

1979

Cora Millett v. Clark Clinic Corporation : Appellant's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

R. M. Child; Donovan C. Snyder; Attorneys for Defendant-Respondent;
Anthony M. Thurber; Attorney for Plaintiff-Appellant;

Recommended Citation

Reply Brief, *Millett v. Clark Clinic Corp.*, No. 16542 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1813

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 Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

CORA MILLETT,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 16542
)	
CLARK CLINIC CORPORATION,)	
)	
Defendant-Respondent.)	

APPELLANT'S REPLY BRIEF

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

ANTHONY M. THURBER
Attorney for Plaintiff-Appellant
211 East Broadway, #213
Salt Lake City, Utah 84111
Telephone: (801) 533-0181

R.M. CHILD
Bayle, Child & Ritchie
Attorneys for Defendant-Respondent
1105 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 364-3627

TABLE OF CONTENTS

	<u>Page</u>
POINT I	
IT IS ENTIRELY PROPER TO APPLY THE PROVISIONS OF SECTION 78-12-41, U.C.A. TO SECTION 78-14-8	1
POINT II	
THE PROVISIONS OF THE MALPRACTICE ACT CANNOT BE CONSIDERED AS CREATING A NEW STATUTORY CAUSE OF ACTION	2
CONCLUSION	4

CASES CITED

<u>Foil v. Ballinger</u> , ___ P.2d ___ (Utah 1979)	1, 3
<u>Gomez v. Valley View Sanitarium</u> , 151 Cal.Rptr. 97 (Cal.App. 1978)	2
<u>Seely v. Cowley</u> , 12 Utah 2d 252, 365 P.2d 63 (1961)	3

STATUTES CITED

U.C.A. § 78-12-40	1, 2, 3
U.S.C. § 78-12-41	1, 2, 4
U.C.A. § 78-14-1	1
U.C.A. § 78-14-2	3
U.S.C. § 78-14-8	1, 2

OTHER AUTHORITY

70 C.J.S. 981, Physicians and Surgeons § 56	3
---	---

IN THE SUPREME COURT
OF THE STATE OF UTAH

CORA MILLETT,

Plaintiff-Appellant,)

vs.)

CLARK CLINIC CORPORATION,

Defendant-Respondent)

Case No. 16542

APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

IT IS ENTIRELY PROPER TO APPLY
THE PROVISIONS OF SECTION 78-12-41,
U.C.A. TO SECTION 78-14-8

Respondent argues that because § 78-12-41 appears in a different chapter of the code it cannot be construed as applying to the provisions of the Utah Health Care Malpractice Act, § 78-14-1, et seq. A similar argument was considered and rejected by this Court in Foil v. Ballinger, ___ P.2d ___ (Utah 1979), No. 16071, filed September 19, 1979. In that case this Court saw no conflict between § 78-12-40 (the so-called "Savings Statute") and the provisions of the Malpractice Act. In Foil, the plaintiff filed suit without first giving notice to the doctor involved, and thereafter did not give

proper notice until after the limitation period had run and the Complaint had been dismissed. The Court held that, due in part to a legislative revision of the Malpractice Act's notice provisions, an action is not considered to be "commenced" by the giving of notice, but rather by the filing of a Complaint. If dismissed for failure to give notice, the action may be renewed by virtue of the Saving Statute which appears in the same chapter as § 78-12-41.

Respondent cannot seriously argue that § 78-12-41 cannot be read together with § 78-14-8 when § 78-12-40 has previously been interpreted as affecting the entire Malpractice Act.

The position is advanced in respondent's brief that the recent California Appeals Court decision in Gomez v. Valley View Sanitarium, 151 Cal.Rptr. 97 (Cal.App. 1978) does not apply because provisions similar to § 78-12-40 and § 78-14-8 appear in the same chapter of the California Code of Civil Procedure. That argument is similarly defective in Utah, and for the same reasons.

POINT II

THE PROVISIONS OF THE MALPRACTICE ACT CANNOT BE CONSIDERED AS CREATING A NEW STATUTORY CAUSE OF ACTION

It is hornbook law that actions in tort for recovery of damages resulting from a health care provider's negligence existed at common law decades, or even centuries, before the

Utah legislature adopted the Malpractice Act in 1976. 70 C.J.S. 981, Physicians and Surgeons § 56. For respondent to argue that the Malpractice Act creates a new or special cause of action is to ignore the legislature's stated purpose for adoption of the Act which appears in § 78-14-2:

[I]t is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers

The Act simply establishes a limitation period and makes minor changes in the procedure of bringing a malpractice action against a health care provider. By no means can the Act be viewed as creating a special statutory liability or cause of action unknown to the common law, as urged by respondent.

This Court's opinion in Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961) may be helpful. Seely involved the question whether the wrongful death period of limitation was a limitation on remedy or liability. The Court determined that "our statute of limitations on wrongful deaths is not a limitation on liability." 12 Utah 2d 252, 255. Actions for wrongful death pre-existed the limitation statute, and the same holds true for actions for damages resulting from medical negligence.

The approach urged by appellant is encouraged by the Foil v. Ballinger decision because this Court therein applied a general limitation provision (the Saving Statute, § 78-12-40) to the Malpractice Act limitation period.

CONCLUSION

Upon the basis of the foregoing authorities and arguments, appellant respectfully submits that the provisions of § 78-12-41 are applicable in this case and require that the district court's Order of Dismissal be REVERSED.

DATED this 18th day of October, 1979.

Respectfully submitted,

- ANTHONY M. THURBER
Attorney for Plaintiff-Appellant
211 East Broadway, # 213
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellant's Reply Brief were served upon R.M. Child, attorney for Defendant-Respondent, at 1105 Continental Bank Building, Salt Lake City, Utah 84101 by U.S. mail, postage prepaid, this 19 day of October, 1979.