

1989

Michelle Deschamps v. Lee Pulley : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 890409

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHELLE DESCHAMPS, personally)
and as Personal Representative)
of the Estate of THEDA E.)
SCHULZ,)

Plaintiff/)
Appellant,)

-vs-)

LEE PULLEY, M. D. and FHP OF)
UTAH, dba FHP MEDICAL CENTER,)
OGDEN,)

Defendants/)
Respondents.)

89-0409 CA

Case No. 880216

BRIEF OF RESPONDENTS

ON APPEAL FROM A SUMMARY JUDGMENT OF THE
SECOND DISTRICT COURT FOR WEBER COUNTY
HONORABLE RONALD O. HYDE, DISTRICT JUDGE

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MICHELLE DESCHAMPS, personally)
and as Personal Representative)
of the Estate of THEDA E.)
SCHULZ,)

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Appellant,)

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii, iii
JURISDICTION AND PROCEEDINGS BELOW	2
ISSUES FOR REVIEW	3
DETERMINATIVE STATUTES	3
STATEMENT OF THE CASE	4
A. <u>Nature of Case and Disposition Below</u>	4
B. <u>The Parties</u>	4
C. <u>The Claims of Negligence</u>	4
D. <u>The Facts as to the Limitations Issue</u>	5
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. <u>EVEN IF THE EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THERE IS NO GENUINE ISSUE ON WHETHER SHE HAD DISCOVERED HER LEGAL INJURY MORE THAN TWO YEARS BEFORE THIS ACTION WAS COMMENCED</u>	11
II. <u>EVEN IF PLAINTIFF HERSELF HAD NOT DIS- COVERED HER LEGAL INJURY, HER LAWYER HAD, AND THAT KNOWLEDGE IS AS A MATTER OF LAW TO BE IMPUTED TO PLAINTIFF</u>	19
CONCLUSION	21
CERTIFICATE OF SERVICE	23
ADDENDUM	24

TABLE OF AUTHORITIES

	<u>Page</u>
A. <u>Utah Code Ann.</u>	
§ 78-2-2(3)(i)	3
§ 78-14-3(1)	6
§ 78-14-3(29)	6, 7
§ 78-14-4	3, 4, 5, 6, 12
§ 78-14-8	8
B. <u>Decisions</u>	
<u>Alt v. Krueger</u> , 663 P.2d 1078, 1082 (Haw. App. 1983)	20
<u>Blanton v. Womancare, Inc.</u> , 696 P.2d 645, 649 (Calif. 1985)	20
<u>Brower v. Brown</u> , 744 P.2d 1337 (Utah 1987)	17
<u>Dickman v. DeMoss</u> , 660 P.2d 1 (Colo. App. 1982)	21
<u>Duerden v. Utah Valley Hospital</u> , 663 F. Supp. (D. Utah 1987)	15
<u>Foil v. Ballinger</u> , 601 P.2d 144 (Utah 1979)	12, 13, 14, 16
<u>Haller v. Wallis</u> , 573 P.2d 1302 (Wash. 1978)	20
<u>Hargett v. Limburg</u> , 598 Fed. Sup. 152 (D. Utah 1984)	16
<u>Hove v. McMaster</u> , 621 P.2d 694 (Utah 1980)	14, 15

	<u>Page</u>
<u>Lange v. Hickman</u> , 544 P.2d 1208 (Nev. 1976)	20
<u>Reiser v. Lohner</u> , 641 P.2d 93 (Utah 1982)	13
<u>Russell v. Martell</u> , 681 P.2d 1193 (Utah 1984) . . .	20
C. <u>Rules of Procedure and Ethics</u>	
Rule 1.4, <u>Rules of Professional Conduct of the Utah State Bar</u>	21
Rule 2.8(d), <u>Rules of Practice of the District Courts</u>	6
Rule 11, <u>Utah Rules of Civil Procedure</u>	18
Ethical Consideration 9-2 of Canon 9, <u>Revised Rules of Professional Conduct of the Utah State Bar</u>	21
D. <u>Treatises</u>	
K. Isselbacher, <u>Harrison's Principles of Internal Medicine</u> (9th Ed. 1980)	5

**MICHELLE DESCHAMPS, personally
and as Personal Representative
of the Estate of THEDA E.
SCHULZ,**

Case No. 880216

LEE PULLEY, M. D. and FHP OF
UTAH, dba FHP MEDICAL CENTER,
OGDEN,

**Defendants/
Respondents.**

ON APPEAL FROM A SUMMARY JUDGMENT OF THE
SECOND DISTRICT COURT FOR WEBER COUNTY
HONORABLE RONALD O. HYDE, DISTRICT JUDGE

This is a timely appeal from an Order of the Second Judicial District Court for Weber County, Honorable Ronald O. Hyde presiding, which granted defendants' motion for summary judgment on the grounds that this medical malpractice action was

barred by the statute of limitations. (A copy of the lower court's decision and order is found in the Addendum at "A".) Jurisdiction exists in this Court under § 78-2-2(3)(i).^{1/}

ISSUES FOR REVIEW

Section 78-14-4 provides that a medical malpractice action is barred unless the plaintiff or patient commences suit within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the injury.

The issue on this appeal is whether, under the standard of review for the granting of summary judgment, the trial court was correct in holding that this matter was barred by the statute of limitations; that is whether, as a matter of law, plaintiff or plaintiff's decedent had discovered their injury more than two years before this action was filed.

DETERMINATIVE STATUTE

The determinative statute is the two-year medical malpractice statute of limitations, § 78-14-4, which provides in pertinent part that:

No malpractice action against a health care provider may be brought unless it is commenced

^{1/} All statutory citations in this brief are to the Utah Code.

within two years after the plaintiff or patient discovers or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence (The complete text is found in the Addendum at "B".)

STATEMENT OF THE CASE

A. Nature of Case and Disposition Below

This is a wrongful death and survival action alleging medical malpractice. The lower court granted defendants' motion for summary judgment on the grounds that it had been commenced more than two years after plaintiff's injury was or should have been discovered and that, therefore, the action was barred under § 78-14-4.

B. The Parties

Plaintiff, Michelle Deschamps, is the surviving daughter and personal representative of her deceased mother, Theda E. Schulz. Defendant FHP-Utah is a health maintenance organization with facilities along the Wasatch Front at which it provides prepaid group medical and dental care to its subscribing members. Defendant Lee Pulley, M. D. was employed by FHP at all relevant times at FHP's Harrison Center in Ogden.

C. The Claims of Negligence

Mrs. Schulz was treated by Dr. Pulley at FHP's Harrison Center on various occasions between June 29 and August 1, 1984,

for complaints of right shoulder and chest pain. Plaintiff alleges that Dr. Pulley prescribed certain medications (unspecified in the Complaint) which caused a disease known as "necrotizing vasculitis."^{2/} [See, generally, Complaint, R-1]. On August 1, 1984, Mrs. Schulz was hospitalized at St. Benedict's Hospital in Ogden for complications arising from this disease and from them she died there on October 30, 1984 at the age of 53.

Plaintiff alleges that Dr. Pulley negligently prescribed medications which caused the vasculitis, failed to diagnose the onset of the vasculitis, failed to adequately treat the vasculitis, and failed to obtain Mrs. Schulz's informed consent to the treatment that he did render.

D. The Facts as to the Limitations Issue

This action was commenced on January 14, 1988. Therefore, under § 78-14-4, it is barred if plaintiff or plaintiff's decedent knew, or reasonably should have known, of the legal

^{2/} A rare, degenerative inflammation of the vascular system which can lead to a variety of complications including kidney failure, skin lesions, joint pain, lung failure, inflammation of the heart and pericardium, peripheral nerve involvement, encephalopathy, and gastrointestinal bleeding. K. Isselbacher, Harrison's Principles of Internal Medicine, pp. 351-5; 1342-3 (9th Ed. 1980).

injury on or before January 13, 1986. Defendants' position, and the position of the lower court, is that discovery occurred not later than December 31, 1984. The undisputed facts relevant to the discovery issue are these:

1. All defendants are "health care providers" as defined in § 78-14-3(1) and this is a "malpractice action against health care providers" as defined in § 78-14-3(29). Therefore, the applicable statute of limitations is § 78-14-4. [R-33, not disputed by plaintiff, hence, admitted under District Court Rule 2.8(d)].

2. The date of the alleged negligent medical care by defendants was between June 29 and August 1, 1984. [Complaint, ¶ 5, R-2].

3. The Complaint was filed on January 14, 1988. [R-1]. (Thus, the four-year statute of repose is irrelevant.)

4. In the "late summer" of 1984, while she was hospitalized at St. Benedict's Hospital, Mrs. Schulz hired an Ogden lawyer, James R. Hasenyager, to "look into the facts surrounding her treatment at FHP Hospital (sic)." [Hasenyager Affidavit, ¶¶ 1 and 2, R-55].

5. Mrs. Schulz executed a "Medical Release" for the release of her FHP medical records to Mr. Hasenyager on September 20, 1984. [R-33, ¶ 5, R-12; undisputed below]. Another "Medical

Release" for Mrs. Schulz's records from FHP was signed by plaintiff on December 5, 1984. [R-33, ¶ 6, R-14; undisputed below].

6. Mr. Hasenyager went ahead and gathered the medical records on Mrs. Schulz, as well as medical literature on vasculitis, "over the next few months." [Hasenyager Affidavit, ¶ 3, R-55].

7. Mrs. Schulz died in St. Benedict's Hospital on October 30, 1984. [Complaint, ¶ 5, R-2].^{3/}

8. Before Mrs. Schulz's death, Mr. Hasenyager had the case reviewed by a pharmacist at the Department of Pharmacy at the University of Utah, Ms. Susan Stephenson. [Michelle Deschamps Affidavit, ¶ 4, R-46]. Ms. Stephenson's letter of October 23, 1984, informed Mr. Hasenyager that vasculitis would rarely, if ever, be caused by the drugs at to which he had made inquiry. [R-49]. A copy of Ms. Stephenson's letter to Mr. Hasenyager was received by plaintiff before her mother's death. [Deschamps Affidavit, ¶ 4, R-46].

9. Following the October 30, 1984 death of her mother, and despite the Stephenson letter, plaintiff still "felt strongly

^{3/} The pertinent statute of limitations is that for medical malpractice actions, not that for wrongful death actions. Thus, the two-year period runs from the date of discovery, not of death. See, § 78-14-3(29).

that a competent specialist should review the records to see if there was any connection between the treatment given by FHP Hospital (sic) and the death of my mother." [Deschamps Affidavit, ¶ 5, R-46].

10. On December 31, 1984, Mr. Hasenyager served a "Notice of Intent to Commence a Lawsuit" on defendants in accordance with § 78-14-8.^{4/} [R-16, 56].

11. The Notice of Intent stated, among other things, that:

(a) The estate of Theda Schulz intended to commence an action for medical malpractice against FHP and Dr. Pulley;

(b) The nature of the claim was that defendants "negligently and carelessly failed to immediately withdraw Theda Shulz (sic) from all medications capable of causing vasculitis which developed and led directly to her death" and that the defendants "failed to immediately start her on the appropriate steroid therapy"; and,

^{4/} Service of a Notice of Intent is complete upon proper mailing. § 78-14-8.

(c) That a "Dr. Yenchinh" (sic-Yenchick) "finally instructed Mrs. Shulz (sic) to cease taking all medications except Tylenol #3 when [on July 23, 1984] he diagnosed Mrs. Shulz (sic) as suffering from vasculitis caused by a drug reaction." [R-16 and 17] (A copy of this document is found in the Addendum at "C".)

12. Mr. Hasenyager had another expert review the case in the spring of 1985, Dr. Gary Gordon, of the University of Pennsylvania School of Medicine. Dr. Gordon reviewed the records and informed Mr. Hasenyager that "there was not a cause of action." [Hasenyager Affidavit, ¶ 6, R-56].

13. Mr. Hasenyager then told plaintiff that, in his opinion, there was "no case," and closed his file shortly thereafter. [Deschamps Affidavit, ¶ 5, R-46; Hasenyager Affidavit, ¶ 7, R-56].

14. Plaintiff "continued to feel uneasy about the circumstances surrounding [her] mother's death" and "wanted a second opinion" and so hired her present counsel, David A. Reeve, at an unstated later date. [Deschamps Affidavit, ¶ 8, R-46].

15. Mr. Reeve had a Dr. Howard Ravenscraft review the case in the spring of 1986. Dr. Ravenscraft was of the opinion that, after all, defendants had been negligent in the treatment of Mrs. Schulz. [Ravenscraft Letter, R-51].

16. Mr. Reeve then filed a second Notice of Intent on June 16, 1986 [R-20], a third one on January 13, 1987 [R-23], went through the prelitigation hearing panel process, and filed the Complaint on January 14, 1987.^{5/}

17. Plaintiff now claims that she was never informed by Mr. Hasenyager of his December 31, 1984, Notice of Intent [Deschamps Affidavit, ¶ 7, R-46] and that the first time she "knew" that her mother's death was caused by defendants' negligence was in May 1986. [Deschamps Affidavit, ¶ 13, R-48].

SUMMARY OF ARGUMENT

Plaintiff, in having "strong concerns" and feelings of "unease" about the care rendered by defendants, by hiring an attorney, having that attorney hire an expert, having that attorney investigate the claim, and knowing of the unexplained and untimely death of her mother, as a matter of law had sufficient knowledge to have discovered her legal injury more than

^{5/} Respondents take issue with Mr. Reeve's contention that he filed the second Notice of Intent because he was "unaware" of Mr. Hasenyager's first Notice of Intent. There is no record evidence to support this claim. Whether successive notices of intent can have the effect of tolling the statute of limitations need not be addressed because plaintiff's position is that she did not discover until May 1986, within the two-year period, and defendants' position is that she did by December 31, 1984, before the second Notice.

two years before she commenced this action on January 14, 1988. Certainty through obtaining a confirming expert's opinion is not a precondition to discovery; inquiry knowledge will suffice.

Even if Ms. Deschamps did not discover her legal injury more than two years prior to the commencement of this action, her first lawyer, James Hasenyager, did, as is evidenced by his December 31, 1984 Notice of Intent, and the knowledge of her lawyer is, as a matter of law, imputed to plaintiff.

ARGUMENT

I.

EVEN IF THE EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THERE IS NO GENUINE ISSUE ON WHETHER SHE HAD DISCOVERED HER LEGAL INJURY MORE THAN TWO YEARS BEFORE THIS ACTION WAS COMMENCED

Plaintiff in substance contends that she did not and could not know of her legal injury until she obtained a medical doctor's opinion that there had been negligence on the part of defendants. The lower court felt otherwise: "I hold that one discovers the legal injury when there are facts sufficient to show that an injury exists, its cause, and the possibility of negligence, and not when one finally finds an expert willing to testify that suspicions of negligence finally have merit." [R-87] Thus, the issue is whether discovery of a legal injury in a medical malpractice action is contingent upon a plaintiff obtaining a favorable expert witness.

That requires an analysis of Foil v. Ballinger, 601 P.2d 144 (Utah 1979) and its progeny. Foil, of course, held that the term discovery of "injury" in § 78-14-4 meant discovery of both the physical injury and of the negligence which caused the injury. That is, the two-year limitations period does not commence to run until the injured person knows or should know both that he has sustained an injury and that this injury was caused by negligent action.

Our inquiry here is an epistemological one: When does one "know" that an injury was caused by medical malpractice? Is it "certainty" knowledge or is it "inquiry" knowledge? A spectrum of the degrees of knowledge between certainty and ignorance might be defined:

1. Upon a plaintiff's jury verdict (which could be assumed to validate plaintiff's expert's opinion);
2. Upon a plaintiff obtaining an expert opinion of negligence, short of trial;
3. Upon a plaintiff having enough of a "strong concern" and "suspicion" of negligence to hire an attorney to investigate the possibility of negligence, obtain medical records, have expert reviews, and hire another attorney when the first withdraws;

4. Upon a plaintiff having a general feeling of dissatisfaction about the medical care received, which dissatisfaction is not yet strong enough to warrant his going to see an attorney;

5. Upon a plaintiff having suffered a physical injury, but having no suspicion of negligence and attributing his injury to happenstance or unavailability.

Foil makes clear that the fifth and lowest degree of knowledge is insufficient to constitute discovery and, perhaps, the same can be said for the fourth. Plaintiff's position is that the second degree of knowledge, "obtaining an expert opinion," is the minimal level needed for discovery. Defendants' position is that the third degree, "strong suspicions of negligence which lead to action" is enough.

The purpose behind the knowledge requirement of the discovery rule is to prevent the loss of a cause of action before a potential plaintiff has an opportunity to become aware of the existence of that cause of action. Foil at 147 and see, Reiser v. Lohner, 641 P.2d 93, 102-3 (Utah 1982) (Stewart, J. dissenting). Once the requisite level of knowledge is achieved, a plaintiff is granted a two-year period, subject to the statute of repose, to act upon that knowledge, generally by hiring an attorney to investigate the potential claim. That investigatory

period allows the patient an opportunity to make a reasonable pre-filing inquiry. However, the law does not contemplate delay of the commencement of this investigatory period until such time as plaintiff obtains a favorable expert opinion. Were that the case, a plaintiff could delay obtaining an expert's confirming opinion and the limitations period would be extended indefinitely by that simple device. The two-year investigatory period is the time when plaintiff should, among other things, pursue her claim by hiring an attorney and finding an expert. But the start of this investigatory period is not postponed until investigation is completed.

In plaintiff's view, no one can "know" of a legal injury until they find a compliant expert witness. A lawyer can be hired; he can file a notice of intent; experts can be hired and fired; lawyers can be hired and fired; indeed, a suit can be filed, but there can be no "discovery" until a patient's suspicions, no matter how strong, are confirmed through expert analysis.

This is not what "discovery" means. Decisions since Foil have made clear that "inquiry" knowledge is sufficient. For example, in Hove v. McMaster, 621 P.2d 694 (Utah 1980) this Court held that a malpractice claim was barred where a plaintiff was, or should have been, aware of the "possibility" of negligence

more than two years before she filed suit. 621 P.2d at 696-697. Ms. Hove, like plaintiff, asserted that she could not have been aware of her legal injury until a physician diagnosed her condition as resulting from defendant's acts. The Court rejected that contention: "Plaintiff could be expected to have recognized the possibility that the recurring discomforts were the result of the injection and that a proper injection would not have caused the alleged injury." (emphasis added) 621 P.2d at 696. See, also, Duerden v. Utah Valley Hospital, 663 F. Supp., 781, 783, n. 1 (D. Utah 1987) for an analysis of the Hove decision from a local federal court.^{6/}

While, as Appellant indicates, it is certainly true that Hove was before the Court on a broader standard of review, nevertheless, the significance of the case is that this Court recognized the legal principle that knowledge of a possibility of negligence is sufficient to constitute discovery, regardless of the standard of review. Defendants agree that plaintiff did

^{6/} Appellant's statement that "the Utah Supreme Court doesn't need help from a federal court to interpret its own opinions" [Appellant's Brief at p. 18] is inappropriate. Of course defendants do not contend that the decisions of the federal courts on matters of state law are binding upon this Court. However, well-reasoned opinions on Utah law from federal courts, while not dispositive, can be enlightening.

not have the possibility of negligence "confirmed" until she obtained Dr. Ravenscraft's opinion in May 1986, but neither can plaintiff dispute that she had "strong concerns" about those possibilities at a much earlier date. The issue is purely a legal one; whether these admitted concerns about defendants' care, which lead to further action are enough, or whether an expert's confirming opinion is also necessary.

In another local federal court decision, Hargett v. Limburg, 598 F. Supp. 152 (D. Utah 1984) Judge Winder noted that:

Under Foil, and its progeny, a legal determination of negligence is not necessary to start the statute of limitations. Rather the crucial question is whether the plaintiff is aware of the facts that would leave a reasonable person to conclude that he may have a cause of action against a health care provider (citations omitted). Those facts include 'the existence of an injury, its cause and the possibility of negligence.'

598 F. Supp. at 155.

Mrs. Hargett had contended that she did not discover the possibility of a legal injury until she consulted a lawyer. This, the court noted, confused "legal injury" with a legal conclusion of negligence. Id. at 154-155 and see, "Developments in Utah Law," 1980 Utah Law Rev. at 709-710: "It is unlikely that the court intended to make running of the statute contingent on the plaintiff's receipt of expert advice from either a doctor or lawyer; yet, the term 'legal injury' may leave the court open

to arguments that a layman could not have been aware of this cause of action without such advice."

The standard was further clarified by this Court in a more recent decision, Brower v. Brown, 744 P.2d 1337 (Utah 1987). In that case, an evenly-divided Court partially upheld a summary judgment entered in favor of defendant doctors on a limitations issue. Plaintiff, Mrs. Brower, had received a puncture in her right thigh during a hysterectomy. This unexplained complication was held to be enough, as a matter of law, to place plaintiff on notice that she had received a legal injury. 744 Utah 2d at 1337.^{7/} That is, "inquiry" knowledge may be enough, at least as to serious and unexplained complications.

It is, as Appellant points out, true that requiring potential plaintiffs to act upon inquiry knowledge might encourage malpractice suits to be commenced before confirmation of the suspected malpractice through expert review. That, after all,

^{7/} Appellant is likely to seize upon the reference in Brower on the utility of a separate limitations trial in medical malpractice cases as indicating that she also should have a trial. But surely Brower cannot be read to mean that Rule 56 is henceforth repealed as to limitations issues in medical cases, that the trial remedy and the summary judgment remedy are equally attractive to defendants, or that there must always be a trial on a limitations issue, no matter how clear the case.

is the inevitable result of a statute of limitations. It serves as a compromise between the interests of defendants in having claims filed while evidence and memories are fresh and the interests of plaintiffs in having a reasonable period of time in which to sue. There may be harsh results, although in this case it is hardly so since Mr. Hasenyager could have filed a complaint before his withdrawal in the spring of 1985, or at least advised plaintiff of the wisdom of doing so.^{8/}

If this Court is of the opinion that "certainty" knowledge is required for discovery, then the lower court should be reversed, since on the facts assumed for the purposes of the motion for summary judgment plaintiff did not "know" for certain that defendants had been negligent until she obtained a favorable expert opinion in May 1986. If, on the other hand, this Court feels that "inquiry" knowledge is sufficient, then the lower

^{8/} Defendants are aware of no Utah case requiring a plaintiff to obtain a favorable expert opinion prior to filing a complaint, at the peril of violating Rule 11, although many health care providers would applaud such a requirement. Realistically, an attorney's certificate that "to the best of his knowledge, information, and belief formed after a reasonable inquiry" that the complaint is "well-grounded in fact and is warranted by existing law" often means merely that an attorney has his own suspicions regarding negligence after investigation, files his complaint to protect the limitations issue, then locates a testifying expert.

court's decision should be affirmed, since by December 31, 1984, plaintiff's decedent had been told that the vasculitis was caused by a "drug reaction" [R-17], that plaintiff's decedent had hired an attorney to investigate the claim, that this attorney did, in fact, investigate the claim and hire an expert pharmacist. Further, by that date plaintiff's mother had died from her disease, and, following the death of her mother, plaintiff had executed another release for medical records and, thus, indicated her intention to continue on with the investigation even after the unfavorable opinion of the expert pharmacist. After her first attorney served his Notice of Intent on December 31, plaintiff's "strong concerns" about defendants' care continued and she hired another attorney after the first withdrew. If this is not "inquiry" knowledge, nothing is.

II.

EVEN IF PLAINTIFF HERSELF HAD NOT DISCOVERED HER
LEGAL INJURY. HER LAWYER HAD, AND THAT KNOWLEDGE IS
AS A MATTER OF LAW TO BE IMPUTED TO PLAINTIFF

Let it be assumed that neither plaintiff nor her mother discovered the legal injury outside the limitations period. The December 4, 1984 Notice of Intent signed by James Hasenyager as attorney for plaintiff makes the same allegations that plaintiff now asserts in her Complaint. (Addendum at "C") There are no material differences. If plaintiff had herself signed

the Notice of Intent, she could hardly now claim with any plausibility that she then had no "knowledge" of defendants' negligence.^{9/} She alleges, however, Mr. Hasenyager never told her of the Notice of Intent and, thus, that it has no relevance on when she discovered her legal injury.

Unfortunately for plaintiff, she is bound by what Mr. Hasenyager knew. A client, as principal, is bound by the acts of her attorney, as agent, within the scope of his actual authority, whether express or implied, or within the scope of his apparent authority. See, Russell v. Martell, 681 P.2d 1193, 95 (Utah 1984); Blanton v. Womancare, Inc., 696 P.2d 645, 649 (Calif. 1985); Alt v. Krueger, 663 P.2d 1078, 1082 (Haw. App. 1983). Otherwise, a client could always claim that while her attorney might have known or done something, she did not, and thus she could not be bound by what her attorney knew or did. Further, noNotice to an attorney of matters within the scope of his representation is notice to his client. Haller v. Wallis, 573 P.2d 1302, 1307 (Wash. 1978); Lange v. Hickman, 544 P.2d

^{9/} Although it would be entirely consistent with her position that there cannot be discovery until a favorable expert opinion is obtained.

1208, 1209 (Nev. 1976); Dickman v. DeMoss, 660 P.2d 1 (Colo. App. 1982).

Whether or not Ms. Deschamps herself had knowledge of her legal injury by December 31, 1984, her attorney did, and that knowledge is imputed to her. There is, of course, a duty on the part of an attorney to inform his client of material developments in the client's affairs. See, Rule 1.4, Rules of Professional Conduct of the Utah State Bar (January 1, 1988) and Ethical Consideration 9-2 of Canon 9, Revised Rules of Professional Conduct of the Utah State Bar (effective before January 1, 1988). If Mr. Hasenyager did not inform plaintiff of the Notice of Intent, it might mean that Ms. Deschamps has a remedy against him for his failure to do so, but it does not mean that his knowledge and acts are not imputed to her.

CONCLUSION

For the reasons stated, the decision of the trial court granting summary judgment in favor of defendants should be affirmed.

DATED this 17th day of October, 1988.

SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Respondents

A handwritten signature in cursive script, appearing to read "Francis J. Carney". The signature is written in dark ink and is positioned above a horizontal line.

Stewart M. Hanson, Jr., Esq.
Francis J. Carney, Esq.

Original Signature under Rule
27(c):

Stewart M. Hanson, Jr., Esq.
Francis J. Carney, Esq.

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Respondents was served this 17th day of October, 1988, by depositing them in the U. S. Mail, postage prepaid, to:

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ADDENDUM

- A. RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.
- B. SECTION 78-14-4, UTAH CODE ANN. (1953, AS AMENDED).
- C. "NOTICE OF INTENT TO COMMENCE A LAWSUIT," DECEMBER 31, 1984.

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

MICHELLE DESCHAMPS, personally,)
and as Personal Representative)
of the Estate of Theda Schulz,)

Plaintiff,)

vs.)

LEE PULLEY, M.D., and FHP OF)
UTAH dba FHP MEDICAL)
CENTER, OGDEN,)

Defendants.)

RULING ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Case No. 1100-88

Defendants' motion for summary judgment presents the question of whether or not this action filed on January 14, 1988, was filed within the time limit proscribed by Section 78-14-4.

Theda Schulz died in late October, 1984. Prior to her death she had contacted Attorney James Hasenyager to investigate the facts surrounding her illness, later diagnosed as vasculitis. Following Schulz' death, Attorney Hasenyager continued to investigate the matter and had the case reviewed by experts. On December 31, 1984, Mr. Hasenyager served a notice of intent to commence lawsuit on defendants on behalf of this plaintiff in which he alleged the same claims and theories of negligence that are now alleged in this complaint. Hasenyager later determined that the case did not have merit. Plaintiff, still being concerned, hired current counsel, who had other experts review

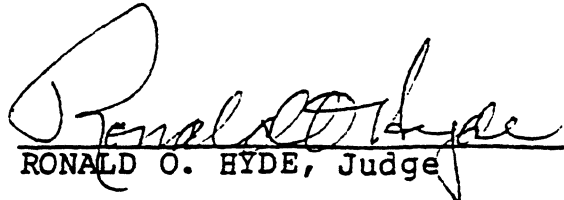
the records, and in May of 1986, obtained the opinion of an expert that there was a causal relationship between the acts of FHP Hospital and Schulz' death. It was plaintiff's claim that it was this time, May of 1986, when they received a favorable opinion that the statute started to run. That is, they did not discover the injury until she found an expert willing to testify to negligence.

The basic question is an interpretation of the term "legal injury" as used in Foil v. Ballinger. I hold that one discovers the legal injury when there are facts sufficient to show that an injury exists, its cause, and the possibility of negligence, and not when one finally finds an expert willing to testify that the suspicions of negligence finally have merit. In view of plaintiff's attorney, Hasenyager, filing the notice of intent to sue, which sets out the facts showing the existence of an injury, its cause, and the allegation or possibility of negligence, I fail to see how the commencing of the running of the statute could possibly be later than the date of the filing of that notice. It is my opinion that the latest possible date that the statute of limitations would commence to run would be December 31, 1984. It could possibly have been sooner than that date, but not later. It is my opinion that the statute of limitations in this matter had run when this action was filed and is, therefore, barred.

Page 3
Ruling on Defendants' Motion
for Summary Judgment
Case No. 1100-88

Defendants' motion for summary judgment is granted.

DATED this 22 day of April, 1988.

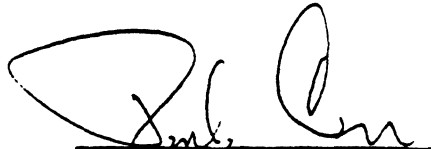

RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of April, 1988, a true and correct copy of the foregoing Ruling on Defendants' Motion for Summary Judgment was served upon the following:

David E. West
David A. Reeve
ARMSTRONG, RAWLINGS & WEST
Attorney for Plaintiff
1300 Walker Center
Salt Lake City, Utah 84111

Francis J. Carney
SUITTER AXLAND ARMSTRONG & HANSON
Attorney for Defendants
175 South West Temple, 7th floor
Salt Lake City, Utah 84101


PAULA CARR, Secretary

May 11 1988
FID
Stewart M. Hanson, Jr., Esq. (1356)
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Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY
STATE OF UTAH

MICHELLE DESCHAMPS, Personally,)
and as Personal Representative)
of the Estate of THEDA E.)
SCHULTZ,)

Plaintiff,)

-vs-)

LEE PULLEY, M. P. and FEP OF)
UTAH dba FHP MEDICAL CENTER,)
OGDEN,)

Defendants.)

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDG-
MENT AND JUDGMENT

Civil No. CV-1100-88

This matter came before the Court, Honorable Ronald O. Hyde presiding, on April 18, 1988, for hearing on defendants' Motion for Summary Judgment on the ground that this action is, as a matter of law, barred by the applicable statute of limitations, § 78-14-4, Utah Code Ann. (1953, as amended). Plaintiff was represented by David A. Reeve, Esq.; defendant by Francis J. Carney, Esq.

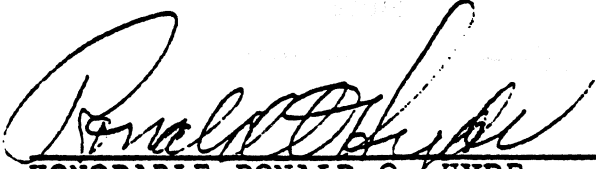
The Court, having reviewed the memoranda and affidavits submitted on behalf of the parties, having heard the arguments of counsel, having entered its memorandum decision on April 22, 1988, and being otherwise advised in the premises, finds that there are no genuine issues of material fact on the limitations issue and for the reasons set forth in its memorandum decision grants defendants' motion, and enters judgment as follows:

It is hereby,

ORDERED, ADJUDGED AND DECREED that summary judgment in favor of defendants, Lee Pulley, M. D. and FHP-Utah and against plaintiff, Michelle Deschamps, individually and as the personal representative of the Estate of Theda Schultz, shall be, and hereby is, entered, no cause of action.

MADE AND ENTERED this 4 day of ~~April~~ ^{May} 1988.

BY THE COURT:


HONORABLE RONALD C. HYDE
District Court Judge

78-14-4. Statute of limitations — Exceptions — Application.

(1) 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, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs: and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law, 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; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law: but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

TO: FHP Utah
3291 Harrison Blvd.
Ogden, UT 84401

Dr. Lee Pulley
FHP Utah
3291 Harrison Blvd.
Ogden, UT 84401

FHP Utah
323 South 600 East
Salt Lake City, UT

Pursuant to Section 78-14-8 Utah Code Annotated, please take notice that Michelle Deschamps, personal representative for the estate of Theda Shulz intends to commence a civil action against you for medical malpractice leading to the death of Theda Shulz.

1. NATURE OF CLAIM: The above-named defendants negligently and carelessly failed to immediately withdraw Theda Shulz from all medications capable of causing vasculitis when she began to exhibit symptoms indicative of vasculitis which developed and lead directly to her death. This claim is in the nature of a wrongful death claim arising from medical malpractice.

2. PERSONS INVOLVED: Theda Shulz, now deceased. Dr. Lee Pulley and FHP Utah, its agents or employees.

3. DATE, TIME AND PLACE OF OCCURRENCE: Ogden, Utah between 6/29/84 and 10/30/84 when Theda Shulz died at St. Benedict's Hospital.

4. CIRCUMSTANCES: June 29, 1984 Theda Shulz was given

tice to Commence Suit
Theda Shulz
Page 2

medications capable of causing the onset of vasculitis. By July 9, 1984 both of her feet were swollen and had developed burning pain. On July 12, 1984 both feet still burned and the feeling was absent in the left foot. Symptoms continued to worsen with loss of feeling up both legs until on July 13, 1984 Dr. Yenichinh finally instructed Mrs. Shulz to cease taking all medication except Tylenol #3 when he diagnosed Mrs. Shulz as suffering from vasculitis caused by a drug reaction.

As a result of complications arising out of the vasculitis Mrs. Shulz died on October 30, 1984.

5. SPECIFIC ALLEGATIONS OF MISCONDUCT: That Dr. Lee Pulley and FHP Utah, its agents or employees negligently and carelessly provided medical care and treatment to Theda Shulz in that they did not immediately withdraw Mrs. Shulz from all medications capable of causing vasculitis when she first began to exhibit signs of developing vasculitis and negligently and carelessly failed to immediately start her on the appropriate steroid therapy.

6. DAMAGES SUSTAINED: Substantial medical costs, severe physical and mental pain and suffering and death. Loss of the love, care, society, companionship and counsel of Theda Shulz.

