

1990

# Holli M. Mahoskey and Charles Mahoskey v. Ogden Clinic, Dr. Boyd J. Farr and Dr. Chris Christensen : Brief of Appellant

Utah Court of Appeals

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**COURT OF APPEALS  
BRIEF**

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900423-CA

IN THE SUPREME COURT IN THE STATE OF UTAH

HOLLI M. MAHOSKEY and  
CHARLES MAHOSKEY,

Plaintiffs/Appellants,

vs.

OGDEN CLINIC, DR. BOYD  
J. FARR and DR. CHRIS  
CHRISTENSEN,

Defendants/Respondents

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Case No. 900190

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT  
OF THE SECOND JUDICIAL DISTRICT COURT  
FOR WEBER COUNTY, STATE OF UTAH  
JUDGE RONALD O. HYDE

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**FILED**

JUL 10 1990

Clerk, Supreme Court, Utah

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JURISDICTIONAL STATEMENT

Jurisdiction over this case is vested in the Utah Supreme Court pursuant to the provisions of Article VIII Section 4 of the Utah State Constitution, U.C.A. Section 78-2-2 (1953 as amended), and Rule 3 of the Rules of the Utah Supreme Court.

### **STATEMENT OF ISSUES**

1. Whether the trial court abused its discretion in granting Defendants' motion for summary judgment when it did not construe the facts in a light most favorable to Plaintiff and erroneously found that no genuine issue of material fact existed.

2. Whether genuine issues of material fact existed as to whether Plaintiff was aware of facts that would have led her to conclude there was a reasonable possibility that her injury was caused by Defendants' negligence.



### STATEMENT OF CASE

Plaintiff filed this action in the Second Judicial District Court, Weber County, alleging medical malpractice. (R. 1, 81). Defendants moved to dismiss Plaintiff's complaint, (R. 21), but the trial court denied Defendants' motion. Defendants then answered Plaintiff's complaint. (R. 110). Plaintiff then motioned for a separate trial on the issue of the statute of limitations. (R. 126). Defendants then moved for summary judgment. (R. 168). The facts presented to the trial court were disputed, but adopting Defendants' version thereof, the court found that no genuine issue of material fact existed, and consequently granted Defendants' motion. (R. 280). Plaintiff's moved to alter or amend the judgment, but the court denied the motion. (R. 351, 377 and 378).

### Statement of Facts.

(1) The following statement of material facts was submitted to the trial court in Plaintiff's Statement of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment, dated October 18, 1989:

a. Plaintiff Holli Mahoskey (hereinafter "Plaintiff"), has alleged that Defendants committed medical malpractice in failing to diagnose her breast cancer. (Plaintiffs' Amended Complaint, paragraph 16.)

b. Plaintiff found a small lump in her right breast in February of 1985. On April 3, 1985, she was examined by Defendant, Boyd Farr, M.D. to determine whether the lump was malignant. Dr. Farr attempted to aspirate the lump several times, and being unsuccessful, requested Defendant, Chris Christensen, M.D., to assist him in the examination. Dr. Christensen examined the lump and also attempted to aspirate it without success. (Plaintiff's Deposition, pages 6 through 11; Plaintiff's Affidavit, pages 1-2; Plaintiff's Amended Complaint, paragraphs 11 and 12.)

c. Both doctors used the same methods in examining and attempting to aspirate the lump. Both doctors were informed by Plaintiff of a family history of cancer, in particular, that Plaintiff's mother had contracted colon cancer, and that Plaintiff had first noticed the lump two months

previous to the exam. (Plaintiff's Deposition, pages 6, 7 and 33; Plaintiff's Affidavit, page 2.)

d. During the April 3, 1985 examination, Plaintiff was told by the Defendants that she was too young to have cancer and, therefore, the lump could not be cancerous. Neither doctor mentioned or discussed any further tests or procedures to determine whether the lump was benign or malignant. Defendants simply told Plaintiff to continue regular breast exams and to come back for a check-up in three months. Plaintiff left the April 3, 1985 exam feeling that she had been properly examined and that the lump was not malignant. (Plaintiff's Deposition pages 11 through 13; Plaintiff's Affidavit page 2; Plaintiff's Amended Complaint, paragraph 13.)

e. In July of 1985, Plaintiff noticed that the lump had begun to grow larger, and had become sensitive and sore. (Plaintiff's Deposition, pages 14, 15, 43 through 46; Plaintiff's Affidavit, page 2.)

f. On July 17, 1985, Plaintiff was examined by Dr. James Gardner who observed that the lump had grown three times its original size and that it was clearly cancerous. This diagnosis was based on a biopsy performed that same day. On July 19, 1985, Plaintiff's right breast was removed in a modified radical mastectomy surgery. (Plaintiff's Deposition, pages 15 through 18; Plaintiff's Amended

Complaint, paragraphs 14 and 15; Plaintiff's Affidavit, page 2.)

g. Plaintiff had contact with two other doctors pursuant to treatment of her breast cancer. Dr. Alton Wagon supervised chemotherapy treatment and follow-up. Dr. Conrad Monson performed sterilization surgery on the Plaintiff, to insure that she would not become pregnant during her six months of chemotherapy treatment. (Plaintiff's deposition, pages 18-21, 27, 49 and 50; Plaintiff's Affidavit, pages 2-4.)

h. Although Plaintiff questioned Dr. Gardner, Dr. Wagon and Dr. Monson about whether Dr. Farr and Dr. Christensen should have diagnosed the cancer at an earlier date, each time she made such an inquiry, she was either told that they did not know, or she was told nothing -- they did not answer her inquiries. Based upon such answers/non-answers to the inquiries, Plaintiff concluded that either the doctors could not truly determine whether Dr. Farr and Dr. Christensen should have diagnosed the cancer, or that they had an opinion on the matter, but did not wish to share it with her. (Plaintiff's Deposition, pages 16, 18, 25, 27, 37 and 38; Plaintiff's Affidavit, page 3.)

i. Dr. Wagon told the Plaintiff, in August of 1985, that had the cancer been discovered earlier, it was possible that a less drastic operation, a lumpectomy, may have been sufficient to treat the cancer, but he could not be sure.

(Plaintiff's Deposition, pages 25 and 38; Plaintiff's Affidavit, page 3.)

j. Other than Dr. Gardner, Dr. Wagnon and Dr. Monson, Plaintiff talked to no other doctors nor to any other medical professionals, prior to September of 1988, about whether Dr. Farr and Dr. Christensen should have diagnosed the cancer in April of 1985. (Plaintiff's Deposition pages 22, 24-28 and 51; Plaintiff's Affidavit, pages 3 and 4 )

k. Although Plaintiff felt anger toward Dr. Farr and Dr. Christensen when she first discovered she had cancer, and felt some suspicion that perhaps they should have diagnosed her cancer in April of 1985, she had no personal knowledge or basis for justifying such suspicion nor for forming an opinion about whether the doctors' examination of her breast lump was negligent or otherwise; nor was she able to determine by inquiring of her other doctors whether there was any basis for thinking that perhaps Dr. Farr and Dr. Christensen had acted negligently. Plaintiff also had no knowledge that other inexpensive tests existed that should have been performed to properly diagnose her cancer. (Plaintiff's Deposition, pages 16, 18, 25, 27, 28, 35, 37, 38 and 46; Plaintiff's Affidavit, page 4.)

l. Plaintiff suffered devastating side effects from her surgeries and chemotherapy. Among other things, Plaintiff lost her hair and her immune system ceased to function normally. Consequently, Plaintiff constantly

suffered from illnesses, chronic weakened physical condition and continuous mental and emotional distress until late summer of 1988. The Plaintiff's continuous poor health and consequent concomitant stresses, in addition to her preoccupation with the foreseeable recurrence of the cancer, rendered the Plaintiff unable to work or rationally investigate the possibility that Dr. Farr and Dr. Christensen were negligent in failing to diagnose her breast cancer until September of 1988. (Plaintiff's Deposition, pages 23-24, 26-29, 34-35, and 47-53; Plaintiff's Affidavit, page 4; Affidavit of Dr. Alton Wagon.)

m. Plaintiff contacted Douglas M. Durbano, Attorney at Law, about her situation in October of 1988. Following a preliminary examination into the matter by her attorney, she was told that failure of Dr. Farr and Dr. Christensen to give her a biopsy in April of 1985 was probably negligent conduct, which could give her a cause of action. (Plaintiff's Affidavit, pages 4-5.)

(2) Defendants, in their briefs and at the hearing on the Motions for Summary Judgment, emphasized their interpretations of statements made by Plaintiff at her deposition relating to the anger and suspicion she felt toward the Defendants at the time she discovered she had cancer in July of 1985. The Defendants interpreted these feelings of anger and suspicion OF the Plaintiff, that the defendant doctors should have discovered her cancer at an earlier date, as evidence of the Plaintiff's

knowledge or constructive knowledge in July of 1985 that she had sustained an injury due to negligent action on the part of the Defendants.

(3) In Plaintiff's brief and at the hearing on the Defendants' Motions for Summary Judgment, the Plaintiff emphasized the following facts to the Court:

a. Although Plaintiff had feelings of anger and suspicion towards the Defendant doctors, suspecting that perhaps they should have discovered her breast cancer in April of 1985, she had no personal knowledge or experience from which to evaluate the possibility of negligence on the part of the Defendants. Moreover, Plaintiff was unable to obtain information about the possibility of Defendants' negligence from her treating doctors in July and August of 1985, between the time she discovered she had breast cancer and the beginning of her radiation treatments for breast cancer.

b. Between August of 1985 and September of 1988, Plaintiff suffered side affects from her surgery and chemotherapy treatment, including frequent bouts of illness, continuing mental and emotional distress, and a chronic weakened physical condition. Because of her poor health and its concomitant stresses, the Plaintiff was unable to rationally explore or evaluate the possibility that the defendant doctors were negligent in failing to diagnose her breast cancer. It was not until she returned to a reasonably normal physical, mental and emotional state in the late summer of 1988 that she was able

to address the issue of the possibility of the defendant doctors' negligence.

(4) The trial court usurped the role of the trier of fact when it did not refrain from ruling on Defendants' motions for summary judgment even though the parties clearly presented a genuine issue of material fact; whether (a) the facts known by the Plaintiff and (b) the Plaintiff's state of mind in July of 1985 showed that the Plaintiff knew or should have discovered through the use of reasonable diligence that she had sustained an injury and that the injury was caused by Defendants' negligent actions. Furthermore, the trial court did not view the facts in a light most favorable to the Plaintiff as required by Utah law. The Court ignored the facts as stated by the Plaintiff, and adopted the facts as proposed by the Defendants, in granting Defendants' Motions for Summary Judgment and in dismissing Plaintiffs' Complaint.

(5) On January 16, 1990, the trial court signed the Order of Summary Judgment and entered that Order in this action on January 17, 1990. Thereafter, on January 23, 1990, the Plaintiff filed a Motion to Alter or Amend Summary Judgment under U.R.C.P. Rule 59. Memorandums of Points and Authorities were submitted by all parties on that Motion, and on March 16, 1990, the trial court signed and entered its Order denying Plaintiffs' Motion to Alter or Amend Summary Judgment. In its Order of Motion for



Summary Judgment dated January 16, 1990, the trial court ruled that "the Plaintiff had knowledge of the existence of an injury, its cause and the possibility of negligence in July, 1985...."

### SUMMARY OF ARGUMENT

In granting Defendants' Motion for Summary Judgment, the trial court was faced with the issue of whether Plaintiff knew or should have known she suffered a legal injury because of medical malpractice. The trial court held that Plaintiff had knowledge of the existence of an injury, its cause and the possibility of negligence in July of 1985.

The trial court abused its discretion in determining its holding because, as required by Utah law, it did not construe the facts in the light most favorable to Plaintiff. The trial court also abused its discretion because the case was not so clear as to find that no genuine issues of material fact existed as a matter of law. Instead, the facts, according to Plaintiff, indicate that at no time before August of 1988 did Plaintiff have sufficient facts for the trial court to determine that she knew or should have known of the possibility of medical negligence. Lastly, the trial court abused its discretion by granting Defendants' Motion for Summary Judgment because it disregarded the equitable presumption created by U.C.A. 78-12-47. Thus, the trial court's decision granting Defendants' Motion for Summary Judgment should be reversed.

## ARGUMENT

### POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION IN  
GRANTING DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT BY FAILING TO CONSTRUE THE FACTS  
IN A LIGHT MOST FAVORABLE TO PLAINTIFF AND  
ERRONEOUSLY FINDING THAT NO GENUINE ISSUE  
OF MATERIAL FACT EXISTED.

The standard of review that an Appellate Court must apply when reviewing an appeal from a summary judgment is whether the trial court abused its discretion in granting or denying the motion. Wheeler v. Mann, 763 P.2d 758, 759 (Utah 1988).

The trial court, when faced with a motion for summary judgment, must follow the relevant Utah civil procedure rule. Rule 56(c) of U.R.C.P. provides that the "judgment sought shall be rendered forthwith if the pleadings, depositions . . . and [affidavits] . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, according to the rule, if there is any genuine issue of material fact, the court, as a matter of law, cannot grant a summary judgment motion.

The court's role in determining whether a motion for summary judgment should be granted has been further defined and documented in recent Utah case law. According to the Utah Supreme Court, in Barlow Society v. Commercial Security Bank, 723 P.2d 398 (Utah 1986); Durnham v. Margetts, 571 P.2d 1332 (Utah 1977); Brower v.

Brown, 744 P.2d 1337 (Utah 1987), the following guidelines are to be strictly adhered to: (1) the Court must construe the facts in a light most favorable to the non-moving party, (2) summary judgment should only be granted when the matter is clear and there is no room for doubt, and (3) if there is a statute governing the exercise of summary judgment in a particular context, the statute should be followed. These points may now be treated in their respective order.

A. In Reviewing a Summary Judgment, the Court Must Construe the Facts in a Light Most Favorable to the Non-Moving Party.

The court's obligation to construe the facts in a light most favorable to the non-moving party is well settled and undisputed. In Barlow Society v. Commercial Security Bank, 723 P.2d 398, (Utah 1986), the Utah Supreme Court explicitly declared and outlined the guideline:

"In reviewing a summary judgment, this Court will view the facts in a light most favorable to the party opposing the motion and will allow the summary judgment to stand only if the movant is entitled to summary judgment as a matter of law on the undisputed facts."

Id. at 1399. See also Wheeler v. Mann, 763 P.2d at 759.

This guideline is particularly applicable to the instant case. In granting Defendants' motion for summary judgment, the district court clearly did not construe the facts in the light

most favorable to Plaintiff. Indeed, it may be confidently stated that the district court did not construe the facts as presented by Plaintiff in any way, but instead, summarily rejected them. Had the court construed the facts in a light most favorable to Plaintiff, it would have found that there was a genuine and material, factual dispute as to whether Holli Mahoskey knew or should have known, in July of 1985, that the injury which she had suffered was caused by Dr. Farr's and Dr. Christensen's negligent diagnosis. This disputed issue alone would have been enough to demonstrate that Defendants did not meet their burden of proof on their motion for summary judgment. Thus, the district court abused its discretion in granting Defendants' motion for summary judgment.

B. Summary Judgment Should be Granted  
Only When the Matter is Clear and  
There is No Room for Doubt.

The Utah Supreme Court set out general parameters further explaining when a motion for summary judgment should and should not be granted in Durnham v. Margetts, 571 P.2d 1332 (Utah 1977). In that case the Court asserted:

"Summary judgment . . . should not be done on conjecture, but only when the matter is clear; and in the case of doubt, the doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover . . . [U]nless the court is able to conclude that there is no dispute on material facts . . . the court should not

summarily . . . render judgment . . . as a matter of law."

Id. at 1338. (Emphasis added).

Relevant to the preceding guideline, the Utah Supreme Court in the recent case of Chapman v. Primary Children's Hospital, 784 P.2d 1181 (Utah 1989), stated that "close calls" on factual issues "are for juries, not judges, to make." Id. at 1186. Thus, summary judgment is not appropriate unless the parties' affidavits and other instruments make it clear that no genuine issue remains as to matters of material fact.

These guidelines are also specifically significant to the present case. It is not clear whether Holli Mahoskey should have or even could have known that her injury was caused by her doctors' negligence. What is clear is that there is a genuine issue of material fact when those facts are construed in a light most favorable to Plaintiff. Even if the existence of a material factual issue was a "close call," the district court should have given Plaintiff the opportunity to have her day in court and attempt to prove her right to recover. Whether she should have, or even could have known that her injury was caused by another party's negligence is an issue for the jury. Thus, the district court abused its discretion in not allowing Plaintiff the opportunity to prove her right to recover.

C. Because of the Bifurcated Trial Statute, U.C.A. section 78-12-47, the Utah Supreme Court Disfavors Granting Defendants' Motions for Summary Judgment in Medical Malpractice Cases, Where the Issue is the Running of the Statute of Limitations.

The Utah legislature has codified the procedure to be followed when the issue of the running of a statute of limitations arises in a medical malpractice context. Section 78-12-47 of the Utah Code Annotated provides that if, in malpractice actions, "the defendant pleads that the action is barred by the statute of limitations, the issue raised thereby may be tried separately and before any other issues in the case are tried."

In Brower v. Brown, 744 P.2d 1337 (Utah 1987), the Utah Supreme Court explained the presumption the statute creates and its effect on summary judgment motions where the running of the statute of limitations was at issue. Concerning the statute, the Court stated:

"This provision meets the same policy concerns as a grant of summary judgment based on the expiration of a statutory limitation period. Like summary judgment, it eliminates the need for defendants to litigate stale claims on substantive grounds when the trier of fact ultimately finds that the statute has run; however, unlike summary judgment, it does not bar the trier of fact from making a factual determination as to the running of the statute. Thus, the interests of both parties

are balanced better by the statutory provision than by the grant of summary judgment."

Id. at 1337. Because the Court was concerned with balancing the interests of opposing parties, it emphasized the importance of factual determinations to be made by triers of fact in medical malpractice actions. The Court re-emphasized this point when it later declared that the statutory provision "support[ed] the view that the determination of when the plaintiff should have discovered the legal injury [was] a question for the trier of fact." Id. at 1339. Thus, the Court properly focused on balancing and fairly serving the just interests of both parties. Serving the interests of both parties, providing equity and fairness as justice requires, is of paramount importance to any court. Equity and justice are at issue in the case at hand. According to the cited statute and its application as explained by the Utah Supreme Court, both Plaintiff's and Defendants' interests would be balanced better if Holli Mahoskey was lawfully granted her right to her day in court.

In summary, the trial court erred when it granted Defendants' motion for summary judgment because: (1) it did not construe the facts in the light most favorable to the non-moving party, (2) the issue on which summary judgment was granted was not clear, and (3) the bifurcated trial statute, U.C.A. section 78-12-47, creates the presumption that the non-moving party should have its day in court



when the issue is the running of the statute of limitations in medical malpractice actions. Therefore, the trial court erred when it granted Defendants' motion for summary judgment.

## POINT II

A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER PLAINTIFF WAS AWARE OF FACTS THAT WOULD HAVE LED HER TO CONCLUDE THERE WAS A REASONABLE POSSIBILITY THAT HER INJURY WAS CAUSED BY DEFENDANTS' NEGLIGENCE.

As illustrated above, the trial court abused its discretion when it granted summary judgment in favor of Defendants by holding that the statute of limitations had run since Plaintiff, Holli Mahoskey, knew or should have known that the injury she received was a result of medical malpractice more than two years before she filed her intent to commence an action. In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), the Utah Supreme Court created a test whereby Utah courts can determine when the statute of limitations begins to run in medical malpractice actions.

- A. The "Foil" Legal Injury Test, Which Indicates When the Statute of Limitation Begins to Run, as Modified by Deschamps, Requires the Plaintiff to Know of Facts That Would Lead Her to Conclude There was a Reasonable Possibility That Her Injury was Caused by the Negligence of Defendants.

The statute governing when malpractice actions may be brought against health care providers is found in Utah Code Ann. section 78-14-4. The statute provides in relevant part:

"(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 . . ."

Interpreting the statute, the Utah Supreme Court in Foil held that for policy reasons, the statutory term "injury" meant "legal injury." Id. at 147. It then held that the statute of limitations would begin to run "when an injured person [knew] or should [have known] that he had suffered a legal injury." Id. Finally, the Court defined "legal injury" creating a two-pronged test, the use of which rendered the application of the statute more equitable. The Court stated the test as follows: ". . . the 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. (Emphasis added). This test is hereinafter referred to as the "Foil" test.

The Court explained several policy reasons justifying its attempt to administer justice and equity in developing the Foil test's second prong: (1) to compensate for the great disparity in medical knowledge between doctors and patients, (2) to prevent punishing the untutored, average layperson for his inability to recognize apparent connections between treatment provided and

injury suffered, (3) to avoid the filing of unfounded claims for the sole purpose of preventing the statute of limitations from running, and (4) to prevent health providers from making attempts to suppress knowledge of medical mistakes. See Foil, at 147, 148. See also Deschamps v. Pulley, 784 P.2d 471, 473 (Utah App. 1989).

The most recent case dealing with the issue of the statute of limitations in medical malpractice actions is Deschamps v. Pulley. There, a daughter brought an medical malpractice action against a doctor for negligent medical treatment given to her mother which subsequently caused her mother's death. However, the Utah Supreme Court held that since the plaintiff knew of the legal injury more than two years before she filed the action, her claim was barred by the statute of limitations. The Court also cited, in addition to the Foil test, a more specific and refined test developed by the United States District Court, D. Utah. Central Division, in Hargett v. Limberg, 598 F. Supp. 152 (1984). The refinement was developed to resolve a confusion which had plagued the Foil test since its inception. That confusion involved the distinction between "legal injury" and "legal conclusion of negligence." The United States District Court stated that a legal determination of negligence was not necessary to start the statute of limitations;

"Rather, the crucial question [was] whether the plaintiff was aware of the facts that

would lead a reasonable person to conclude that they may have a cause of action against the health provider. Those facts include the existence of an injury, its cause and the possibility of negligence."

Hargett, at 155. This test shall hereinafter be referred to as the "Deschamps" test. Among the new elements added to the Foil test language by the Deschamps test were the terms "aware of facts," "reasonable person" and "possibility of negligence." The addition of these new terms, like the addition of the second prong of the Foil test, should also be viewed as an attempt to render the statute's application more equitable. An analysis of these new terms will increase the intelligibility of both tests. The terms will be analyzed in their respective order; the first term to be treated is "awareness of facts."

The Deschamps test equates its term, "awareness of facts," with the Foil test's term, "knowledge of negligence." In Deschamps, the Utah Supreme Court focused on the narrow question presented--"knowledge of negligence." Deschamps, at 473. Two paragraphs later, the Court, citing Hargett stated, "the crucial question is whether the plaintiff was aware of the facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider." Id. (Emphasis added). Thus, the Court equated "awareness of facts" to "knowledge of negligence," meaning actual "knowledge of medical negligence."

This conclusion is affirmed by the language the Court uses after citing Hargett, wherein it continues to use the term, "knowledge of negligence." See Id. Such usage emphasizes the requirement that a plaintiff have knowledge, not mere suspicion, of the medical negligence which caused his or her injury for the statute of limitations to run. See Vest v. Bossard, 700 F.2d 600, 604 (10th Cir. 1983) ("Mere suspicions or the possibility of a plaintiff having factual knowledge is not enough to cause the statute of limitations to run in favor of the defendants.") The new term "reasonable person" may now be reviewed.

A "reasonableness" requirement is also emphasized in Deschamps. As stated above, the Deschamps test expressly included the element of reasonableness by referring to what a reasonable person would conclude from certain facts. The Foil court also imposed a "reasonableness" requirement by requiring the injured person to exercise "reasonable diligence" in determining the nature and cause of his or her injury. See Foil, 601 P.2d at 149. To make the test rationally consistent, the characteristic of reasonableness should also attach to and qualify the new term, "possibility of negligence."

Depending on its interpretation, the Deschamps test's third new term, "possibility of negligence," renders the whole test either internally inconsistent or objectively reasonable. If the

term is not qualified by reasonableness, then any possibility of negligence would be sufficient to bring a cause of action, regardless of how remote that possibility might be. Since the practice of medicine is not an exact science, there is always the remote possibility that a medical professional has been negligent when his care seems to result in or fails to stop a particular injury. Even if medical negligence merely appears to exist in a particular case, human nature often pushes a person to blame the medical professional for his troubles, whether placing that blame is justified or not. Moreover, not only is there always a remote possibility of negligence, but a "remote possibility" interpretation directly contradicts the Utah Supreme Court's policy reasons for developing the second prong of the Foil test to begin with. Indeed, if a remote possibility of medical negligence were sufficient grounds for legal action, a claimant would be deemed to have knowledge of the possibility of negligence when he had knowledge of the injury, and the second prong of the Foil test would thus become meaningless and useless.

However, if the term "possibility of negligence" is interpreted to mean "reasonable possibility of negligence," then the internal consistency of the Foil test, the definitive Deschamps supplement and the integrity of the Utah Supreme Court is preserved. The consistency of the Foil test would be preserved

because reasonable persons should know of reasonable possibilities of medical negligence. The Deschamps test would be internally consistent because it would not require reasonable, injured laypersons to be aware of and responsible for "unreasonable" or "remote" possibilities of medical negligence. The integrity of the Utah Supreme Court would be preserved because, by adopting the "reasonable possibility" clause, the second prong of the Foil test would still be rational, equitable and viable. Thus, the possibilities of medical negligence for which plaintiffs should be accountable and those which would trigger the statute of limitations to run should be "reasonable" possibilities, not "remote" ones.

In summary, pursuant to the Foil test as modified by Deschamps, where the issue concerns Utah Code Ann. section 78-14-4 and the commencing of its statutory two year limitations period, justice and equity require the following: The two year statute of limitations period should not commence to run until the injured person (1) knows or should know that she has sustained an injury, and (2) knows, or with the exercise of reasonable diligence, should know of the existence of a reasonable possibility of medical negligence.

B. Application of the Foil/Deschamps  
Standard to the Instant Case.

Application of the Foil/Deschamps standard to the instant

case demonstrates that the statute of limitations had not run when Plaintiff, Hollie Mahoskey, brought her claim against Defendants. The first prong of the test is not in dispute. In late July of 1985, Holli knew or should have known she had suffered a physical injury. On July 19, 1985, Holli's right breast was completely removed because the lump previously diagnosed by Defendants was "clearly cancerous." (R 9, 84, 129). Later, in August of 1985, Dr. Wagnon told Holli that if her cancer could have been discovered earlier, it could possibly have been treated with less drastic treatment. (R. 159). Thus, only the second prong of the test is in dispute here.

Plaintiff did not know nor did she have reason to know of the existence of a reasonable possibility of medical negligence, even though she exercised reasonable diligence in trying to determine if she had been a victim of it. In fact, Plaintiff's situation is the type which the Utah Supreme Court tried to protect when it decided the Foil v. Ballinger case.

"In the health care field it is typically the case that there often is a great disparity in the knowledge of those who provide health care services and those who receive the services with respect to expected and unexpected side effects of a given procedure, as well as the nature, degree and extent of expected after effects. While the recipient may be aware of a disability or dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the



treatment provided by a physician and the injury suffered."

Foil at 147. A closer review of the facts will illustrate the applicability of the Court's language.

As stated in the facts, on April 3, 1985, Holli was examined and treated by not one, but two doctors. (R. 1, 147-150). Independently, each doctor employed the same examination method and each doctor reached the same conclusion: the lump in Holli's breast was not and could not be cancerous. (R. 151). She had no medical background and no reason to question or doubt the information she received from the two doctors or the procedures they performed. Indeed, she deeply trusted Defendant Dr. Farr because he had been her physician for a number of years and he had always given her good care. (R. 147, 161). She believed him. She also followed his instruction and continued to monitor the lump in her breast for signs of cancer. Nor was she aware of the further procedures routinely performed in these circumstances to verify the diagnosis, which were not performed in her behalf.

In July of 1985, Holli noticed that the lump was larger and very sensitive and sore. (R. 197). On July 17, 1985, Holli was examined by Dr. James Gardner who, after performing a biopsy, informed Holli that the lump was clearly cancerous. (R 197). Two days later, Holli underwent modified radical mastectomy surgery and her right breast was completely removed. (R 197). After the

surgery, Holli had frequent contact with two other doctors; Dr. Wagnon, who supervised her chemotherapy and Dr. Monson who performed Holli's sterilization therapy. (R 197).

As the uncontested facts indicate, Holli questioned these doctors regarding the care she received from Defendants Farr and Christensen, desiring to know if cancer could have and should have been detected earlier. Yet each time she inquired, she was either told that they did not know, or she was told nothing at all. (R 197). As was stated above, Dr. Wagnon told Holli that if the cancer could have been discovered earlier, less drastic measures may have been sufficient for treating the cancer, but he was not sure. (R 198). This response did not answer Holli's question of whether the cancer could have been discovered earlier, but only informed her of a well known general medical principle, i.e., the earlier that a disease is discovered, the less drastic will be the measures necessary to solve the problem. What Holli needed was information or facts from which she could conclude there was a reasonable possibility of medical negligence on the part of Defendants Farr and Christensen. Neither Dr. Wagnon's recitation nor the responses from her other doctors revealed to Holli any such facts or information. Thus, even after Holli discovered she had breast cancer, she still was not aware of facts which gave her knowledge or should have given her knowledge of a reasonable

possibility that Dr. Farr and Dr. Christensen had been negligent in failing to diagnose such cancer in April of 1985.

Comparing the instant case to the Deschamps case reveals significant factual variations. It may be recalled that in the Deschamps case, a daughter brought an action for the negligent medical treatment of her mother, Mrs. Schulz. Mrs. Schulz died because a regimen of drugs prescribed by her doctor, caused her to contract the fatal disease vasculitis. Ms. Deschamps retained an attorney to investigate the situation even before Mrs. Schulz' death. The Utah Supreme Court affirmed a summary judgment, holding that Ms. Deschamps knew or should have known of the legal injury which was the basis of her action more than two years before we filed her action. Deschamps, 784 P.2d at 473.

The Court found that in October of 1984, at the time of her mother's death, Ms. Deschamps was aware of or should have been aware of the facts and information regarding her mother's disease and subsequent death. By reviewing and comparing Mrs. Schulz' medical records with the medical literature on vasculitis over a two month period, Ms. Deschamps' attorney acquired for Ms. Deschamps, information which was sufficient to commence the running of the statute of limitations period under U.C.A. 78-14-4. Id.

In the instant case, as stated above, Holli Mahoskey had no facts in her possession, other than her personal knowledge as a layperson, from which to form a conclusion about the possibility of negligence on the part of her doctors, until August of 1988. At that time, for the first time, she had an opportunity to conduct an inquiry into the possibility of negligence. Only then did she obtain information and facts sufficient to commence the running of the statute of limitations.

Moreover, Holli's situation varies from the Deschamps case because the alleged negligence arose from a failure to diagnose, rather than from negligent administration of treatment. A causal connection between negligent medical care and physical injury is certainly more obvious where treatment has been positively rendered and is followed by an adverse medical condition which did not exist until after the treatment was given. In the case of a negligent diagnosis, the causal connection between negligent medical care and physical injury may never be recognized. The Wyoming Supreme Court stated this principle in Metzger v. Kalke, 709 P.2d 414 (Wyo. 1985).

"In cases involving an undiagnosed affliction especially, the patient may not discover the wrong until so informed by another doctor: The question of malpractice in a diagnostic situation is often dependent upon when the plaintiff is informed by another physician that the original diagnosis was wrong and whether if a correct diagnosis had been made

and treatment rendered the ultimate result would have changed. Moreover, the fact that plaintiff obtains a correct diagnosis does not necessarily constitute notice that the earlier incorrect diagnosis was rendered negligently." (Citations omitted.)

Id. at 419. Although Metzger may not be factually identical to the instant case, the principle it contains is valid beyond the case's restricted facts. It was not reasonable to require a layperson such as Holli to make a causal connection between Defendants' failure to diagnose her cancer and any possible injury she may have suffered as a result, without first obtaining further information from some educated source.

Shortly after her surgery, in August of 1985, Holli began the gruelling journey through chemotherapy. (R 154). She suffered severe and continuous side effects as a result. She was plagued by physical illnesses since her immune system was severely weakened by the treatment. In addition, even after she recovered physically from the cancer and its treatment, Holli suffered emotional and mental disturbances and distress. Because of the physical, emotional and mental distress brought on by her cancer and subsequent treatment, Holli was unable to function normally for almost three years, until approximately August of 1988. At this time, she was able to put her life back together, return to work, investigate the possibility of plastic surgery, and further investigate the possibility of negligence on the part of

Defendants. In light of the extreme physical, emotional and mental difficulties Holli suffered as a result of her cancer and its subsequent treatment, it was reasonable diligence on her part to postpone further investigation of the possibility of Defendants' negligence until August of 1988. Therefore, the statute of limitations did not commence until September of 1988, when Holli discovered through reasonable diligence that there was a possibility of the Defendants' negligence.

After such a prolonged and incapacitating experience, Holli felt anger toward Defendants Farr and Christensen, and understandably so. After all, they had told her that the lump could not be cancerous. Understandably, she felt some suspicion as to whether they had been negligent in her regard. A layperson's suspicion and anger are not the equivalent of an awareness of facts constituting medical knowledge of the possibility of medical negligence. See Vest v. Bossard at 604. (Mere suspicions or the possibility of a [p]laintiff having factual knowledge is not enough to cause the statute of limitations to run in favor of the defendants). As her feelings of anger and suspicion indicate, Holli, like most humans, desired to blame someone for her situation, whether the blame was justifiably placed or not. But in order for the statute of limitations to commence in a medical malpractice action, the law

requires more than mere unfounded suspicion and anger. The law requires knowledge of a reasonable possibility of medical negligence. If the Court finds that Holli's suspicions were sufficient to commence the running of the statute of limitations, then there can be no legal difference between what a frustrated layperson thinks and what an educated medical expert knows. Thus, the statute of limitations could not have commenced until September of 1988 when Holli, having recovered from her traumatic experience, consulted with an attorney for the first time and obtained a reasonable knowledge of the possibility of a negligent diagnosis.

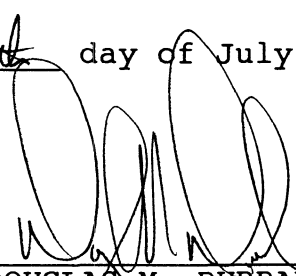
To preserve the public policy rationale first developed by the Utah Supreme Court in Foil, the Court must find that the statute of limitations has not run. A contrary decision would discredit the Court's well reasoned and consistently heeded Foil opinion.

### CONCLUSION

The trial court abused its discretion and consequently erred in granting Defendants' motion for summary judgment. The court did not construe the facts in a light most favorable to Plaintiff, the non-moving party, nor was the case so clear that the court could determine that no genuine issues of material fact existed.

Further, the court disregarded the presumption created by U.C.A. section 78-12-47 which disfavors summary judgments on the issue of the running of the statute of limitations in medical malpractice actions. Moreover, the trial court erred in granting summary judgment and consequently barring Plaintiff's action because Plaintiff, as an untutored layperson, did not know, nor by exercising reasonable diligence could she have known that she was the victim of medical malpractice. Therefore, the trial court's decision granting Defendants' motion for summary judgment should be reversed and Plaintiff given her right to have her day in court as justice and equity so require.

Respectfully submitted this 9<sup>th</sup> day of July, 1990.



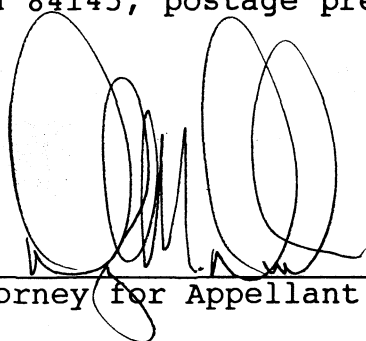
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**CERTIFICATE OF MAILING**

I hereby certify that I caused to be mailed and/or hand delivered four true and correct copies of the foregoing Appellant's Brief to Richard W. Campbell, CAMPBELL & NEELEY, 2485 Grant Avenue, Suite 200, Ogden, Utah 84401 and David W. Slagle, SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, Post Office Box 45000, Salt Lake City, Utah 84145, postage prepaid, on this the 9th day of July, 1990.



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Attorney for Appellant