

2002

Saundra Brower and Frank Oscar Brower v. Dr. David W. Brown, And I.H.C. Hospitals, Inc., a corporation, and I.H.C. Hospitals, Inc., a corporation Valley View Medical Center : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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20553

SAUNDRA BROWER and  
FRANK OSCAR BROWER,  
  
Plaintiffs-Appellants,  
  
vs.  
  
DR. DAVID W. BROWN, and  
I.H.C. HOSPITALS, INC.,  
a corporation, and I.H.C.  
HOSPITALS, INC., a corporation  
VALLEY VIEW MEDICAL CENTER,  
  
Defendants-Respondents.

Case No. 20553

PETITION FOR REHEARING OF APPELLANTS  
SAUNDRA BROWER AND FRANK OSCAR BROWER

Petition for Rehearing from decision of the Supreme Court  
of the State of Utah, filed September 10, 1987

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STATEMENT OF CASE

Appellants are appealing only from that portion of the decision of the Supreme Court of the State of Utah filed September 10, 1987 which affirms the summary judgment in favor of defendant I.H.C. Hospitals, Inc.

This was an appeal from an order granting summary judgment against the plaintiffs in that the statute of limitations barred the causes of action.

In the opinion of the Supreme Court filed September 10, 1987, the order granting summary judgment against Dr. Brown was reversed, but the court, being equally divided as to the plaintiffs claim against I.H.C., affirmed the summary judgment as to that defendant. The plaintiff's hysterectomy occurred October 22, 1980 and hospitalization followed. In July of 1981, plaintiff Sandra Brower sought emergency medical treatment at Kanab hospital with blood clot problems arising out of an injection and puncture in her leg she received while in the hospital recovery room on October 22, 1980.

Plaintiffs gave the 90 days statutory notice of intent on February 16, 1983 and filed their action June 14, 1984.

Plaintiffs contend that the negligence of the hospital relative to the injection and puncture were not discovered until July 1981.

## SUMMARY OF ARGUMENT

While in the recovery room in October 1980 at the I.H.C. hospital in Cedar City, plaintiff Sandra Brower received some type of injection variously referred to as a "K" shot or injection. She was not conscious at the time, but it was given while in the recovery room recovering from the hysterectomy. Plaintiff's sister and husband saw the amount of blood spurting from her thigh (deposition of Sandra Brower, pg. 94 lines 2-4).

The Court in its opinion has reviewed the facts of the matter.

The injection, whatever it was, was part of a "single package" treatment given to plaintiff. Plaintiff had no way of separating the injection from the other treatment received at the hands of her Doctor, Dr. Brown. She surrendered herself into the hands of Dr. Brown, who placed her in the hospital where the surgery was performed. Dr. Brown tended her through all of the proceedings. She had no way of knowing until July of 1981 that something was wrong in this "single package" course of treatment. Dr. Brown had been advised of the puncture wound, but did not respond. Plaintiff therefore, could only assume that it was part of the treatment for her illness and was not alerted to, nor became aware that anything was wrong, until the emergency hospital treatment in July of 1981 when she was advised of the negligence of whoever administered the injection to her. Nothing had happened prior to that time to lead her to believe that there was anything wrong other than the usual recovery problems.

The matter should have been treated as a single course of conduct or transaction; and the trier of fact should determine, as the legislature intended, whether the plaintiff knew or should have known at the time of the injection of the negligence of the defendant I.H.C. (Utah Code Ann. Sec. 78-12-47 (1987)).

### ARGUMENT

#### POINT I

APPELLANT'S CAUSES OF ACTION SHOULD HAVE BEEN TREATED AS ONE TRANSACTION BY THE REVIEWING COURT.

Since the legislature has established the method for determining cases of this type, as to whether the plaintiff has met the statute of limitations problem, the Court should have allowed the trier fact to determine the question to the statute of limitations. The procedure has been expressly set up by the legislature for determination of when the Plaintiff should have discovered the injury (Utah Code Ann. Sec. 78-12-47 (1987)).

An analogy can be drawn between the cases involving the leaving of the broken surgical needles, sponges, and other foreign matters inside the body of a patient. The depositing of some material inside of a patient's body by injection is no different than leaving of a sponge or some form of material inside a body. In one case, the body opening is closed up

afterwards. In the case of the injection, the substance is injected into the body, and left there afterwards. The only difference is that the puncture wound, if any created by the needle is not sewn shut.

Further, a needle, in and of itself can, as a sharp instrument, can damage a nerve or other tissue in the body. Since the damage is out of the vision of the patient it is similar to surgery in that the actual injury may occur inside the body. The damage may be left inside the body, as in the case of a foreign object being left in the body, or as in the case of negligence in a surgical procedure itself, which is afterwards hidden by being sutured.

Is there really a distinction between the two? In the instant case, the surgical procedure, if we can so allude to it, is done by a needle. The discovery of the negligence was not discovered until July 1981, which was well within the statute of limitations.

The Court has cited the case of Christensen vs Rees, 436 P. 2d, 435 (Utah 1968). That case is authority for the proposition that the statute of limitations does not begin to run until the patient has learned of the presence of a foreign object, which in that case was a broken surgical needle. That is analgous in that Plaintiff did not learn of the presence, presumably of some injurious substance, or damage to the interior tissues of her body, until July of 1981, in an emergency precipitated hospitalization.

In the Case of Ruth vs Dight, et. al, 75 Washington 2d 660, 435 P. 2d 631 (Washington 1969), the Washington Supreme Court held that the statue of limitations commences to run when the patient discovers, or in the exercise of reasonable care for his own health and welfare should have discovered the presence of a substance or article in his body. A surgical sponge was left in the patient's body. Some 20 years elapsed, until discovery of the sponge was made. During that period of time, the patient sought continued medical assistance, to no avail. In addition the patient had extreme pain and distress.

There is no difference between a foreign object left in a body through surgical means after which the cavity if sutured and the placement of a foreign or harmful object or substance in the body by injection, or damage of interior body tissue, by needle. A small blood spurt per se from an injection certainly does not put the patient on notice of some impending problem within the body where the needle was injected. Especially, when inquiry had been made, but no response received from Dr. Brown. The plaintiff assumed by the lack of interest of the defendants that there was no problem, and that this was a normal, expected part of the whole transactional hysterectomy procedure.

The Ruth Court, supra at pages 436, 437, stated, " Unless the legislature has acted affirmatively, the Court should attempt to strike a balance between harm to the person who would not in the usual course of events know he had been wronged until long after the statue of limitations had cut off his legal remedies,

or being deprived of remedy versus harm of being sued. . ."

The Ruth Court also discussed the concepts of fundamental fairness and the common law purpose to provide a remedy for every genuine wrong. This latter overriding concept tempers our common law system, and the implementation of statutory law relative thereto.

Hence, the hysterectomy hospitalization and events related thereto, while different causes of action should be treated as one single transaction, or course of conduct and the trier of fact should determine when the plaintiff knew or should have known of the negligence of I.H.C.

There is no difference between the implantation into the body of some harmful or foreign substance, and leaving a foreign object in the body after surgery; conversely there is no difference between an injury to tissue or otherwise in a patient's body, created by a needle and an injury created negligently during surgery which is afterwards sutured. The patient could have an infected or bloody incision, and assume it is a normal part of the surgical process.

## POINT II

THE SUPREME COURT SHOULD HAVE REVERSED THE MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT.

The Supreme Court of Washington in the case of Ohler vs. Tecoma General Hospital, et. al 92 Wash 2d 507, 598 P. 2d 1358 (Washington 1979), in a case involving administration of oxygen

to a baby resulting subsequent blindness, held that in determining accrual of the cause of action, that all of the essential elements of the possible cause of action, to wit, duty, breach, causation, and damages, must be "discovered" before the cause of action begins running. All essential elements of the possible cause of action should have reasonably been discovered by the patient before the cause of action occurs. In instant case, the plaintiff did not become aware of the duty of the health care provider, nor the breach of duty of the health care provider, nor was she aware of any damages, until July of 1981, which is within the statutory period.

Should she have had notice of some complication because her husband and sister saw blood spurting from an injection. She relied upon the health care providers to notify her of any problem thereby. She did discover the following year, in July 1981, that there was a duty, that the duty had been breached, and that she was damaged, because of the complications of the injection and/or puncture in her leg on October 22, 1980.

#### CONCLUSION

It is respectfully submitted that the Court should have reversed the order granting summary judgment as to defendant I.H.C. and treated the entire course of conduct as one "transaction". There is no difference between an injurious "substance" left in the body from an injection or damage done by

a needle in the course of an injection, and something left in the body during surgery.

The trier fact should determine the question of the statute of limitations, as provided by the legislature, and the order granting summary judgment in favor of defendant I.H.C. be reversed.

Respectfully submitted,



Russell A. Cannon  
Attorney at Law

CERTIFICATION OF COUNSEL

Russell A. Cannon, counsel for the petition certifies that the petition for a rehearing is presented in good faith and not for delay.

September 23, 1987.



Russell A. Cannon  
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the forgoing, Petition for Rehearing of Appellants, Sandra and Frank Oscar Brower, postage prepaid this 24th day of September, 1987, to:

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