

1988

Debra King v. Doran V. Porter, M.D. and Searle Pharmaceuticals, Inc. : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO: 880214

IN THE SUPREME COURT IN AND FOR THE STATE OF UTAH

DEBRA KING, :
Plaintiff and Appellant, :
vs. : Category 14 (b)
DORAN V. PORTER, M.D., :
and SEARLE PHARMACEUTICALS, : Case No. 880214
INC., a foreign corporation, :
Defendants and Appellees. :

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH, JUDGE CULLEN Y. CHRISTENSEN

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APPELLANT'S REPLY TO RESPONDENT'S BRIEF

Appellant hereby replies, pursuant to Rule 24(c) of the Rules of the Utah Supreme Court, to new matters set forth in the Brief of Respondent:

NEW MATTERS SET FORTH IN RESPONDENT'S BRIEF

1. Searle asserts that the affidavit of King's expert witness, Robert E. Baier, Ph.D., is insufficient to establish a prima facie case against Searle, because it was filed after the date set by the District Court for designation of King's expert witnesses. (Respondent's Brief, p.10)

2. Searle argues that King cannot rely upon res ipsa loquitur because the issue is raised for the first time on appeal. (Respondent's Brief, p. 14)

3. Searle asserts that because King's other expert witness, Charles W. March, M.D., is not critical of the Cu-7, then the affidavit of Dr. Baier is insufficient to create a prima facie case. (Respondent's Brief, p. 15)

ARGUMENT

I. THE ISSUE AS TO WHETHER THE AFFIDAVIT OF APPELLANT'S EXPERT, DR. ROBERT E. BAIER WAS UNTIMELY FILED IS MOOT.

King concedes the fact that the affidavit of Dr. Robert E. Baier was filed after the date designated in the Scheduling Order (R. 177) for the naming of King's expert witnesses. However, in Affidavits (R. 266) and in oral arguments before the District Court (R. 511-514) King demonstrated that the failure to designate expert witnesses as per the scheduling order was due to the fact that she had been abandoned by her original expert, so that she was forced at the last minute to seek alternate expert assistance. King explained that this event was unexpected and unavoidable, and that she had immediately taken action to retain other experts so as to be able to comply with the District Court's Scheduling Order. (R. 266, R. 408) King further informed the District Court that she had indeed retained other experts, but asked that she be granted additional time in which to obtain affidavits from the experts

(R. 264) before responding to Searle's Motion for Summary Judgment. The District Court denied King's motion on the grounds that she had not yet named the experts as required by the Scheduling Order, and that she had not demonstrated that the experts' testimony would create a material issue of fact as to Searle Pharmaceuticals. (R. 310)

King then filed a Motion for Relief pursuant to URCP 60(b), arguing that her failure to designate an expert was due to mistake and excusable neglect, and that, while certainly sanctions might be imposed for failure to comply with the Scheduling Order, Summary Judgment was inappropriate. Oral Arguments upon the Motion for Relief were scheduled, and the District Court indicated that it would not enter the Order of Summary Judgment until after the hearing which occurred on 15 January, 1988.

The District Court in its Ruling of 27 January, 1988, specifically stated that King had responded to Searle's Motion for Summary Judgment, and that this response had been fully considered by the Court. (R. 457) The Court further stated that it was refusing Searle's proposed Order which denied Plaintiff's Motion for Extension of Time in which to Answer Searle's Motion for Summary Judgment, and was returning that document, unsigned to Searle. (R. 461) In so ruling, the District Court clearly opted

to accept the Affidavit of Dr. Baier. The issue of timeliness became moot.

The Ruling which explains the rationale for the District Court's decision to enter Summary Judgment deals entirely with, what the District Court perceived to be, defects in Dr. Baier's affidavit. The Court's ruling as to summary judgment was based on the issue of whether Dr. Baier's affidavit was sufficient to create a material question of fact as to the element of causation. It is that issue, alone, which is the subject of the present appeal.

II. THE DOCTRINE OF RES IPSA LOQUITUR HAS BEEN RELIED UPON BY APPELLANT SINCE THE INCEPTION OF THIS LAWSUIT.

Searle is mistaken when it asserts that King relies upon res ipsa loquitur for the first time upon appeal. King first specifically alleged that the doctrine should be applied as to her claim against Searle Pharmaceuticals in her Complaint at paragraphs 36 through 39, under the section entitled "Second Cause of Action - Defendant Searle Pharmaceuticals" (R. 7-8). In addition, the applicability of the doctrine was extensively argued before the District Court in oral arguments on 15 January, 1988. Res ipsa has been an important theory of King's case since its commencement. Clearly the issue was not raised for the first time on appeal.

King has adequately demonstrated each of the elements which are prerequisites to the application of the doctrine. She was

relieved of the necessity of demonstrating a causal connection between the instrumentality controlled by the defendants and her injury, because that causal connection is conceded by the parties: the fact that the Cu-7 perforated King's uterus is admitted by all concerned. King thus established a prima facie case against Searle, separate and apart from her claim of Strict Liability in Tort to which the Affidavit of Dr. Robert E. Baier pertains.

III. IT IS IRRELEVANT THAT APPELLANT'S OTHER EXPERT, CHARLES M. MARCH, M.D., DOES NOT CRITICIZE THE CU-7.

Respondent's Brief quotes portions of the deposition of King's other expert witness, Charles March, M.D. (Respondent's Brief, p. 15), who testified that he had seen no conclusive evidence to indicate that the Cu-7 was an unsafe device. It is entirely possible that Searle may elicit similar testimony from Dr. March at trial. This does not negate that fact, however, that the affidavit of Dr. Robert Baier creates genuine questions of fact concerning the safety of the Cu-7, and the causal connection between the action of the device and the injuries sustained by King.

Dr. March was retained by King to testify as to the allegations of medical malpractice against defendant Doran V. Porter, M.D. Dr. March was not asked to critique Dr. Baier's research or conclusions, nor was he acquainted with Dr. Baier's

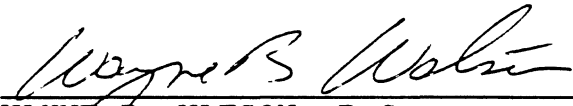
work, the results of which have not yet been published. His comments cannot be construed as direct refutation of Dr. Baier's opinions. Should Dr. March acquaint himself with Dr. Baier's work and remain steadfast in his opinion as to the safety of the Cu-7, it will become the function of the jury to weigh that testimony with the other evidence before them.

CONCLUSION

The affidavit of Dr. Robert Baier established compelling evidence of a causal connection between the destructive action of the Cu-7 upon living tissues and the perforation of Debra King's uterus. There is clearly sufficient evidence to create a jury question as to the proximate cause of King's injuries.

Appellant respectfully submits that the Summary Judgment entered in favor of Searle Pharmaceuticals should be reversed.

DATED this 29 day of December, 1988.



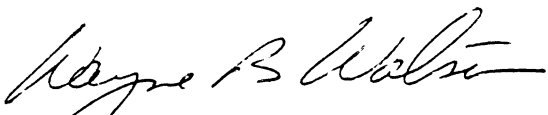
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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, true and correct copies of the foregoing APPELLANT'S REPLY TO RESPONDENT'S BRIEF on this 4 day of January, 1989, to the following:

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