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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BARBARA M. HOVE,

Plaintiff-Appellant,

vs.

Case No. 16850

JOHN S. McMASTER, D.D.S., and HIGHLAND DENTAL CLINIC, INC., a professional corporation,

Defendants-Respondents.

RESPONDENTS' BRIEF

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

Honorable Ernest F. Baldwin, Judge

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FILED
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RESPONDENTS' BRIEF

NATURE OF THE CASE

As stated in the Appellant's Brief this is an action for damages resulting from an alleged act of dental malpractice. The only issue before the Court is whether the 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

Again as stated in the Appellant's Brief this action was bifurcated and the only issue tried by the Court below was whether or not the Appellant failed to commence her action against the Resdpondents within two years from the date on which she knew, or should have known, that she had sustained an injury and that said injury was caused by the Respondent, John S. McMaster, D.D.S. The Court resolved this issue of fact in favor of the Respondents, that is, that Appellant did

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fail to commence her action against the Respondents within two years from the date on which she knew, or should have known, that she had sustained an injury and, based on that finding, held that the plaintiff's action was barred by the foregoing Statute of Limitations.

RELIEF SOUGHT ON APPEAL

Respondents seek to affirm the Findings of the Court in the trial below.

STATEMENT OF FACTS

The Statement of Facts contained in the Appellant's Brief, as to the chronology of the event is correct. However, the statement simply glosses over or fails to point out that evidence in the record which sustains the Findings of the Trial Court. It was agreed at the outset of the trial below, for the purposes of that trial, that the injury of which the Appellant complained occurred during the course of dental treatment administered by Dr. McMaster on February 27, 1974 (Tr. 6-10), and that the Appellant had two years from the date she knew, or should have known, of the injury in which to file her action. All of the evidence was therefore directed toward the issue of when the Appellant knew, or should have known, that she had suffered a legal injury.

The Appellant is a resident of Cleveland, Ohio, where she moved after the graduation of her husband from law school at the University of Utah (Tr. 21). She was born in Albany, New York, and attended high school in Albany. After high school she attended several schools, eventually receiving a

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a degree in nursing at Albany Memorial Hospital in Albany, New York, which qualified her as a registered nurse. From there she attended Boston University where she received a Bachelor of Science in Nursing Science (Tr. 14). While attending the University she worked at the Student Health Clinic and the U. S. Public Service Hospital in Boston (Tr. 15), and has since spent several months working in hospitals as a nurse. As a nurse she is qualified to make injections of drugs into the human body (Tr. 17), and has been taught how to make injections so as not to interfere with a nerve (Tr. 18). More specifically she has been taught the consequences of making an injection directly into a nerve (Tr. 18), one of which is that the person who was receiving the injection would suffer a shocking sensation which she described as "more in the sense of hitting your elbow, your funny bone and getting a shocking sensation" (Tr. 19).

On February 27, 1974, the Appellant went to see Dr. McMaster, a dentist, for the purpose of having a cavity filled. She was given two injections. At the time of the second injection the Appellant testified that she recalled the doctor pushing his needle in and it hit something hard;

> "And then he kept pushing it and then it seemed to give way and hit something soft and when it did I got this shock in my face and I said, awe, awe, awe, which is about all I could say with my mouth open". (Tr. 24).

When asked to equate her experience as a nurse and the shock suffered by patients when an injection is made into

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a nerve as to whether that was the kind of shock she felt she answered, "I would say it would be fair to say, a similar type". (Tr. 24). She described the sensation as feeling the medication being injected, it felt as if it traveled toward her nose and then went under her eye. She had a slight burning sensation and then it all went numb. (Tr. 25).

It took her a long time to get the sensation in her face back (Tr. 27). When it did come back she was left with the sensation of feeling that her face and nose were plugged up. She had tingling off and on for the next six months, had a sense of pressure behind the right eye, and had half a dozen blood shot eyes over the same period (Tr. 28). She stated she knew something was wrong, something felt funny. She did not attribute it specifically to that injection but she did relate it specifically to the visit she had with Dr. McMaster on February 27, 1974, which is when she stated her problem seemed to start. (Tr. 29).

The Appellant then states that her condition calmed down for a while and then after a few months it would flare up again (Tr. 30). In February of 1975, she stated, referring to the periods of time when her symptoms would flare up,

> Well, as I said, I kept having them on and off so I thought something wasn't right and Dr. McMaster said he couldn't find anything and I suggested, well, I think I ought to go see a neurologist and he said, yes, that might not be a bad idea and he said, do you want me to recommend one and I said that I had one in mind (Tr. 30).

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The doctor she selected was a Dr. Wayne Hebertson, whom she saw on February 24, 1975. When asked if she had a discussion with Dr. Hebertson as to whether the injection caused her problem she testified, "I may have asked him if it did because I was - what I was looking for is why I was having the problem and treatment."(Tr. 31).

Dr. Hebertson's deposition was published during the course of trial. He testified that he is a board certified neurologist (Tr. 69).

Appellant gave Dr. Hebertson a history of the dental procedure and the numbness which gradually went away. He testified that about two weeks prior to his examination the Appellant noted an onset of pain above the right cheek bone, tingling below the right eye, her right ear felt plugged and her right eye was tired. It was the doctor's opinion that the complaints which he observed in Mrs. Hove could certainly reflect some involvement of the facial nerves or other facial structures such as a jaw joint (Tr. 70). He discussed his diagnostic impressions with her which were:

> "That she could have local infection of the facial nerves such as one might get with shingles. Also whether it might represent some complication of her prior dental injections and/or her dental surgery. Whether she may have some arthritic condition in the jaw joints and/or some other dental source of pain in her mouth and jaw." (Tr. 71).

Thereafter, she continued to visit various doctors and dentists, each time relating the history of the injection

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and soliciting their opinions as to whether or not that was causing her problem. Dr. Wayne Provost, a dentist, testified he saw her in September of 1975, and at that time she asked him about the burning sensation and pain she had on the right side of her face and if it could be due to a dental injection. The doctor at that time told her he thought it was unlikely (Tr. 58).

She saw a Glen K. Lund, M.D., a ear, nose and throat specialist, to whom she related that she had pain in her face on the right side and some nasal obstruction on the same side and that she dated this back to the time when she had an injection for a dental procedure. The doctor felt she had a nasal obstruction on the right side but could not see the source of pain. He did think she might have atypical facial neuralgia which might be due to remote injection. It does not appear that he discussed it with her but did recommend that she see a neurologist (Tr. 63-64). The Appellant did see a neurologist, Dr. Leonard Jarcho, who practices at the University of Utah Medical Center. The Appellant gave him a history of a burning sensation on the right side of her face and said that in May 1974, she had both her wisdom teeth removed and right last molar filled, during which an injection hit a nerve near the nose and at that time she had shooting pain in her right upper jaw almost back on the ear with numbness to the angle of the mouth and up to the skull (Tr. 73). The doctor thought it unlikely that her complaint of a burning sensation was an organic complaint. He found no evidence

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of any injury to the nerve and no connection between the injection which she described in her history and her complaints when he examined her on April 26, 1977 (Tr. 74).

The Appellant gave the same history to Dr. John Gardner in Cleveland, Ohio. Dr. Gardner's impression was that the plaintiff had atypical facial pain. He reported, "Seemingly its onset can be dated to needle trauma to what sounds like the maxillary nerve on the right side at the time of injection."

ARGUMENT

THE PREPONDERANCE OF THE EVIDENCE IN THE CASE SUPPORTS THE COURT'S FINDINGS THAT THE ACTION OF THE CLAIMANT WAS NOT COMMENCED WITHIN TWO YEARS OF THE DATE ON WHICH SHE KNEW OR SHOULD HAVE KNOWN THAT SHE SUFFERED A LEGAL INJURY.

The issue in this case is not whether or not this Court may believe that the Appellant knew or should have known that she had a legal injury at least two years and ten months before she filed her notice of intent to sue, but whether the Trial Court could have so found on the basis of the evidence.

In the case cited by the Appellant, in his brief, Hardy v. Hendrickson, this Court held that the evidence supported the Trial Court's reformation of a joint tenancy agreement, which reformation was based on findings of the Trial Court that the joint checking account was opened for the sole purpose of allowing a daughter to handle the business affairs of her incapacitated mother, without knowledge of the mother,

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and that the daughter during her lifetime made no claim of ownership by reason of joint tenancy. This Court held:

> "On appeal the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence or it manifestly appears that the court misapplied the law to the established facts."

It should not be assumed from what has been set out in the Statement of Facts that Dr. John S. McMaster was guilty of malpractice and, except for the defense of the Statute of Limitations, the Appellant has a legal claim against the Respondents. Even the medical report of Dr. John Gardner, on which she apparently basis her claim, does not support this conclusion.

Section 78-12-47, Utah Code Annotated, 1953, provides:

> "In any action against a physician and surgeon, dentist . . . for professional negligence or for rendering professional services without consent, if the responsive pleading of the defendant pleads the action is barred by the statute of limitations, and if either party so moves the court, the issue raised thereby may be tried separately and before any other issues in the case are tried. If the issue raised by the defense of the statute of limitations is finally determined in favor of the plaintiff, the remaining issue shall then be tried."

The Respondents simply elected to try the issue of whether or not the Appellant's action was barred by the Statute of Limitations before the issue of whether or not the Respondents were guilty of any act of malpractice was tried.

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Section 78-14-4, Utah Code Annotated, 1953, as amended, provides:

> "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 . . ."

This Court in the case of Foil v. Ballinger, 601, P.2d 144, held that the statute begins to run when the injured person knows, or should know that he has suffered a legal injury. Therefore, it was assumed for purposes of the trial of this part of the case that the Respondents were guilty of malpractice, that is to say that the Appellant did suffer a legal injury, and the question was when did, or should the Appellant have discovered that injury. If we take one extreme, we could say the Appellant should have discovered the injury the moment the injection was made. If we take the other extreme, which seems to be the position taken by the Appellant's counsel in this case, we would say the action does not start to run until the person who feels that he has sustained a legal injury finds a witness who he believes will come into court and testify in his favor. Such a holding would render the two year statute meaningless because a person who felt he had sustained a legal injury could always wait two, three or up to four years before contacting an attorney or making any effort to substantiate his claims.

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The Appellant in this case was a registered nurse who had gone beyond that stage and taken out a Bachelor of Science Degree in Nursing Science. She had worked in hospitals and other medical care facilities. She was trained in the proper method of making an injection and knew what might be expected to occur if an injection was made in such a manner as to injure a nerve. She describes the complaints which she had following the injection on February 24, 1974, as being similar to that which she would expect as a nurse if she had made an injection which damaged the nerve. It is submitted that it can therefore be argued that she knew at the time the injection was made, assuming it was made improperly, that she had suffered a legal injury.

Thereafter, for six months, the plaintiff had a burning and tingling sensation in her face, suffered a half a dozen or more blood shot eyes and had a plugged up feeling in her nose and ears. It is submitted that any reasonable individual who has ever been to a dentist and had an injection would know that the reaction which the plaintiff had was not that which might reasonably be expected from an injection and that therefore the injection was made in an improper manner.

However, we need not confine ourselves to what the plaintiff should have reasonably inferred by reason of her own knowledge and experience. One year after having received the injection she, on her own notion, went to a doctor of her own selection, Dr. Wayne Hebertson, who told her that her complaints, "might represent some complication of her prior

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dental injections and/or her dental surgery." The doctor also told her that he thought the condition should be continued under observation in hopes that it might alleviate spontaneously and to contact him further if she had any persistence of her difficulty. She choose not to do so.

Assuming that the Respondents were guilty of malpractice in this case, we need not ask ourselves the question as to when the Appellant should have known that she sustained a legal injury. She was apparently convinced of this from the outset. This is evidenced by the fact that every time she went to a doctor for dental treatment or any other purpose, one of the first questions that she always asked was whether or not her complaints could be related to an injection made in February of 1974.

It is therefore submitted that the Statute of Limitations in this case began to run when the plaintiff first formed this conclusion which might be as early as the date of the injection itself, when she had the unusual reaction to the injection which she described as being similar to that sustained by a patient when an injection is made into a nerve. It surely was formed during the six months following the injection when she had the complications she claims following the injection such as the blood shot eye, tingling in her face and things of that nature. At the very latest the conclusion was formed when she went to Dr. Hebertson and related the history of the dental procedures and was informed by the doctor that her problem might represent some complication

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of her prior dental injections and/or dental surgery.

If we give the Appellant the benefit of the doubt, the statute did not begin to run until the date she saw the doctor on February 24, 1975. This was two years and ten months prior to the time the notice of intent to commence an action was served on December 29, 1977, and three years before the Complaint was filed on February 22, 1978 (Tr. 53).

It may be argued that the plaintiff should be given more time to develop testimony to substantiate her claims. The burden placed on the Appellant in this case is no different than the burden placed on the plaintiff in other civil actions. The person who believes he has been libeled, slandered or assualted, has only one year in which to determine to bring a lawsuit against the offender. In the case of wrongful death the plaintiff has two years, the same period of time as here, to do so.

The attorney for the Appellant argues that the findings of the Trial Court is not supported by the evidence. He contradicts himself by the following admission found on page ten of his argument: "The evidence here is clear 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."

The Appellant attempts to draw an analogy between the cases of Foil v. Ballinger and this case. It appears from reading the case of Foil v. Ballinger that that case is

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an appeal from a summary judgment which was based on the allegations of the complaint rather than on the evidence produced at a trial and the case was remanded for a determination as to when the plaintiff knew or should have known of the alleged negligence giving rise to her injuries. The medical problem in Foil v. Ballinger concerned the administration of a permanent subarachnoid phenol block and was much more complicated than the medical problem in this case. Even so, the Court held that the Statute of Limitations would begin to run when the plaintiff in that case had an indication from a report to the State Industrial Commission that her rectal and bladder problem of which she complained may have been caused by the administration of a subarachnoid phenol block.

In the case of Christiansen v. Rees, 20 Utah 2d 199 436 P.2d 435, it does not appear that the plaintiff had any indication that a surgical needle had been left in his body during a surgical operation. Again this case was decided on a motion for summary judgment and again the Court held:

> "However, upon the record, it is our judgment that the question of whether or not the plaintiff commenced his action within four years after he knew, or should have known, of the presence of the surgical needle in his body is an issue to be resolved by the trier of the facts."

In this case if we start with the assumption that the defendants were guilty of malpractice, it is clear the Appellant, Hove, as stated in Appellant's Brief, knew that she had a "problem" from the moment of the injection and spent

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three and a half years thereafter in trying to find a doctor who would so testify. Even if we assume that the Appellant did not know of the problem at the time of the injection, she knew as much after she had seen Dr. Hebertson one year after the injection, as she learned when she saw Dr. Gardner on October 21, 1977, when Dr. Hebertson discussed with her whether her problem might represent some complication of her prior dental surgery, injections or dental surgery which she chose not to follow up on.

CONCLUSION

In this case we have an Appellant with a Bachelor of Science Degree in Nursing Science and with special knowledge as to what complaints or symptoms might be expected from an injection in an improper manner into or near a nerve. If we believe the Appellant, on February 27, 1974, she received such an injection from the Respondent, John S. McMaster, and experienced the reaction which she testified might be expected under those circumstances. At that point, if we believe the Appellant, she knew she had a problem. She continued to experience difficulty for the next six months, at which time she claims that it subsided and then flared up for a period of time before she saw Dr. Hebertson, who informed her that her problem might be due to complications of her prior dental injections and/or dental surgery. Thereafter, the Appellant continued to see various doctors for the treatment of her various problems but in each instance inquired of them as to whether or not her problems related to an injection on February

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27, 1974, which was made in a negligent manner, she was aware of this fact, if not at the time of the injection, at least within a year after the injection. Nevertheless, Appellant did not commence her lawsuit by the filing of a notice of intent to sue until December 29, 1977, over three years after the incident. On the basis of that evidence, the Trial Court found that the Appellant knew, or had reason to know, that she had suffered a legal injury over two years prior to the time that she commenced her action. Having so found, the Court dismissed her complaint under §78-14-4, which provides that,

> "No malpractice action 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."

Though each of us may take a different view of the evidence, it does not appear that the findings of the Court are against the weight of the evidence or that the Court below misapplied the law to the established fact. In fact, viewed most favorably the evidence clearly supports the findings of the lower court.

Some of us may feel that the period of time prescribed by the statute is too short and that it imposes too great a burden upon plaintiff. However, that is for the Legislature to determine and should not be determined by judicial fiat or by failing to enforce the statute. The Statute of Limitations in a medical malpractice case imposes no greater burden upon plaintiffs than do the Statutes of Limitations for many other

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causes of action. In the field of medical malpractice the Legislature has simply determined that matters should be put to rest in a shorter period of time than in many other areas such as the statute applying to written contracts.

It is submitted that the Findings of the Trial Court should be affirmed.

DATED this 23rd day of May, 1980.

Respectfully submitted,

HANSON & NELSON

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CERTIFICATE OF MAILING

I, Don J. Hanson, attorney for the Respondents in the above-entitled action, hereby certify that on the 23rd day of May 1980, I served the attached Respondents' Brief upon Jonn T. Anderson, attorney for the Appellant, by depositing two copies thereof in the United States Mail, postage prepaid, addressed as follows:

John T. Anderson
ROW & FOWLER
340 East Fourth South
Salt Lake City, Utah 84111

Don J. Hanson

DON J. HANSON

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