENSE BASED ON THE UTAH HEALTH
CARE MALPRACTICE ACT BECAUSE AP-
PELLANT CONSENTED TO THE FILING
OF RESPONDENT'S AMENDED ANSWER
IN WHICH SUCH A DEFENSE IS RAISED

On May 5, 1978, more than three months following the filing of the Complaint in this case, counsel for appellant wrote a letter to the various counsel for respondents in which he stated:

You will recall that we duly filed and served the statutory (UCA Sec. 78-14-8) "Notice of Intent to Commence Action" upon various defendants simultaneously with service upon them of the summons and complaint in this action; in the answer of Dr. Wilfert the defense was raised that the required notice was not given ninety days prior to commencement of the action; while I believe the defense has no merit whatever, any problem can easily be corrected by my re-serving that defendant or any others that may seek to raise such a defense. . . .(R. 176-77)

In response to this letter, counsel for respondent Orton wrote the letter of May 10, 1978, a copy of which is attached as "Exhibit B" to appellant's brief.

On August 11, 1978, counsel for Dr. Orton wrote the letter of August 11, 1978, a copy of which is attached

as Exhibit "D" to appellant's brief. In that letter, respondent's counsel stated:

Enclosed please find Motion for leave to file an Amended Answer on behalf of Dr. T. Kenneth Orton, and also the proposed Amended Answer which sets forth the defense of statute of limitations. I also enclose original and two copies of a Consent that Dr. T. Kenneth Orton file the enclosed Amended Answer. If you are willing to sign the Consent without the necessity of the hearing on my Motion, please execute and return to me the original and one copy thereof. (Emphasis added)

On August 14, 1978, counsel for appellant sent a letter to respondent Orton's counsel stating:

As you requested, enclosed please find the original and one copy of the Consent form allowing you to file your proposed amended answer for the defendant T. Kenneth Orton in this matter. (R. 210)

Rule 15(a), Utah Rules of Civil Procedure, provides in part that ". . . a party may amend his pleading . . . by written consent of the adverse party. . ."

Rule 15(c) is entitled "Relation Back of Amendments" and provides:

Wherever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Dr. Orton's original Answer was filed on or about March 14, 1978. By virtue of the provisions of Rule 15(c),

the defense of failure to comply with the provisions of the Utah Health Care Malpractice Act contained in the Amended Answer relates back to March 14, 1978.

Appellant argues that Rules 8(c) and 12(h) work to bar this respondent from asserting his defenses under the Malpractice Act. The provisions of Rule 15(c) likewise answer that argument. Plaintiff's interpretation of Rules 8(c) and 12(h) would render Rule 15 a nullity in that parties could never effectively amend their pleadings.

Appellant makes much of his contention that he had consented to the filing of an Amended Answer containing a statute of limitations defense but not a defense asserting non-compliance with the notice provisions of the Malpractice Act. There are two answers to this contention. First, appellant's counsel had before him a copy of the Amended Answer at the time he executed the Consent to the filing of that Amended Answer on behalf of his client. Second, as demonstrated in Vealy v. Clegg, a statute of limitations defense clearly may include issues involving failure to serve a Notice of Intent to Commence Action or a defect in said Notice.

It is respectfully submitted that appellant's argument that this respondent had waived any defense based on the Malpractice Act is clearly without merit. If, arguendo, defendant had waived by failing to include his defense in the original answer, plaintiff forgave said waiver by consenting

to the filing of the Amended Answer which set forth the defense.

CONCLUSION

Appellant has argued that to apply the 1979 Amendment to the Utah Health Care Malpractice Act would not impair any vested rights. Appellant does not take into account any of the rights that vested and were relied upon as a result of the Legislature's passage of the Malpractice Act in 1976. The District Court correctly interpreted the Act and this Court sustained that interpretation in the well-reasoned and entirely correct decision in Vealy v. Clegg. Appellant ignores the cases that may have been settled as a result of the passage of the Malpractice Act and its interpretation in Vealy. And what of the parties in Vealy itself? Appellant cannot seriously contend that no rights vested or that no reliance was placed on the Malpractice Act and its interpretation under Vealy.

The analysis in this brief has shown that, in Utah, respondent has a vested right to his statute of limitations defense, and further that this vested right is of the type which is included in the due process protection of Article I, Section 7 of the Constitution of Utah. Respondent has also shown that if the legislature intended retrospective application of the 1979 Amendment of the Malpractice Act, said Amendment would amount to special legislation which is forbidden by Article VI, Section 26 of the Constitution of Utah. Furthermore,

the final clause of amended Section 78-14-8 must be declared unconstitutional because no mention of said clause is made in the title of H.B. 164 as required by Article VI, Section 22 of the Constitution of Utah.

Finally, the analysis under Point IV above shows that counsel for appellant knowingly consented to the filing of an Amended Answer by respondent Orton which Answer pleaded a defense based on the statute of limitations. Thus whether respondent Orton may have earlier waived a defense based on the statute of limitations is a moot question.

It is respectfully submitted that the Order of the lower court should be affirmed.

Respectfully submitted,

BAYLE, CHILD & RITCHIE

/s/

R.M. Child

Attorneys for Respondent Orton

MAILING CERTIFICATE

I hereby certify that I mailed two (2) true and correct copies of Brief of Defendant-Respondent T. Kenneth Orton, first-class postage thereon prepaid, to Richard W. Giauque, Richard W. Casey, Berman & Giauque, attorneys for plaintiff-appellant, 500 Kearns Building, Salt Lake City, Utah 84101 and

to J. Anthony Eyre, Kipp and Christian, Attorneys for Defendant-
Respondent Dr. Wilfert, 600 Commercial Club Building, Salt
Lake City, Utah 84111 on this 15th day of June, 1979.

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R. M. Child