

1980

Connie Ray Lund v. Ralph B. Foley : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

CONNIE RAY LUND,
Plaintiff-Appellant
vs.
RALPH B. FOLEY,
Defendant-Respondent

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CASE NO. 16921

APPEAL FROM THE ORDER OF DISMISSAL OF
THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, UTAH
HONORABLE JOHN F. WAHLQUIST, JUDGE

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE
STATE OF UTAH

CONNIE RAY LUND,)
)
 Plaintiff-Appellant)
)
 vs.) CASE NO. 16921
)
 RALPH B. FOLEY,)
)
 Defendant-Respondent)

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Order of Dismissal granted by the Honorable John F. Wahlquist, Judge of the Second Judicial District Court in and for Weber County, State of Utah, and entered in the above entitled matter on the 22nd day of January, 1980.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order of Dismissal and a remand to the lower court for a full trial on the merits

or, in the alternative, for a reversal of the Order of Dismissal to the extent the same dismisses appellant's Complaint with prejudice so that appellant may refile appellant's cause of action pursuant to the provisions of Section 78-12-40 Utah Code Annotated (1953, as amended).

STATEMENT OF FACTS

Appellant commenced this action for such compensatory damages as are reasonable in the premises by alleging that in January, 1971, appellant sustained severe lacerations when appellant fell through a storm glass window at appellant's residence (R.1). Appellant further alleged that respondent, while acting as appellant's attending physician, undertook the removal of several glass fragments from appellant's body and to suture appellant's wounds (R.2). It was further alleged that respondent failed to exercise that degree of skill, care, and learning consistent with the standard of care normally rendered in the community and that as a direct and proximate result thereof, appellant was required to undergo surgery on the 28th day of January, 1977, for the removal of additional glass fragments discovered in the right side of appellant's chest (R.2). Appellant sought to recover damages for the additional medical expenses incurred by appellant and for the

extreme mental and emotional pain and suffering alleged to have been suffered by appellant (R.2).

Respondent's Answer was filed on the 29th day of December, 1978 and the matter was at issue.

On February 23, 1979, appellant filed a Request for Production of Documents (R.7), and on the 30th day of March, 1979, appellant took the deposition of respondent and the respondent deposed appellant.

A Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment (R.11,12-14) was filed by respondent on May 21, 1979 wherein respondent raised the issue of the applicable Statute of Limitations. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (R.23-26) was filed on June 7, 1979 and by a Memorandum Decision (R.15) the lower court held the applicable Statute of Limitations was two years and respondent's Motion for Summary Judgment was denied (R.27).

A Request for Trial Setting (R.28) was filed on August 7, 1979 and by Stipulation and Order (R.29-30) the original trial setting of November 15, 1979 was vacated.

Prior to the rescheduled non-jury trial setting of January 22, 1980, appellant advised her counsel that she would not be able to appear on January 22, 1980 because of appellant's

possible involvement in an administrative hearing being conducted in Las Vegas, Nevada, appellant's place of residence. A telephone conference call between counsel for the respective parties and the Court was conducted on January 21, 1980, at which time appellant's counsel requested a continuance of the trial for the stated reason, "...that plaintiff was unable to appear inasmuch as she lives in Las Vegas, Nevada and was to be involved unexpectedly in an administrative hearing sometime during the week of January 21, (1980)". R.32).

On the day set for trial, appellant's counsel appeared before the Court and removed the motion for a continuance because of appellant's absence (R.37). The motion was again denied by the Court (R.38) and when appellant's counsel was unable to proceed, counsel for the respondent moved for a dismissal with prejudice (R.38). Appellant's counsel requested that an order of dismissal be without prejudice; however, the Court granted the dismissal, "...on the merits", and the Order of Dismissal dismissed appellant's complaint with prejudice (R.33).

ARGUMENT

POINT I

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR A CONTINUANCE OF THE TRIAL SETTING

BECAUSE OF PLAINTIFF'S INABILITY TO PERSONALLY BE AND APPEAR BEFORE THE COURT ON THE DATE AND AT THE TIME SET FOR THE COMMENCEMENT OF THE TRIAL.

As pertinent to this proceeding, Rule 40(b) of the Utah Rules of Civil Procedure provides in part:

"Upon motion of a party, the Court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown."

Appellant initially recognizes the discretionary authority of a trial court in disposing of motions relating to the continuance of a trial setting; however, appellant respectfully submits that the Order of Dismissal entered by the lower court in this proceeding constituted an abuse of the vested discretion. The recital set forth in the Statement of Facts above clearly establishes that the proceedings before the lower court were prosecuted with due diligence without the inner position of delaying tactics or maneuvers by either side of the controversy. Both parties took full advantage of the discovery procedures and proceeded in an expeditious manner. By refusing to grant a continuance, the lower court overemphasized the inability of appellant to be and personally appear before the court on the date set for trial and unjustly penalized appellant for this one breach in an otherwise order procedure.

In Bairas vs. Johnson, 13 U2d 269, 373 P2d 375 (1962),

this court reversed a lower court's denial of a motion for a continuance and stated at 373 P2d 377, 378:

"Rule 40(b) U.R.C.P. provides that a granting of a continuance lies in the trial court's discretion. This case presents one of those difficult instances in which it is necessary to examine the reasonableness of the exercise of that discretion. Certainly, this court should not reverse the ruling of the trial court absent a showing that the latter abused its discretion. However, it is in accord with the most fundamental traditions of our legal system that a party should be afforded every reasonable opportunity to be in attendance at his trial.

"Obviously, there may be times when a party may be able to add little or nothing by way of assistance or testimony at a trial, and in such an instance there may be little reason to grant a continuance to accomodate an absent party. But such is not the instant case. The plaintiff's testimony is essential to his case."

Appellant actively pursued the discovery procedure and prepared for an evidentiary presentation in support of appellant's position. The denial of appellant's motion for a continuance unjustly deprived appellant of the opportunity to be heard with respect to appellant's alleged grievance and present testimony and other evidence in support thereof. Had appellant unduly protracted the proceedings as in First Security Bank vs. Johnson, 540 P2d 521 (1975) or that appellant had been dilatory in responding to respondent's efforts at discovery and resisted attempts to resolve the issues as in Maxfield vs. Fishler, 538 P2d 1323 (1975), appellant would not be pursuing

this appeal. However, where the record is supportive and illustrative of appellant's efforts to resolve the issues but is precluded from appearing because of a potential involvement in an out-of-state administrative hearing, a denial of a motion for continuance with the resulting dismissal of appellant's action, clearly constitutes an abuse of discretion by the trial court.

POINT II

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT'S MOTION TO DISMISS WITH PREJUDICE BECAUSE OF APPELLANT'S INABILITY TO PROCEED WITH THE TRIAL.

The Order of Dismissal (R.32,33) specifically provided,

"...that the Complaint of the Plaintiff of the above entitled action be and the same is hereby dismissed with prejudice." (R.33)

By dismissing appellant's complaint with prejudice, the lower court abused its discretion by precluding appellant from refileing an appropriate complaint.

Section 78-12-40 Utah Code Annotated (1953, as amended) provides:

"If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise and upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the

plaintiff...may commence a new action within one year after the reversal or failure." Emphasis added.

The issue thus becomes whether the circumstances giving rise to the dismissal of appellant's complaint justified a dismissal with prejudice so as to operate as an adjudication on merits and deprive appellant of the benefits of Section 78-12-40 Utah Code Annotated (1953, as amended).

Appellant concedes that there may be appropriate circumstances that would justify a dismissal with prejudice with the finality desired by respondent; however, in this proceeding, appellant actively pursued the prosecution of her claim to the particular date set for trial and which precluded from being in attendance at the trial for reasons and responsibilities not within appellant's control. Accordingly, appellant should have been allowed the opportunity to comply with Section 78-12-40 Utah Code Annotated (1953, as amended) and obtain an adjudication of her claim on the merits.

CONCLUSION

For the reasons herein stated, the order of the lower court denying appellant's motion for a continuance should be reversed and the matter remanded for a full trial on the merits, or, in the alternative, the Order of Dismissal should

be reversed to the extent that the same dismisses appellant's complaint with prejudice so that appellant may bring another action pursuant to the provisions of Section 78-12-40 Utah Code Annotated (1953, as amended).

Respectfully submitted this _____ day of May,
1980.

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