

1980

Velma Gladys Yates v. Vernal Family Health Center,
A Project of Division of Family And Community
Medicine, University of Utah; Uintah County
Hospital; Vernal Drug Company, A Utah
Corporation; And Gordon Lee Balka, M.D : Brief
of Respondent Gordon Lee Balka, M.D.

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Yates v. Vernal Family Health Center*, No. 16602 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

VELMA GLADYS YATES,

Plaintiff-Appellant,

vs.

VERNAL FAMILY HEALTH CENTER,
a project of Division of Family and
Community Medicine, University of
Utah; UTAH COUNTY HOSPITAL;
VERNAL DRUG COMPANY, a Utah
corporation; and GORDON LEE
BALKA, M.D.

Case No. 16602

Defendants-Respondents.

BRIEF OF RESPONDENT GORDON LEE
BALKA, M.D.

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF UTAH COUNTY
TO HONORABLE ALLEN B. SORENSEN, JUDGE

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corporation; and GORDON LEE
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Case No. 16602

Defendants-Respondents.

BRIEF OF RESPONDENT
GORDON LEE BALKA, M.D.

NATURE OF THE CASE

This was an action for alleged medical malpractice, controlled by the Utah Health Care Malpractice Act, Section 78-14-1, et seq. (All statutory references are to the Utah Code Annotated (1953), as amended, unless otherwise indicated.)

DISPOSITION IN THE LOWER COURT

The action was dismissed for failure to comply with Section 78-14-8 (1979, as amended), requiring notice of intent to bring an action as a condition precedent to suit.

RELIEF SOUGHT ON APPEAL

Respondent Balka seeks an affirmation of the trial court's Order dismissing the suit.

STATEMENT OF FACTS

Appellant had been a patient of respondent Gordon Lee Balka, M.D., for a period of some fifteen months prior to March of 1977. During this period, respondent Balka prescribed various medications in his treatment of appellant. These prescriptions were filled by respondent Vernal Drug Company. On March 12, 1977, appellant was admitted to respondent Uintah County Hospital in a "disoriented and incoherent" condition, apparently the result of consuming large and excessive quantities of the prescribed drugs. She developed "continual convulsive seizures" and on approximately March 15, 1977, she was transferred to a hospital in Salt Lake County. The seizures were controlled and on April 6, 1977, appellant was re-admitted to respondent Uintah County Hospital where she remained until her discharge on April 12, 1977.

On April 7, 1978, a letter was sent to respondent Balka (and three other respondents). The letter was signed by appellant's husband, Marzine Yates as claimant, and by his attorney, Robert M. McRae, in the express capacity of "Attorney for Claimant". The text of the letter clearly differentiates appellant (who is referred to as "claimant's

wife") from her husband. The letter gives notice that appellant's husband, not appellant,

"potentially is asserting and claiming and may commence a civil action for damages arising out of possible negligent [professional conduct]".

On July 19, 1978, appellant, not her husband, filed an action claiming medical malpractice. While the Complaint established only one cause of action, the alleged wrongful conduct consisted of three "counts": First, the prescribing of the medications; second, the furnishing of the same; third, the care appellant received while in Uintah County Hospital during March of 1977.

Appellant further claimed that in March of 1978 it was discovered that she was suffering from "permanent central nervous system disorders," caused by the alleged negligent conduct.

On August 7, 1978, respondent Balka filed his Answer, which established four defenses. The fourth defense is relevant here. It alleged that appellant had failed to file a Notice of Intent to Commence Action as required by the Utah Health Care Malpractice Act, specifically Section 78-14-8, U.C.A. (1979, as amended).

Respondent Balka's response gave appellant notice of his failure to comply with the Act. Nevertheless, appellant refused to file a proper notice, contending that the April 7 letter was sufficient. The trial court disagreed,

and on July 25, 1979, after the statute of limitations had run on appellant's cause of action, issued its order dismissing appellant's Complaint on the grounds of failure to file a Notice of Intent to Commence Action as required.

This appeal followed.

I.

APPELLANT'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE OF FAILURE TO COMPLY WITH THE PROVISIONS OF THE UTAH HEALTH CARE MALPRACTICE ACT

In his action, appellant failed to comply with § 78-14-8, U.C.A. (1979, as amended). This section requires a potential plaintiff in a health care malpractice action to issue a prescribed form of notice prior to initiating an action. In the instant case there has been neither "strict" nor even "substantial", compliance with the statute.

The statute states:

78-14-8. Notice of intent to commence action. No malpractice action against a health care provider may be initiated 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 include a general statement of the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and

complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be deemed to have been served on the date of mailing. 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 120 days from the date of service of notice.

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, counterclaims or crossclaims against a health care provider.
(Emphasis added.)

The notice must be given by the plaintiff (not by a relative of the plaintiff), and it must be signed by the plaintiff, or the plaintiff's attorney (as opposed to the attorney of a family member).

Under the pertinent statute (and the statute as it existed prior to amendment) the letter which appellant asserts gives the required notice is clearly defective. The letter is written on the letterhead of Robert M. McRae & Associates, and it states:

April 7, 1978

"Pursuant to 78-14-8 UCA, notice is here-with given that Marzine Yates, husband of Velma Yates, potentially is asserting and claiming and may commence a civil action for damages arising out of possible negligent prescribing, negligent dispensing of drugs or other forms of prescribed medicine, and negligent hospitaliza-

tion and treatment of his wife. In compliance with the aforesaid section of the Utah Code, it is believed and will be alleged in the event a civil action is commenced that from approximately March, 1976 until March, 1978, claimant's wife received prescriptions from the Vernal Drug Company believed to have been prescribed by Dr. Lee Balka in his official capacity as a partner or responsible agent of the Vernal Family Health Center, which prescriptions, in combination of use or separate, were dispensed in an excessive amount which has resulted in permanent mental damage to claimant's wife. It is further believed that as a result of the prolonged excess abuse of the prescription medication, the seizure and subsequent coma which claimant's wife suffered approximately one year ago were possibly the result of negligence."

. . .

The "claimant", or potential plaintiff, referred to in the letter is Marzine Yates. Appellant is only referred to as "claimant's wife". The letter is signed by the "claimant", Marzine Yates, and by Robert M. McRae, in the capacity of "Attorney for Claimant", not as attorney for appellant (i.e. Velma Gladys Yates). Marzine Yates did not file a complaint based on the alleged malpractice, rather appellant filed the action. This respondent's answer to that complaint asserted as a defense the lack of notice and gave appellant clear and fair warning of the defect in sufficient time to effect a cure and preserve the cause of action. Nevertheless, appellant (through her attorney) refused to submit a proper notice as required by the statute.

A statement regarding the general rule as to notice requirements in medical malpractice cases is found in

61 Am.Jur.2d 306, Physicians, Surgeons, etc., § 180, where it states:

§ 180. Statutory notice of injury.

Where a statute exists requiring a person claiming to have received personal injuries to serve a detailed notice, in writing, of such injuries upon the person by whom it is claimed these injuries were caused, within a limited time after the occurrence of such injuries, it has been held that the statute applies to actions for malpractice whether they sound in contract or in tort. Such a statute must be strictly complied with, and all matters required by the statute to be stated in the notice or its equivalent must be stated, or it is not sufficient, and the service of summons, affidavits, notice of adverse examination, and subpoena cannot operate as compliance with the statute where one of the essential facts required to be stated in the notice is omitted therefrom. Such a statute, properly speaking, is not a statute of limitations.
(Emphasis added.)

The above statement refers to statutes dealing with personal injury claims generally, while the Utah statute in question is specifically directed at medical malpractice actions. The significance of this is discussed below, as it relates to effectuating the public purpose which the statute seeks to serve.

In Vealey v. Clegg, 579 P.2d 919 (Utah 1978), this court held that the notice requirement of § 78-14-8 is constitutional (see Point II of this brief), that giving notice serves to "toll" the statute of limitations (by means of extension) when necessary to preserve an action, and that the filing and service of a complaint (which necessarily

contains all the information required in the notice) does not satisfy the statute's notice requirements.

The importance of Vealey, supra, as it relates to the case at bar is that there, as here, the appellant asserted that a document, containing the pertinent information required by the statute, constituted compliance with the statute. That complaint contained virtually every item required by the statute, never-the-less this court held:

" . . . that the statute requires notice to be given ninety days before the action is filed."

The complaint was not equivalent to the required notice, and therefore was properly dismissed. Further, the filing of the complaint, as such, would not serve to extend the statute of limitations.

Here, unlike Vealey, the purported notice did not contain the essential facts required by the statute. Most notably, it did not indicate who the plaintiff would be. Moreover, it was misleading as to the nature of the cause of action asserted. By reference to the letter in question, one would only be appraised of Mr. Yates' potential action to recover medical and other expenses and for loss of his wife's services and consortium. In fact, Mr. Yates was never the plaintiff in any action based on the letter and the letter failed to give notice of the action filed by appellant. When compared to the asserted "notice" in Vealey, a fortiori the letter here is insufficient to serve

notice as required by Section 78-14-8 U.C.A. (1979).

This court addressed the notice requirement in the recent case of Foil v. Ballinger, 601 P.2d 144 (Utah 1979). In Foil the court held that the statute of limitations in medical malpractice actions commences to run from the date of the injury or from the date the injury was discovered or should have been discovered by the person injured.¹ Also at issue in Foil was whether Section 78-12-40 U.C.A. (1953) operated to toll the statute of limitations when no notice as required by Section 78-14-8, U.C.A. (1979) had been filed within the statutory period.

The significance of Foil is to be found in certain dicta which provides a guide to the proper construction to be given the Utah Health Care Malpractice Act in general, and Section 78-14-8, U.C.A. (1979), in particular.

In the Foil case (at pages 4 and 5 of the advance sheets) it states:

"... it is important to keep in focus the proposition that that section deals only with malpractice actions against health care providers; it is not a general statute of limitation on personal injury actions as such."

"One of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits against health care providers, with all the attendant costs, economic and otherwise, that such suits entail."

¹(The term "discovered" is here loosely used. "Discovery" of the injury relates not only to the mere fact of injury, but also to the fact that it was caused by an act of medical malpractice.)

And at page 8, specifically dealing with the statute in question here:

Section 78-14-8 merely prescribes a condition precedent to the filing of a summons or a complaint. A failure to comply with such conditions does not constitute an adjudication on the merits, but is merely a procedural defect that does not relate to the merits of the basic action in any way. There are numerous instances in which the law requires fulfillment of a condition precedent before the filing of a complaint, and failure to comply with the condition may result in a dismissal, but not on the merits.

Obviously, notice as per Section 78-14-8 U.C.A. (1979) is required, regardless of the tolling statute and such notice is a condition precedent which must be met before a medical malpractice action may be brought. While the condition precedent is merely procedural, compliance is never-the-less mandatory.

As to the purpose of the recent amendment to Section 78-14-8, U.C.A. (1979), at p.10 in Foil, the court states:

"The amendment to §78-14-8 was made to establish the Legislature's intent that a notice of intent to sue was not the operative fact in the commencement of an action and that the notice was not applicable to causes of action arising prior to enactment of the Malpractice Act. In part, at least, the amendment was in response to this Court's holding in Vealey. Changes made in §78-14-8 are strictly and purely remedial in nature. They do not serve to create

or eliminate any vested interests or causes of action. They simply govern technical provisions for the bringing of a malpractice action. (Emphasis added.)

The amendment obviously has no effect on the notice requirement in this case.

The most significant aid to the proper construction of the Utah Health Care Malpractice Act is to be found in the text of the statute itself. Section 78-14-2, U.C.A. (1953), states:

"In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluations and settlement of claims."

The patent intention of the legislature was to protect the public's interest in a sound health care system from the many adverse effects which necessarily attend the current sharp increases in medical malpractice cases. The primary device to achieve this end is the availability of reasonable malpractice insurance for Utah's health care providers and the provisions of the Act are designed to provide a favorable environment for such insurance. Specifically, limitations are placed on the bringing of medical malpractice actions to facilitate reasonable and accurate calculation of malpractice insurance premiums. The procedures chosen are

further expressly designed to facilitate "early evaluation and settlement of claims."

The clear intent is to restrict medical malpractice actions. In addition to the requirement of notice, the legislature provided a comprehensive statute of limitations (78-14-4); fully spelled out all elements, as well as defenses, to actions based on informed consent (78-14-5); and expressly required a written instrument as a prerequisite to an action for breach of guarantee on contract in the medical malpractice field (78-14-6). In order to further this policy, a strict standard of compliance with the statutory procedures is required.

The concept of requiring notice for medical malpractice cases (and indeed for personal injury actions in general) is not new. State legislatures have long recognized the beneficial effects that flow from requiring prior notice in such lawsuits, including, of course, the discouraging of frivolous suits, and the encouraging of settlements, thus avoiding protracted, and often undesirable litigation.

Our notice statute is plain, unambiguous, and easy to comply with. Indeed, appellant, through her attorney, was aware of the insufficiencies of the letter as notice and had ample opportunity to cure any defects. If the statute is to be altered, it is for the legislature, not the courts,

to effect the change. If the purposes of the Utah Health Care Malpractice Act are to be effectuated, substance must be given to it's provisions. The procedures which it sets out must be complied with. These procedures are specifically designed to meet dangers to the public welfare, as perceived by the legislature. The trial court correctly held that a procedural condition precedent to bringing a medical malpractice action, had not been complied with, and therefore properly dismissed the action.

II.

THE NOTICE OF INTENT REQUIRED BY § 78-14-8
U.C.A. (1979) DOES NOT OFFEND THE CONSTITUTION OF THE UNITED STATES.

The recent case of McGuire v. University of Utah Medical Center, 603 P.2d 786 (1979) answers appellant's contention that § 78-14-8, U.C.A. (1979) is special legislation. It was there argued that the 1979 amendment to that section was prohibited special legislation. This court disagreed, noting:

"That contention cannot withstand analysis. In Utah Farm Bureau Insurance Co. v. Utah Insurance Guaranty Association, Utah, 564 P.2d 751 (1977), this Court defined a general law as one which applies to and operates uniformly upon all members of any class of persons. The 1979 amendment clearly operates uniformly upon a class of persons: all persons having a cause of action arising prior to the effective date of the Malpractice Act, whether they have been filed or not . . . The amendment therefore stands on the same basis, as to the generality of its application,

as does the original notice of intent to sue provision and the statute of limitations provision in the Act. . . .
(Emphasis added, p.788)

The McGuire case is obviously sufficient authority to uphold the constitutionality of the disputed statute.

Appellant asserts that § 78-14-8, U.C.A. (1979), violates three provisions of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The following Utah Constitutional provisions are allegedly offended:

Article I §2 [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Article I §24 [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Article VI §26 [Private laws forbidden.]

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

Appellant argues denial of equal protection of the laws. Of significant note is the absence of an alleged violation of due process of law under either the Fourteenth Amendment to the United States Constitution or Article I §

of the Utah Constitution.

The claim that § 78-14-8, U.C.A. (1979) violates the Utah Constitution is clearly untenable in light of the extensive pronouncements by this Court on the subject of equal protection and general versus special legislation. The general rule is that doubts as to the constitutionality of statutes are to be resolved in favor of the statute's validity. In Board of Medical Examiners v. Blair, 57 Utah 516, 196 P.2d 221 (1921), a law requiring chiropractors to be licensed was attacked on a variety of grounds. The Court, in upholding the statutory scheme, conceded that certain of appellant's arguments "had merit" but concluded:

Should it be conceded that the contention renders doubtful the validity of the requirement that chiropractors have a knowledge of materia medica and some other subjects referred to in the statute, it would not render the law invalid, because when there is any reasonable doubt as to the validity of a statute, the doubt must be resolved in favor of validity. It is only where the invalidity or unconstitutionality is clear and beyond civil law that the courts have the right to declare a law, or any part of the same, invalid. (Emphasis added, p.225)

Under such a standard, the instant appellant's assertion of unconstitutionality cannot prevail. At the very most, appellant has raised only "doubts" as to the invalidity of § 78-14-8. More specifically, the law of Utah places on the party challenging the statute the burden of proving unconstitutionality. If a rational relation exists

between the classification and the purpose of the statute, the statute must be upheld. A classification is never unreasonable or arbitrary if a reasonable basis exists and there is uniform application of the act. See Utah Farm Bureau Insurance Co. v. Utah Insurance Guaranty Assoc., 564 P.2d 751 (Utah, 1977).

Under the Fourteenth Amendment to the United States Constitution, as well as under the Constitution of Utah, only a reasonable relation between the classification and the purpose of the statute, and uniform application, are required to withstand attacks based on a denial of equal protection. As is amply illustrated in Point I of this brief, such a reasonable relation surely exists here.

Indeed, in the case at bar there exists not only a "reasonable relation," but also the compelling state interest that is the essence of the "strict scrutiny" which appellant erroneously asserts is applicable here. The interest is insuring that an adequate level of professional medical care is available to the people of Utah. The legislature has found that in order to achieve this state of interest, it is necessary to control the "crisis" of medical malpractice insurance via the comprehensive scheme of the Utah Health Care Malpractice Act. The notice provision of 78-14-8, U.C.A. (1979) is clearly and directly related to early claims settlement and to discouraging frivolous suits. Both of those objectives have the effect of decreas-

ing medical malpractice insurance premiums. The notice provision, 78-14-8, U.C.A. (1979) is not objectionable as denying equal protection.

Appellant makes the further (although related) claim that 78-14-8, U.C.A. (1979) constitutes forbidden special legislation. Appellant's brief states that:

. . . "No justification exists for singling out the medical profession and providing it with procedural protection not afforded other groups." . . .
(P.18, Emphasis added.)

Appellant demonstrates a basic misunderstanding of the nature of the procedures mandated by 78-14-8, U.C.A. (1979). The statute's purpose is to protect the public interest in adequate medical care, not the interests of physicians who would seek to avoid malpractice suits.

Section 78-14-8, U.C.A. (1979) is clearly a general law. In U.F.B.I. Co. v. U.I.G.A., supra, the Court states:

. . . 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. The constitutional prohibition of special legislation does not preclude legislative classification, but only requires the classification to be reasonable.
(p.754)

Medical malpractice plaintiffs stand in a different position than plaintiffs in other professional malpractice actions. The difference lies in the vital importance to society of insuring adequate medical care. Section 78-14-8, U.C.A. (1979) helps to meet that interest of society, and it does so in a fair and equitable manner. It operates uniformly on all those within a class, namely, plaintiffs in health care malpractice actions. It clearly meets all constitutional requirements, and must be upheld.

CONCLUSION

Since the notice required by Section 78-14-8, U.C.A. (1979) is clearly valid under the Constitution of Utah, and as such notice, a condition precedent to a medical malpractice action was not given in the case at bar the order of dismissal of appellant's cause of action must be affirmed.

DATED this 15th day of February, 1980.

Respectfully submitted,

CERTIFICATE OF DELIVERY

I certify that I have on this 13th day
of February, 1980, delivered to the
following a copy of the aforesaid Brief of Respondent,
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