

1979

# Cora Millett v. Clark Clinic Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GERA MILLETT,

Plaintiff-Appellant

vs.

CLARK CLINIC CORPORATION,

Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT OF UTAH  
HONORABLE ROBERT BULLOCK, PRESIDING

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### CASE CITED

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### STATUTES CITED

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action and required further surgery on November 2, 1976. On August 17, 1978, Notice of Intent to Commence Action was served on the defendant, and the Complaint was filed on January 18, 1979 in the Fourth District Court.

#### ISSUE

Whether the general tolling provisions of § 78-12-41, Utah Code Ann. (1953, as amended) prevent dismissal of Cora Millett's Complaint.

#### ARGUMENT

THIS ACTION WAS COMMENCED  
WITHIN THE PROPER PERIOD UNDER  
UTAH LAW

The language of § 78-14-8, Utah Code Ann. (1953, as amended) makes it clear that during the 90 day period beginning with service of the notice, an action cannot be initiated against the health care provider. It is unarguable that this is a 90 day statutory prohibition which must be met before an action can be initiated. The construction of this statute urged by the respondent is that since the Complaint was filed more than 90 days after the service of notice (at which time more than two years have elapsed since Mrs. Millett's last operation) such facts conclusively ban the action under the Utah Health Care Malpractice Act. However, such construction would violate the clear expression of the Legislature found in § 78-12-41, Utah Code Ann. (1953, as amended).

This provision first adopted in 1943 provides:

When the commencement of an action is stayed by ... statutory prohibition the time of the continuance of the ... prohibition is not part of the time limited for the commencement of the action.

In effect, then, § 78-12-41, which deals with all limitations of actions, prevents the 90 day period from being included in the running of the two year limitation period.

Appellant contends that her cause of action did not arise until she was aware of her claim and that such awareness occurred after her second surgery which was performed on November 2, 1976. The two year statute of limitations (§ 78-14-4) was tolled for a period of 90 days or was tolled until November 17, 1978, (§ 78-12-41) because of the requirement to give notice. The 90 day extension period would then begin to run on November 17, 1978 and expire on February 17, 1979. Clearly then the Complaint was timely filed.

The only court known to have addressed itself to this issue is a California Appeals Court in Gomez v. Valley View Sanitorium, 151 Cal.Rptr. 97 (Cal.App. 1978). The operative facts presented there were substantially identical to the present case. The injury, a wrongful death, was on February 5, 1976. Under an identical 90 day notice requirement in California, the plaintiff gave such notice to the health care provider on November 26, 1976. The applicable statute of limitations was one year. Therefore, the



notice was given within 90 days of the normal expiration of the one year period. The California statutes also included a provision identical to § 78-12-41. The Court held:

As we construe the applicable statutes, plaintiff's action was timely filed.

By its terms, Code of Civil Procedure section 364 subdivision (a) prohibits the commencement of an action for medical malpractice for a period of 90 days following service of a notice such an action would be filed. Where, as here, notice is served within 90 days of the running of the statute, the period of limitations is extended. Incongruously, section 364 prohibits the commencement of the action within the period of limitations as extended. Section 364 however, does not self-destruct, because Code of Civil Procedure section 356 provides:

"When the commencement of an action is stayed by ... statutory prohibition, the time of the continuance of the ... prohibition is not part of the time limited for the commencement of the action."

Because Code of Civil Procedure section 364 prohibits the commencement of an action until 90 days have expired when a plaintiff serves the required notice of intention to commence it, that 90-day period must be excluded when calculating the applicable statute of limitations. Where section 364 also operates to extend the period of limitations because notice is served within 90 days of the expiration of the statute, the plaintiff is entitled to that extension as well as the tolling of the statute during the 90 days plaintiff is prohibited from filing his action.

151 Cal.Rptr. at 98.

Note that even if the appellant's claim arose on September 26, 1976, the date of the first operation, the approach

used by the court in Gomez would extend the two year limitation period to March 30, 1979 (90 days from November 17, 1978 plus the 41 days between August 17 and September 26, 1978). This would be well within the date of actual filing which was on January 18, 1979.

#### CONCLUSION

For the foregoing reasons, the appellant's Complaint was timely filed, and the district court's Order of Dismissal was in error and should therefore be REVERSED.

DATED this 10th day of September, 1979.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiff-Appellant were personally served upon R.M. Child, attorney for Defendant-Respondent, at 1105 Continental Bank Building, Salt Lake City, Utah, this \_\_\_\_ day of September, 1979.