

2009

Midge Morgan v. Intermountain Health Care, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MIDGE MORGAN,

Plaintiff and Appellant,

vs.

INTERMOUNTAIN HEALTH
CARE, INC., IHC LDS HOSPITAL
and JOHN AND JANE DOES I-XX,

Defendants and Appellees.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20091044-CA
Trial Court Case No. 050918581

INTERLOCUTORY APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE L.A. DEVER

Oral Argument Requested

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ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DISMISSED MORGAN'S NEGLIGENCE CLAIMS ON SUMMARY JUDGMENT BECAUSE EXPERT TESTIMONY WAS UNNECESSARY TO ESTABLISH THAT HER INJURIES WERE CAUSED BY THE ALLEGED NEGLIGENCE OF THE HOSPITAL.

Defendants rely upon this Court's ruling in *Fox v. Brigham Young University*, 2007 UT App. 406, 176 P.3d 446., to argue that expert witness testimony is necessary in the present case to prevent jurors from having to "resort to speculation when making a decision on whether the alleged negligence caused Morgan's injuries." In *Fox*, the plaintiff sued the university alleging negligence that caused her to fall down a flight of steps on campus, resulting in a broken right leg. Significantly, the plaintiff made several statements to the EMTs responding to the scene:

While the EMTs were assessing her condition and treating her, Mrs. Fox repeatedly stated to them that she felt her right knee go out as she was going down. She explained to the EMTs that she fell down only one stair, that she had been previously diagnosed with osteoarthritis in her right knee, and that there was some missing cartilage in that knee. Mrs. Fox also stated that she did not hold BYU responsible, but that she had always felt that the stairs by the Harman Building were too narrow and have always been dangerous.

Id. at ¶ 5.

The plaintiffs did not provide a causation expert, arguing instead that Mrs. Fox's injuries were "within the realm of common experience and because there was no significant lapse of time between the injury and the onset of the physical condition for which Ms. Fox sought compensation." *Id.* at ¶ 9. The trial court granted summary judgment. On appeal, this Court affirmed the trial court's ruling, holding that the trial court "did not err in dismissing the Foxes' negligence claim for failure to present expert testimony on the element of causation because the factors associated with Mrs. Fox's fall and injury were sufficiently medically complex to require such testimony." *Id.* at ¶ 25.

The present case is distinguished from *Fox* in several respects. First, contrary to Defendants' characterization, Midge Morgan ("Midge") did not have a "long history of shoulder problems." Midge testified that she dislocated her right shoulder in 1970, requiring surgery to put a staple. The staple was removed approximately three or four months later. (Rec. 261) She testified that between 1970 and 1998, she had no further shoulder problems. (Rec. 261) In June of 1998, Midge was in an automobile accident. As a result of that accident, she suffered pain in the upper part of her shoulders, where they connect to her neck. (Rec. 262). Midge's treating physician, Dr. Stephen J. Warner ("Dr. Warner") testified that the symptoms Midge reported at this time

were consistent with neck injuries sustained in the automobile accident and not shoulder injuries. (Rec. 285; 289, ¶ 8) Midge testified that she does not recall any doctor telling her that she had any preexisting or degenerative shoulder injuries. (Rec. 269) Immediately after the incident with Nurse Rebecca Davis (“Ms. Davis”), Midge did not provide alternate explanations for her injuries, unlike Mrs. Fox. She testified that the pain she felt after Ms. Davis attempted to yank her out of the bed was unlike anything she had ever felt before. (Rec. 276) In short, Midge’s injuries bear little resemblance to those in *Fox*.

Second, unlike *Fox*, Defendants in the present case were not passive agents in Midge’s injuries. No other human actors directly acted upon Mrs. Fox; her leg gave out as she was descending the stairs. In the present case, Midge’s injuries did not occur because she was simply lying in her hospital bed. Midge argues that her injuries were the direct result of the actions of Ms. Davis, the agent of the Defendants. Midge alleges that had Ms. Davis not attempted to yank Midge out of bed, her rotator cuffs would not have torn.

Plaintiff also rejects the argument that Defendants’ unrebutted expert testimony warrants summary judgment. In *Baczuk v. Salt Lake Regional Medical Center*, 2000 UT App. 225, 8 P.3d 1037, this Court rejected the argument that

summary judgment is always warranted in cases where one party provides un rebutted exculpatory evidence, holding:

When a plaintiff relies on *res ipsa loquitur*, “[if] any defendant can come forward with a *conclusive exculpatory statement* or explanation of how the injury occurred, then the doctrine of *res ipsa loquitur* will not apply because there is no longer a need for an inference of negligence or causation.” If, however, defendant’s explanation is not conclusive, “then it is up to the finder of fact to decide whether plaintiff has established all of the elements of negligence...by a preponderance of the evidence.”

Id. at ¶ 17 (internal citations omitted) (emphasis in original).

In the present case, Defendants argue that the nature of Midge’s injuries require expert testimony in order to be understood by the jurors. To support this argument, Defendants offer the testimony of Dr. Bruce Evans (“Dr. Evans”) to explain how Midge’s injuries occurred. Dr. Evans testified that in his opinion, the rotator cuff injuries Midge suffered were inconsistent with they type of injury she alleges. (Rec. 425-426). The testimony of Dr. Evans is offered as an exculpatory explanation of the cause of Midge’s injuries.

Plaintiff counters Dr. Evans’ testimony with that of Midge’s treating physicians, Dr. Warner and Dr. Michael Metcalf (“Dr. Metcalf”). Dr. Warner testified that he has cared for Midge since May 4, 1999. (Rec. 282) He also testified that the symptoms Midge complained of prior to the surgery on February 26, 2003, were consistent with her neck injuries, not shoulder

problems. (Rec. 239, ¶ 8; 285) He also testified that if the incident happened as Midge described, this single incident could have torn both of Midge's rotator cuffs. (Rec. 288-289) In the present case, therefore, Defendants have not offered a "conclusive exculpatory statement or explanation of how the injury occurred," as this Court held in *Baczuk*. As such, summary judgment was inappropriate in this case. It falls to the finder of fact to examine all of the facts of the case to determine whether Plaintiff has established all of the elements of negligence by a preponderance of the evidence.

II. EXPERT TESTIMONY IS NOT NECESSARY TO ESTABLISH THE STANDARD OF CARE AND BREACH OF THE STANDARD OF CARE IN THIS CASE.

Defendants argue that expert witness testimony is required to demonstrate the standard of care and breach of the standard of care in medical malpractice cases. Defendants cite *Dalley v. Utah Valley Regional Medical Center*, 791 P.2d 193 (Utah 1990), and *Chadwick v. Nielsen*, 763 P.2d 817 (Utah App. 1987) to support this contention. But a closer reading of these and other cases indicates that the rule is not as clear-cut as Defendants would make it appear. In *Dalley*, for example, the plaintiff brought a medical malpractice suit, claiming that she received a burn on her right calf while undergoing an elective caesarian section operation. The trial court granted the defendants' motion for summary

judgment on the grounds that the plaintiff failed to produce expert medical testimony to establish what instrumentality caused the burn. In overturning the trial court's decision, the Utah Supreme Court held:

It would appear that it is within the knowledge and experience of laypersons that a woman with a healthy leg does not usually go into an operating room for a caesarean section operation and emerge with a burn on her leg without some occurrence of negligence. This type of inference does not require expert testimony concerning the standard of care and breach of that standard.

Another requirement to establish the evidentiary foundation of *res ipsa loquitur* is that the plaintiff prove that she did not contribute to the injury suffered. Again, it would appear that it is within the general experience and knowledge of laypersons that a woman who is under an epidural anesthetic rendering her essentially paralyzed from the waist down during the caesarian section delivery of a child generally is not in a position to negligently or intentionally burn herself on the back of her right calf. We conclude that laypersons are capable of discerning whether the injury occurred irrespective of any participation by the plaintiff.

Id., 791 P.2d at 196.

A better reading of the rule regarding expert testimony in medical malpractice cases comes from *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992). In *King*, the plaintiff brought suit against her physician and the manufacturer of an intrauterine device (IUD), after the IUD perforated her uterus. The trial court granted summary judgment for the manufacturer. In reversing and remanding the trial court's ruling, the Utah Supreme Court held:

Accordingly expert evidence is usually necessary to establish either direct evidence of malpractice or a foundation for a legitimate *res ipsa* inference, “because the nature of the [medical] profession removes the particularities of its practice from the knowledge and understanding of the average citizen.

Of course, in some medical malpractice cases, common knowledge and experience of laypersons is sufficient to establish a foundation for a conclusion of negligence. A classic example is leaving a foreign object in a patient’s body during surgery. Clearly, a lay person can reasonably and legitimately infer from his or her common knowledge and experience that leaving a foreign object in a person during a surgical operation is a negligent act.

Id., 832 P.2d 858, 862 863 (Utah 1992) (citations omitted, emphasis added).

In *Baczuk*, the plaintiff received a pressure injury and burns to his buttocks and right leg from a heating pad while he was undergoing surgery to reattach fingers that had been severed in a snowblower accident. The defendants moved for summary judgment, on the grounds that the plaintiff had offered no expert opinion to rebut the defendants’ expert opinions. The trial court granted summary judgment, concluding that, in the absence of such expert testimony, there was no issue of material fact regarding the defendants’ alleged negligence. In reversing and remanding the trial court’s decision, this Court held that “[i]t is within the understanding of laypersons that [the plaintiff’s] burn and/or pressure injury on an originally uninjured part of his body not involved in the surgery more probably than not resulted from negligence.” *Id.* at ¶ 7. This Court went on to state:

It requires no medical or technical expertise to understand that a person may suffer a burn and/or a pressure injury from lying in the same position for too long on a heating pad. Nor does it require medical expertise to understand the steps that must be taken to avoid such injuries. Accordingly, Plaintiff was justified in relying on the understanding of laypersons to survive Defendants' summary judgment motion.

Defendants argue that their experts' affidavits show that the cause of Plaintiff's injury is beyond the understanding of laypersons. Where, as here, a plaintiff relies on the knowledge and understanding of laypersons to establish the evidentiary foundation from which negligence may be inferred, "a defendant may challenge the adequacy of that foundation with evidence showing that [the inference of negligence] is actually beyond the realm of common knowledge and experience." However, summary judgment for defendants will be denied if "the *res ipsa loquitur* inference [is] strong enough to survive a motion for a directed verdict at the close of the plaintiff's case."

Id. at ¶¶ 11-12 (internal citations omitted).

In *Collins v. Utah State Developmental Center*, 1999 UT App. 336, 992 P.2d 492, the plaintiff brought suit as guardian for a mentally retarded adult residing in an intermediate care facility. The individual was injured while playing on a swing while under the supervision of two staff members of the facility. The trial court granted the facility's motion for a direct verdict on the grounds that without expert testimony, the plaintiff did not establish the applicable standard of care and the breach thereof. In reversing and remanding the trial court's ruling, this Court held that expert testimony was unnecessary:

The record does not show, and the Center does not suggest, that the implementation of the decision to allow Collins to swing had “to be performed by a person with medical training or that it involved the exercise of medical judgment or required medical expertise.” Most jurors could easily ascertain the standard of care owed to a three-year-old when supervising her on a swing. Similarly, they would understand the standard of care owed to a person with Collins’ capacities. Simply put, the duty the Center owed to Collins, and its alleged breach, required no expert testimony.

Collins therefore did not need expert testimony to establish the appropriate standard of care and any breach thereof. “In this type of situation, the plaintiff can rely on the common knowledge and understanding of laymen to establish this element.”

Id., 1999 UT App 336, ¶¶ 10-11, 992 P.2d 492 (internal citations omitted).

Also illuminating in the present case is the Georgia Court of Appeals decision in *Moore v. Louis Smith Memorial Hospital, Inc.*, 454 S.E.2d 190 (Ga. App. 1995), discussed at length by the Utah Court of Appeals in *Collins*, 1999 UT App. 336, ¶¶ 9-10, 992 P.2d 492. In *Moore*, a nursing home patient was injured when being moved from her wheelchair to her bed when her foot became caught in a bed rail. The court held that expert testimony was not necessary in this case, as the circumstances did not require the exercise of expert medical judgment:

In this case, plaintiff was injured while being moved from her wheelchair to her bed. The record does not show and defendant does not suggest that this aspect of plaintiff’s care was required to be performed by a person with medical training or that it involved the exercise of medical judgment or required medical expertise. “[U]nder all of the evidence of

record, the safe movement of [plaintiff] from the [wheelchair to the bed] was merely an act of relative physical strength and dexterity rather than an act requiring the exercise of expert medical judgment.”

Id., 454 S.E.2d 192 (citation omitted, alterations in original). The facts in *Moore* are quite similar to the present case. Both involve moving patients, rather than complex medical procedures or specialized medical knowledge. Removing Midge safely from the bed, as in *Moore*, was simply a matter of the relative strength and dexterity of Ms. Davis. It did not require the exercise of expert medical judgment. This appears to be the type of exception to the expert witness requirement envisioned by the weight of Utah case law.

Likewise, in the present case, it would appear to “be within the knowledge and experience of laypersons” that a woman does not usually go into the hospital for neck surgery and emerge with not one, but two torn rotator cuffs without some kind of negligence. Plaintiff is justified in relying on the understanding of laypersons to understand the circumstances surrounding her injuries. Midge testified that prior to the surgery on February 26, 2003, the pain she was suffering did not come from the location of the rotator cuffs.

(Rec. 262). Dr. Warner testified that he did not attribute the pain Midge experienced as related to her shoulders. (Rec. 288) Immediately after the incident with Ms. Davis, Midge testified that she felt excruciating pain where

the shoulders and upper arms meet, and that it was unlike anything she had experienced before. (Rec. 276).

The present case is also distinguishable from both *Hoopiaina* and *Chadwick*. In *Hoopiaina*, for example, the plaintiff contended that he was mistakenly administered quinadine intended for another patient in the same hospital room. The plaintiff suffered injuries to his lungs and cardiovascular system, which he attributed to the drug. In this case, expert testimony was mandatory, as the effects of quinadine are clearly beyond the understanding of the average person.

The issue in *Chadwick* was whether the defendant committed malpractice in the course of removing a varicose vein from the plaintiff's leg, a process known as a saphenous phlebectomy. Prior to this operation, plaintiff insisted on having a phleborheogram test done to determine if her veins and circulatory system were functioning properly. The plaintiff in this case conducted no discovery whatsoever. Expert testimony was required in this case in order to determine whether the defendant properly analyzed the results of the test prior to conducting the surgery, as this knowledge was also clearly beyond the understanding of the average person. This Court affirmed summary judgment for the defendant physician, on the grounds that the plaintiff failed to provide

qualified expert testimony necessary to understand the required standard of care. But in so doing, this Court reaffirmed the common knowledge exception to the expert witness rule, stating:

Due to the technical and complex nature of a medical doctor's services, expert medical testimony must be presented at trial in order to establish the standard of care and proximate cause – except in unusual circumstances. For example, “*expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.*”

Id., 763 P.2d at 821. (citations omitted) (emphasis added)

The present case is significantly different. It does not require specialized knowledge of drugs, or of vascular surgery, to analyze the propriety of Ms. Davis' actions on the day in question. As the court held in *Moore*, this is an issue of relative strength and dexterity rather than an act requiring the exercise of expert medical judgment. No specialized knowledge is required, making expert testimony unnecessary. In addition, unlike *Chadwick*, extensive discovery has been conducted in this case. Several depositions have been taken, both parties have been served and answered, and both parties have provided documents. Midge's treating physicians are prepared to testify regarding the injuries to Midge's shoulders. The primary question at issue in this case concerns the manner in which Ms. Davis attempted to move Midge out of the hospital bed. Midge claims that Ms. Davis yanked her out of bed by the arms. Ms. Davis

claims that she put her arm around Midge's back to support her. This is a clear issue of fact, which makes summary judgment unwarranted in this case.

CONCLUSION

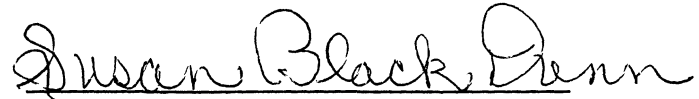
Summary judgment is inappropriate in this case. Expert testimony is not necessary in this case, either to establish that her injuries were caused by the alleged negligence of the hospital or to establish the requisite standard of care and breach of the standard of care. Moving a patient from a hospital bed does not require the type of expert knowledge required in *Hoopiiaina* or *Chadwick*. As the court held in *Collins* and *Moore*, in this kind of case, the plaintiff can rely on the common knowledge and understanding of laymen. A layperson can assess whether or not it is negligent to yank or jerk a patient out of a hospital bed with such force that it causes injury.

In addition, the evidence provided by Dr. Metcalf, Dr. Warner and Midge creates a question of fact for the jury to determine whether Midge's torn rotator cuffs could have been caused by Ms. Davis yanking or jerking her out of bed.

For the foregoing reasons, Plaintiff Midge Morgan respectfully requests the Court to reverse the decision of the trial court.

DATED this 22nd day of September 2010.

DUNN & DUNN, P.C.

A handwritten signature in cursive script that reads "Susan Black Dunn". The signature is written in black ink and is positioned above the printed names of the attorneys.

TIM DALTON DUNN

SUSAN BLACK DUNN

CHRYSTAL MANCUSO-SMITH

Attorneys for Plaintiff Midge Morgan

CERTIFICATE OF SERVICE

Pursuant to UTAH R. APP. 21(b), the undersigned hereby certifies that on the date indicated below I caused to be served a true copy of the foregoing

REPLY BRIEF OF PLAINTIFF AND APPELLANT MIDGE

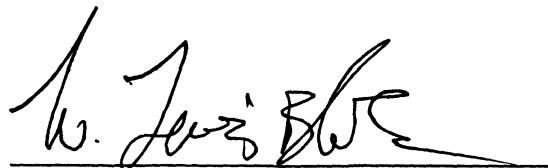
MORGAN, by the method indicated below, to the following:

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DATED this 22nd day of September 2010.

DUNN & DUNN, P.C.

A handwritten signature in black ink, appearing to read "W. Lewis Bott", written over a horizontal line.

Legal Assistant