

1980

Barbara M. Hove v. John S. McMaster, D.D.S., and )  
Highland Dental Clinic, Inc., A Professional  
Corporation : Appellant'S Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BARBARA M. HOVE, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
JOHN S. McMASTER, D.D.S., and )  
HIGHLAND DENTAL CLINIC, INC., )  
a professional corporation, )  
 )  
Defendants-Respondents. )

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Case No. 16850

APPELLANT'S BRIEF

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Appeal from a Judgment of the District Court  
of Salt Lake County

Honorable Ernest F. Baldwin, Judge

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Case No. 16850

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APPELLANT'S BRIEF

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NATURE OF THE CASE

This is an action for damages resulting from an act of dental malpractice. The only issue before the court is whether appellant's claim is barred by the statute of limitations contained in the Utah Health Care Malpractice Act, § 78-14-4, Utah Code Annotated (1953, as amended).

DISPOSITION IN TRIAL COURT

The trial in this action was bifurcated, and the issue of whether appellant's claim was timely filed under the Act was tried to the court without a jury. The court held that appellant's claim was barred by the applicable statute of limitations for the reason that appellant failed to commence her action against respondents within two years from the date on which she knew

or reasonably should have known that she had sustained an injury and that it was caused by the defendant John S. McMaster, D.D.S. Appellant's complaint was dismissed with prejudice, and respondents were awarded their costs.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and entry of judgment in her favor that her claim, as a matter of law, is not barred by the statute of limitations.

#### STATEMENT OF FACTS

On February 27, 1974, appellant, Barbara M. Hove (hereinafter "Hove"), a registered nurse and housewife, visited respondent John S. McMaster, D.D.S. (hereinafter "Dr. McMaster"), at his office at the Highland Dental Clinic, for the purpose of having a cavity filled in the upper right second molar (R. 22). Preparatory to the filling, Dr. McMaster made two injections of an anesthetic (R. 22). After the first injection, Dr. McMaster started drilling on the tooth, but the injection did not appear to deaden the pain, so he gave Hove a second injection (R. 23). During the second injection, the needle "hit something hard . . . and then he [Dr. McMaster] kept pushing it and then it seemed to give way and hit something soft and when it did I [Hove] got the shock in my face. . . ." (R. 24.)

Hove felt that the shock sensation was "unusual" or "different," but attributed the sensation to the dual injections, which she had never before undergone (R. 27).

After the numbness of the anesthesia dissipated, Hove experienced a "plugged-up" sensation on the right side of her face and nose (R. 28). During the months immediately following the injection, she experienced a tingling sensation in the same area and suffered from several bloodshot right eyes and pressure behind that eye (R. 12, 28). She conveyed these problems to Dr. McMaster on several occasions, and he advised her to "take some aspirin and it would calm down and go away" (R. 29).

Approximately six months after the injection, the symptoms subsided, but then, after a few months, they again flared up. This pattern persisted for more than three years (R. 30, 49, 50). Hove testified that she knew something was wrong--that "something felt funny"--but she did not attribute the problem specifically to the injection (R. 29). Approximately one year after the injection, in February 1975, Hove suggested to Dr. McMaster that she might visit a neurologist in an attempt to determine the origin of her symptoms, and Dr. McMaster agreed that that would be a good idea (R. 30).

On February 24, 1975, Hove visited Wayne Hebertson, M.D., a neurologist, who performed a neurological examination (R. 31, 70, 71). On the basis of his examination, Dr. Hebertson concluded that there were several possible explanations for the symptoms: local infection of facial nerves due to "shingles," arthritis in the jaw joints, a complication arising out of the dental injection, "and/or some other dental source of pain in her mouth and jaw" (R. 71). No abnormalities could be detected and no definite diagnosis was rendered (R. 72). He at no time suggested to Hove that her symptoms were the product of neurological injury resulting from the dental injection (R. 39).

On September 9, 1975, Hove visited a second dentist, Wayne Provost, D.D.S., for a second opinion concerning her symptoms (R. 32, 39, 58). She

asked Dr. Provost whether the pain on the right side of her face could be due to the dental injection (R. 58). Dr. Provost replied that that was "unlikely" (R. 58), and he too never suggested that the problem was of a neurological nature (R. 39).

In November 1975, Hove sought treatment for her bloodshot right eye from an ophthalmologist, George S. Tanner, M.D. Dr. Tanner could offer no diagnosis of the problem (R. 40).

In March, 1977, Hove awoke in the middle of the night with excruciating pain in the same area of the face and jaw (R. 34). She again sought Dr. Provost's treatment, and he referred her to an endodontist, Richard Ellgren, D.D.S. (R. 34). Dr. Ellgren examined Hove and opined that he felt the problem was sinus related (R. 34). Therefore, he referred Hove to Glen K. Lund, M.D., an ear, nose and throat specialist. Dr. Lund examined her on March 10, 1977, and diagnosed the problem as a "nasal obstruction" and as "atypical facial neuralgia," possibly due to the dental injection (R. 65). However, Dr. Lund testified that he did not tell Hove of this portion of the diagnosis (R. 65), and Hove so testified (R. 42).

Continuing her efforts to uncover the cause of her symptoms, Hove visited a second neurologist, Leonard W. Jarcho, M.D., on April 26, 1977 (R. 73, 74). Dr. Jarcho conducted a complete neurological examination and could find no evidence of neurological injury (R. 74). Indeed, he concluded that there was no direct connection between the dental injection and her complaints (R. 74).

In June 1977, Hove and her family moved to Cleveland, Ohio. There she visited another dentist, Stewart Katz, D.D.S. (R. 43). She explained to him her symptoms, but he was unable to make a diagnosis (R. 43, 44). In

September, 1977, Hove began experiencing some "tugging" at the corner of her right eye and some aching above the tooth treated by Dr. McMaster, so Dr. Katz referred her to another endodontist in Cleveland, Dr. Falkner (R. 44). Dr. Falkner performed an examination, but could offer no diagnosis (R. 44). Shortly thereafter, an internist, Dr. Mengies, examined Hove (R. 44). His diagnosis, if any, is unclear (R. 35, 44).

Finally, in October 1977, Hove visited yet another neurologist, Patrick Sweeney, M.D. Dr. Sweeney performed a thorough neurological examination, and advised Hove for the first time that she was suffering from "atypical facial pain due to causalgia" which was probably caused by Dr. McMaster's injection of three and a half years earlier (R. 46, 49). No other physician prior to this had advised Hove that this was the problem (R. 46, 49). On the following day, another neurologist, John Gardner, M.D., confirmed Dr. Sweeney's diagnosis (R. 47). Dr. Gardner's diagnosis was that:

This patient has suffered causalgia resulting from mechanical more than chemical injury to the maxillary nerve, the second division of the trigeminal or fifth cranial nerve. Onset precisely at the time of dental manipulation does provide a very clearcut etiological relationship to this procedure. The type of pain which she describes and the response to stellate ganglion injection are all very consistent with causalgia. The remaining pain is less specific, but of similar origin. I see no other reasonable cause for her symptoms. (Ex. P-1.)

On December 29, 1977, Hove served a Notice of Intent to Commence Action upon Dr. McMaster. Her complaint was filed on February 22, 1978.

## ARGUMENT

THE COURT ERRED IN HOLDING THAT APPELLANT'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS SINCE HER ACTION WAS FILED WITHIN TWO YEARS OF THE DATE ON WHICH SHE KNEW OR COULD REASONABLY BE EXPECTED TO KNOW THAT A KNOWN INJURY WAS CAUSED BY WHAT IS ALLEGED TO BE A NEGLIGENT ACT.

The statute of limitations contained in the Utah Health Care Malpractice Act, § 78-14-4, Utah Code Annotated (1953, as amended), provides:

(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 . . . . [Emphasis added.]

At issue in the instant case is whether "the injury" occurred on the date of Dr. McMaster's injection into Hove's gum--February 27, 1974--or on the date on which Hove was first told by any physician or dentist that her symptoms were the manifestations of injury to the second division of the trigeminal nerve caused by the injection--October 1977. The issue and facts of this case are practically indistinguishable from those addressed recently by this court in Foil v. Ballinger, 601 P.2d 144 (1979).

The proper construction to be accorded the term "injury" in the above statute was a major issue resolved by this court in Foil. In that case, plaintiff sustained a back injury in 1967 which required repeated treatment and surgery. On January 18, 1974, plaintiff was administered a permanent subarachnoid phenol block. Following this surgical procedure, she suffered from certain rectal and bladder problems and, in an effort to remedy those problems, underwent additional surgery. Her condition persisted and presumably she underwent further examinations in an effort to uncover the reasons for her continuing problems. On June 23, 1977, a medical panel

submitted a written report concerning plaintiff's medical condition to the Utah State Industrial Commission. The report disclosed that both the rectal and the bladder problems of the plaintiff had been caused primarily by the subarachnoid block administered on January 18, 1974.

In response to plaintiff's claim that the surgeon who performed the block operation was guilty of malpractice, defendant argued that the action filed January 10, 1978, was time-barred because plaintiff knew of her injury at or shortly after the administration of the subarachnoid block in January 1974. Plaintiff, on the other hand, argued that the crucial date for determining when the limitations period commenced to run was the date she first became aware of the causal relationship between her physical problems and the alleged negligent operation, that being June 23, 1977, when the medical panel submitted its report.

This court stated the issue as follows: "whether the statute of limitations commences to run from the date of injury or from the date an injured person knows or should know that a known injury was caused by what is alleged to be a negligent act." Id., at 145 ). The conclusion, based upon the nature of malpractice actions and prior Utah law, was that "the statute begins to run when an injured person knows or should know that he has suffered a legal injury (Id. at 147) (emphasis added). That is, "[t]he two year provision does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action." Id., at 148. Thus, this court rejected the notion that the limitations period necessarily begins to run from the date on which physical symptoms first appear, since even though the patient "may be aware of a disability or dysfunction, there may be, to the untutored under-

standing of the average layman (and 'even those who are trained in medical science' such as Hove), no apparent connection between the treatment provided by a physician and the injury suffered." Id., at 147. For this reason, "when injuries are suffered that have been caused by an unknown act of negligence by an expert, 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." Id., at 147.

This court found support for its holding in the earlier Utah case of Christiansen v. Rees, 20 Utah2d 199, 436 P.2d 435 (1968). Christiansen involved an action for injuries suffered due to alleged negligence in leaving a broken surgical needle in the plaintiff. The location of the needle was not disclosed nor discovered until almost ten years after the operation in which it was used. The action was filed soon after discovery, but apparently beyond the applicable limitations period. The court adopted plaintiff's contention that the statute did not begin to run until plaintiff discovered or should have discovered the existence of the foreign object. In Foil, this court reasoned that it could see "no basis for making a legal distinction between having no knowledge of an injury, as was the case in Christiansen, and no knowledge that a known injury was caused by unknown negligence." Id., at 148.

In the instant case, Mrs. Hove underwent dental treatment on February 27, 1974. From the moment of injection and thereafter to the present she suffered from the physical symptoms previously described. She diligently sought medical attention from at least 12 doctors in an effort to uncover the cause of her disabilities. Prior to October, 1977, she was examined by three dentists, two neurologists, three endodontists, one periodontist, one ophthalmologist, one otolaryngologist, and one internist. In almost four years,

not one of them diagnosed neurological injury to the second division of the trigeminal nerve (R. 49, 50), and only Dr. Hebertson even remotely hinted that Hove's problem originated with the dental injection. But even Dr. Hebertson testified that he could detect no abnormalities and could render no definite diagnosis (R. 71).

It was not until the neurological examinations by Drs. Sweeny and Gardner in October 1977 that the injury was diagnosed as nerve damage which was likely caused by Dr. McMaster's dental treatment of February 27, 1974. Until that time, Hove was unaware that the symptoms plaguing her were the products of neurological injury. Once this became clear, a Notice of Intent to Commence Action was promptly filed and a complaint was issued before the expiration of four years from the date of the alleged negligence.

Hove exercised exceptional diligence to discover the reasons for her physical problems. How could she have possibly known prior to October, 1977, that those problems were caused by a negligent act if the very doctors and dentists she consulted could offer her no clue that that was in fact the problem? Since her diligence in attempting to discover the origin of her problems was reasonable, according to Foil, the date on which she in fact discovered that origin--October 1977--is the date on which the statute of limitations commences to run. As such, the action was timely filed and her claim preserved.

The trial court's finding to the contrary is clearly against the weight of the evidence and it manifestly appears that it misapplied the law embodied in Foil to the established facts. In such instances, a reviewing court may depart from the general rule that the trial court's findings are entitled to deference and will not be disturbed on appeal. Brown v. Board of Education

of Morgan County School District, 560 P.2d 1129, (Utah 1977); Hardy v. Hendrickson, 17 Utah2d 251, 495 P.2d 28 (1972).

The evidence here is clear that while Hove knew that she had a "problem" from the moment of the injection, for three and a half years thereafter she could obtain absolutely no diagnosis that this "problem" was caused by negligence in that injection (R. 49). The defendant himself recommended only that she "take some aspirin and it would calm down and go away" (R. 29). The ensuing string of 12 physicians and dentists could offer no definite explanation for the cause of her problem. Knowledge of the "legal injury" was obtained only at the time Drs. Sweeny and Gardner rendered their diagnoses that her problem was causally related to the dental injection three and a half years earlier. It strains credulity to say, as the trial court in effect did, that "Mrs. Hove, even though the record is clear that not one of the 12 physicians and dentists you visited prior to October, 1977 could tell you that your problem was caused by Dr. McMaster's injection, this court is nevertheless convinced that you knew or had reason to know that you had a cause of action against Dr. McMaster on the date of the injection." If 12 experts could not determine the nature of her problem, how could she possibly be held to know or have reason to know that she had sustained a legal injury on the date of the injection? The trial court's holding that she did know or had reason to know is clearly against the weight of the evidence and represents a misapplication of the teachings of Foil.

#### CONCLUSION

From the date of the dental injection on February 27, 1974, Hove experienced symptoms of pressure, pain and tingling in the area of her right

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cheek and jaw. During the next three and a half years, she visited no fewer than 12 physicians and dentists in an effort to determine the cause of these symptoms. None could offer a definite diagnosis. In October, 1977, she learned for the first time that her injury was neurological and was likely caused by Dr. McMaster's negligence. Therefore, the date on which she first learned that she had suffered a legal injury, as defined by Foil, was October 1977. It is difficult to imagine diligence more reasonable; and since she could have no reason to know that she had suffered a legal injury, the date on which she in fact discovered that she had suffered a legal injury is the date on which the statute of limitations commenced to run. From the date of that discovery she acted promptly to file her action prior to the expiration of four years from the date of the injection.

The trial court's holding that Hove knew or reasonably should have known that she had suffered a legal injury at least two years before she commenced her action is contrary to the weight of the evidence and is a misapplication of Foil. The judgment heretofore entered should be reversed and judgment should be entered in favor of Hove as a matter of law.

DATED this 28th day of April, 1980.

RESPECTFULLY SUBMITTED,

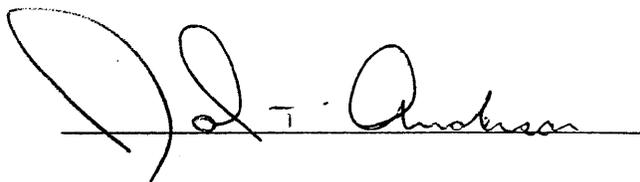


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## CERTIFICATE OF SERVICE

I, John T. Anderson, attorney for appellant in the above-entitled action, hereby certify that on the 28 day of April, 1980, I served the attached Appellant's Brief upon Don J. Hanson, attorney for respondents, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Don J. Hanson  
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A handwritten signature in black ink, appearing to read "John T. Anderson", is written over a horizontal line.