

1989

Michelle Deschamps v. Lee Pulley : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH
BRIEF

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AND AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF THEDA E. SCHULZ,

Plaintiff and Appellant.

vs.

LEE PULLEY, M.D. and FHP OF
UTAH, d/b/a FHP MEDICAL CENTER
OGDEN,

Defendants and Respondents.

Case No. 880216

BRIEF OF APPELLANT

An appeal from a Summary Judgment of the Second
District Court of Weber County
Hon. Ronald O. Hyde, Judge

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Clerk, Supreme Court, Utah

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APPELLANT'S BRIEF ON APPEAL

STATEMENT OF JURISDICTION

This is a medical malpractice/wrongful death action that was commenced in the District Court of Weber County. The District Court granted defendants' Motion for Summary Judgment, finding as a matter of law that the statute of limitations had run on plaintiff's claim. Appeal to this court has been timely made pursuant to §78-2-2(3)(i), Utah Code Annotated, which grants appellate jurisdiction in connection with judgments over which the Court of Appeals does not have original jurisdiction.

STATEMENT OF ISSUES

The following issues are presented for review in this appeal:

1. Whether plaintiff's medical malpractice action is barred by the limitations statute at §78-14-4, Utah Code Annotated.

2. Specifically, whether plaintiff discovered or reasonably should have discovered the negligence of the defendants during the limitations period.

3. More specifically, the extent or degree of knowledge that plaintiff must possess to trigger the statute of limitations.

DETERMINATIVE STATUTE

A determinative statute of this appeal is §78-14-4, Utah Code Annotated, which provides as follows:

"(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".

It is only the highlighted portion of the above statute that contains the language that is determinative. The remaining portions of the statute are not material to the issues on appeal. It is undisputed that this statute applies to wrongful death and survival actions. See §78-14-3(29) Utah Code Annotated.

STATEMENT OF CASE AND FACTS

Inasmuch as this case involves an adverse ruling from a

summary judgment, appellant is entitled to have the case reviewed in the light most favorable to her. Atlas Corp. v. Clovis National Bank, 737 P.2d 225 (Utah 1987); Lucky Seven Rodeo Corporation v. Clark, 755 P.2d 750 (Utah App. 1988).

Thus, for purposes of the summary judgment and this appeal, the following facts must be considered as being true:

Plaintiff Michelle Deschamps is the surviving daughter and personal representative of her mother Theda E. Schulz (R-1). Defendant Dr. Lee Pulley is a practicing physician and was employed by defendant FHP (R-1).

Between the dates of June 29, 1984 and August 1, 1984, Mrs. Schulz was treated by Dr. Pulley and FHP for shoulder and chest pain (R-2). In treating this patient, Dr. Pulley prescribed a regimen of drugs which induced a terminal disease known as vasculitis¹ (R-3). As a result of the drug induced disease, Mrs. Schulz was hospitalized at St. Benedicts Hospital on August 1, 1984, where she remained until her eventual death on October 30, 1984 (R-4).

Prior to her death, Mrs. Schulz contacted an attorney in Ogden, Utah, James R. Hasenyager, to look into the facts surrounding her treatment by FHP (R-55). In October, 1984

¹ Vasculitis is a disease of the blood vessels.
See Dorland's Medical Dictionary.

Hasenyager obtained a letter report from the University of Utah Pharmacy Department indicating that there was little medical literature to support drug induced vasculitis (R-49). Hasenyager continued his investigation after the death of Mrs. Schulz and on December 31, 1984 filed, pursuant to §78-14-8, Utah Code Annotated, a Notice of Intent to Commence Malpractice Action (R-16, 56). Hasenyager did not tell plaintiff that he had filed a Notice of Intent and she had no knowledge of its filing (R-46). Thereafter, in the spring of 1985, Hasenyager had all of the medical records reviewed by Dr. Gary Gordon of the University of Pennsylvania School of Medicine (R-46, 56). Dr. Gordon concluded that plaintiff did not have a cause of action (R-56). Hasenyager then told plaintiff that he did not believe she had a valid claim and closed his file (R-56).

Although plaintiff had received two adverse medical reports, and her attorney had declined to go forward with her case, she continued to feel "uneasy" about the circumstances surrounding her mother's death (R-46). She thereafter contacted her present counsel, David A. Reeve, who agreed to obtain a further review (R-47). In May 1986, Reeve received a report from Dr. Howard Ravenscraft which confirmed that the FHP physicians had deviated from standard medical practice in the treatment of Mrs. Schulz and their actions were indeed the cause of her tragic and premature death (R-51).

After receiving the report from Dr. Ravenscraft, plaintiff's new counsel (being unaware of the Notice of Intent filed by Hasenyager) filed a new Notice of Intent on June 16, 1986² (R-20); filed a Request for Prelitigation Panel Hearing on January 13, 1987 (R-27); presented the matter to the Prelitigation Panel on November 2, 1987 (R-8); was notified of the Panel's decision on November 17, 1987 (R-8); and filed the complaint in this action on January 14, 1988 (R-1). Plaintiff's complaint was met by a Motion for Summary Judgment (R-28) wherein it was alleged that the action is barred by reason of the Statute of Limitations at §78-14-4, Utah Code Annotated.

The Motion for Summary Judgment was heard before the Honorable Ronald O. Hyde of the Second Judicial District. Judge Hyde granted the summary judgment reasoning that plaintiff as a matter of law knew or reasonably should have known of her claim at the time Attorney Hasenyager filed the Notice of Intent on December 31, 1984. That being so, Judge Hyde concluded that the filing of the complaint on January 14, 1988 was beyond the 2 year limitations period (R-86).

² Because of a possible defect in the elapsed time between the Notice of Intent and the Request for Prelitigation Panel Hearing, and using an abundance of caution, counsel filed a second Notice of Intent on January 13, 1987 along with the Request for Prelitigation Panel Hearing. This is not material to the issues on appeal.

It is plaintiff's position in this action that she made reasonable efforts to discover her claim and that she did not know, nor could she have reasonably known, of the negligence or the causation until May 1986 when she obtained the opinions of Dr. Ravenscraft.

SUMMARY OF ARGUMENT

Plaintiff's argument on appeal may be summarized as follows:

1. §78-14-4, Utah Code Annotated, authorizes the filing of a malpractice action within two years after the plaintiff "discovers or through the use of reasonable diligence should have discovered the injury".

2. Utah authorities have held that discovery of the "injury" means discovery of the negligence which resulted in the injury. Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

3. A mere suspicion of negligence does not trigger the statute of limitations.

4. Whether or not plaintiff discovered or reasonably should have discovered the negligence is a fact question.

5. The fact that plaintiff's prior attorney filed a Notice of Intention to Commence Malpractice Action without her knowledge, and later concluded from his investigation that her

case was not meritorious and closed his file, is not an absolute event that would irrevocably activate the state of limitations. At best, this is a fact to be considered with all other facts in determining plaintiff's conduct and knowledge.

6. The trial court committed manifest error in holding that the statute of limitations had run as a matter of law.

ARGUMENT

PLAINTIFF'S ACTION WAS TIMELY FILED AS THE STATUTE OF LIMITATIONS DID NOT COMMENCE UNTIL MAY OF 1986

Clearly the leading Utah case on the "discovery rule" is Foil v. Ballinger, 601 P.2d 144 (Utah 1979)³ where the plaintiff did not learn of the defendant doctor's negligence until 3½ years after it occurred. The knowledge came as a result of a report from an Industrial Commission medical panel. In a scholarly and exhaustive opinion this court squarely held "that the two year provision does not commence to run until the injured person knew or should have known that he sustained an injury and that the injury was caused by negligent action". Thus, the court stated:

"Accordingly we hold that the term discovery of "injury" in §78-14-4 means discovery of injury and the negligence which resulted in the injury".

³ See also Christensen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968).

In making the above ruling, the court reasoned a) that there is a great disparity of knowledge between those who provide health care services and those who receive them, and laymen simply are unequipped to diagnose the cause and effect of certain ailments, b) that knowledge of the negligence ought to be required in order to prevent the premature filing of unfounded claims, c) that anything less than full knowledge might tempt some health care providers to not make full disclosure to their patients, or even suppress the truth, d) that the maximum 4 year limitation period is reasonably short and adequately guards against difficulty in defending stale claims, and e) that a further safeguard against tardy claims is the requirement of exercising reasonable diligence. All of these considerations, and more, are present in the instant case. Some of the more compelling arguments are as follows:

1. Discouraging the Filing of Unmeritorious Claims. In Foil, the court makes the following statement:

"The law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right".

The above also might logically be rephrased to state that the law ought not to be construed to compel an injured party to file an action before his attorney could ethically or legally do so.

Rule 11, Utah Rules of Civil Procedure, provides as follows:

"The signature of an attorney (to a complaint) ... constitutes a certificate by him that (the complaint) is well grounded in fact and is warranted by existing law...

If a (complaint) is signed in violation of this rule, the court ... shall impose ... an appropriate sanction, which may include an order to pay to the other party ... reasonable expenses ... including a reasonable attorney's fee."

Not not only does Rule 11 prohibit an attorney from filing unwarranted complaints, but this court has also adopted a strong position against the filing of appeals where there is no reasonable factual or legal basis for the appeal. Rule 33(a) and 40(a), Rules of Utah Supreme Court; Brigham City v. Mantua Town, 754 P.2d 1230 (Utah 1988) (attorney's fees and double costs awarded for unwarranted appeal).⁴ The policy of the law is and rightfully has been to discourage unfounded claims. In light of this policy it is untenable to argue that Hasenyager should have proceeded with an action that he simply could not file without violating his responsibilities as an officer of the court.

In the instant case, plaintiff's counsel, after making a diligent effort, didn't learn of any facts to justify

⁴ The Court of Appeals has also adopted the same policy. Rule 40(a) Rules of Utah Court of Appeals; O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987).

proceeding with the action. To now adopt respondent's position is to adopt a policy that would compel or encourage the premature filing of malpractice actions. If there is any type of suit that ought to be discouraged, it is a suit against a professional where his reputation and practice might be adversely effected by even a nonmeritorious suit. These suits are expensive to defend and often involve significant emotional impact upon the defendant. Indeed, as pointed out in Foil, one of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits against health care providers. Lawyers are under constant criticism from professional organizations and others because of alleged unfounded suits. Responsible plaintiff's Bar organizations such as ATLA and UTLA repeatedly admonish their members not to file unmeritorious suits. If there is anything the legal community doesn't need in this day and age of tort reform it is a policy of law that gives credibility to trigger happy plaintiff's lawyers. Plaintiff and her attorney James Hasenyager ought to be commended, not punished, for their exercise of restraint where they "suspected" negligence but could not after due diligence discover any facts to confirm their suspicions and to justify the filing of an action.

2. The Effect of Filing a Notice of Intent. But for the fact that plaintiff's counsel filed a Notice of Intent to Commence Malpractice Action, there is little doubt that her

action would not have been dismissed. Yet there is no reason why this single fact should become so absolutely determinative, especially where plaintiff had no knowledge of the filing and where counsel himself could not discover any facts to justify proceeding further.

The effect of the trial court's ruling is to create out of thin air a new test, unsupported by statutory or case authority, to start the statute running. The trial court is not free to do this. The critical test is whether plaintiff had knowledge of "the negligence that resulted in the injury" not whether her counsel filed a notice.

After everything else is said and done, the real issue in this case is whether a subjective suspicion of negligence on the part of the plaintiff constitutes knowledge. If it does, then the trial court was correct in its ruling. But if that is the law it runs directly opposite to the philosophy of Foil v. Ballinger, supra, and flies in the teeth of virtually every principle and consideration given as a reason for that decision.

One could not seriously and in good conscience urge that lawsuits ought to be encouraged where there is but a "suspicion" of negligence. Suspicion is not knowledge of negligence. It is urged by the plaintiff that the knowledge required to start the statute of limitations ought to be a knowledge of facts that would lead a reasonable prudent person to believe

that he had a cause of action. In a malpractice case, the facts of negligence would almost always focus on the professional standard of care and whether there had been a deviation from the standard. In the instant case, such facts came to light in May 1986. Until that time, neither plaintiff nor her counsel had anything beyond a bare suspicion.

3. No Serious Danger of Stale Claims. In fashioning a correct principle of law the court should not lose sight of the purpose of statutes of limitation generally -- namely, to guard against the difficulty of proof created by the passing of time.

In Utah, virtually all other negligence actions are covered by the 4 year statute of limitations at §78-12-25. This statute has worked well and without controversy for decades since the time of its passage. The health care profession, through its powerful legislative lobby, has been successful in getting special legislation to shorten medical negligence claims to 2 years from the date of discovery. But the same statute places a maximum time of 4 years from the date of the alleged act which is the same period that has historically been considered reasonable for everyone else.⁵ Thus, there could never be any legitimate danger from a stale claim.

For purposes of this appeal, it must be accepted as true that the defendants negligently killed Mrs. Schulz and now

⁵ See Sorensen v. Larsen, 740 P.2d 1337 (Utah 1987) holding that the 4 year provision operates as a statute of repose.

raise the statute of limitations as a technical defense. Under these circumstances, there is no reason for the court to adopt an unreasonably restrictive interpretation of the statute⁶.

4. Other Foil Considerations. In holding that discovery of "injury" means discovery of the negligence which resulted in the injury, the court in Foil v. Ballinger, supra, also emphasized that a different rule might discourage health care providers from candidly telling their patients of their mistakes in hopes that the statute of limitations might run before the patients are fully advised. The court noted that this would be an undesirable objective as "the law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damages ameliorated".

Another requirement under §78-14-4 is the duty of the plaintiff to exercise reasonable diligence in determining the negligence and cause of her injury. This requirement adds another factor to discourage the bringing of late claims.

In addition, the entire picture must be viewed in the light of the tremendous disadvantage that any layman has of understanding medical implications, medical standards, medical

⁶ This court has held that §78-14-4, the subject statute, should be construed in a harmonious manner to promote justice by precluding it from becoming a procedural trap for the unwary. Forbes v. St. Marks Hospital, 754 P.2d 933 (Utah 1987).

alternatives and the effects of medical treatment. Especially is this important in a case such as this where we are dealing with a rare disease that isn't entirely understood even by physicians. These factors weight heavily in favor of adopting a reasonably liberal discovery rule.

All three of the above considerations apply every bit as much to the facts here as they do to the facts of Foil.

5. Other Utah Authorities. Respondents in the lower court succesfully cited the case of Hove v. McMaster, 621 P.2d 694 (Utah 1980) in support of their motion for summary judgment. Hove does not represent any departure from Foil v. Ballinger and in fact supports the position of the appellant. In Hove, the lower court, after a full trial of the facts, found that the plaintiff had knowledge of her injury more than two years before she filed the action. Plaintiff was a professional nurse with medical experience and the trial court found that she either knew or resonably should have known of the defendant's negligence. On appeal, the Supreme Court affirmed the ruling pointing out that the issue was not whether plaintiff knew or reasonably should have known, but whether the trial court could have so found on the basis of the evidence that was presented. The findings of the lower court were sustained, but obviously the same evidence could have supported opposite findings if the court had believed the plaintiff. The

court cited Foil as authority for the proposition that knowledge is a fact question. There is a big difference between the instant case and Hove. In Hove, the case was reviewed with all facts to be considered in the light most favorable to the lower court's findings. Here all facts must be considered in the light most favorable to the plaintiff. Plaintiff has not as yet been given the luxury of a trial and is entitled to her day in court as was Barbara Hove.

An unfortunate and troublesome part of the Hove decision is the language on page 696 stating that the plaintiff there could have been expected to have recognized the possibility that the recurring discomforts were the result of the alleged negligent injection. The word "possibility" was picked up in a later federal case⁷ and was also used by Judge Hyde as a standard wherein he held that plaintiff need only know of the possibility of negligence in order to activate the statute of limitations (R-87). This obviously needs to be clarified by the court, as there are three possible meanings to the use of this language in Hove. They are:

1. The word "possible" could have been used innocuously or

⁷ See Hargett v. Limberg, 598 F. Supp 152 (D. Utah 1984). In Hargett, Judge Winder listed the elements as 1) the existence of any injury, 2) its cause, and 3) the possibility of negligence. There the cause was known, but plaintiff believed the negligence would be difficult to prove. In the instant case, plaintiff not only had no facts to show negligence but she had no facts to establish causation until May of 1986.

inadvertently merely in the sense to confirm the fact that the trial court had made an actual finding of knowledge or imputed knowledge on the part of plaintiff. If this is the case, the language is taken entirely out of context by the respondent and by the lower court. Plaintiff believes this to be the most logical explanation for the language.

2. It also could mean that the plaintiff in a malpractice action must know of some fact to confirm the possibility of negligence. If this is the case, the trial court still would have committed error because here the plaintiff didn't know of a single fact to confirm even the possibility of negligence until May 1986. Nor did she know of any fact to confirm the cause of the disease.

3. It could also mean that a suspicion of negligence satisfies the statute since anything is "possible"⁸. If this is the case, then Foil v. Ballinger is emasculated and plaintiff loses this appeal. For the reasons argued in pages 8 thru 16 of this brief, plaintiff does not believe this alternative to be a proper interpretation of the statute.

Another case relied upon by the respondents is Magoc v. Hooker, 796 F.2d 377 (10th Cir. 1986) wherein the statute of limitations was deemed to have commenced when plaintiff's

⁸ This is the position that was successfully argued to the trial court by the respondent (R-73).

counsel sent a demand letter to the defendant describing the claim. That case likewise is not in point as it was admitted there that plaintiff knew of the malpractice but just didn't know the full extent thereof⁹. In any event, Magoc isn't binding upon this court; the Utah Supreme Court doesn't need help from a federal court to interpret its own opinions.

CONCLUSION

Prior to May, 1986, plaintiff in this action had nothing more than a subjective suspicion of defendant's malpractice. A suspicion is not knowledge. This court should not adopt a rule that would promote the filing of lawsuits against professionals based upon mere suspicions. There are other adequate safeguards that protect against the filing of stale claims.

Plaintiff's knowledge is a fact question. The degree of knowledge necessary to trigger the statute of limitations ought to be a knowledge of facts that would lead a reasonably prudent person to believe that he or she had a cause of action. Plaintiff ought to be entitled to present her evidence on this issue to the trier of facts.

It is respectfully urged that the summary judgment in this

⁹ See also Duerden v. Utah Valley Hospital, 663 F. Supp 781 (D. Utah 1987).

case be reversed and that plaintiff's action be reinstated in the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the within brief have been served upon Francis J. Carney, Suiter, Axland, Armstrong & Hanson, Attorneys for Respondents, 175 South West Temple, Seventh Floor, Salt Lake City, Utah, 84101-1480, this 18 day of August, 1988.

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