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

Utah Court of Appeals

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Richard W. Campbell; Campbell & Neeley; Attorney for Defendant/Respondent Ogden Clinic and Dr. Boyd Farr.

Douglas M. Durbano; Paul H. Johnson; Attorneys for Plaintiffs/Appellants; David.W. Slagle; Snow, Christensen & Martineau; Attorney for Defendant/Respondent Dr. Chris Christensen.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900423 CA

IN THE COURT OF APPEALS OF 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. 900423-CA

Category No. 14b

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

REPLY BRIEF OF APPELLANT

DOUGLAS M. DURBANO (#4209)
PAUL H. JOHNSON (#4856)
4185 Harrison Blvd., #320
Ogden, Utah 84403
Telephone: (801) 621-4111
Attorneys for Plaintiffs/
Appellants

Richard W. Campbell
CAMPBELL & NEELEY
2485 Grant Ave., Suite 200
Ogden, Utah 84401
Telephone: (801) 621-3646
Attorney for Defendant/
Respondent
Ogden Clinic and Dr. Boyd Farr

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 621-9000
Attorney for Defendant/
Respondent
Dr. Chris Christensen

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DOUGLAS M. DURBANO (#4209)
PAUL H. JOHNSON (#4856)
4185 Harrison Blvd., #320
Ogden, Utah 84403
Telephone: (801) 621-4111
Attorneys for Plaintiffs/
Appellants

Richard W. Campbell
CAMPBELL & NEELEY
2485 Grant Ave., Suite 200
Ogden, Utah 84401
Telephone: (801) 621-3646
Attorney for Defendant/
Respondent
Ogden Clinic and Dr. Boyd Farr

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 621-9000
Attorney for Defendant/
Respondent
Dr. Chris Christensen

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INTRODUCTION

The statement of the facts, the jurisdictional statement and the statement of the case are set forth in Appellant's Opening Brief at page 1 and pages 3 through 11. Jurisdiction has been conferred on the Appellate Court pursuant to UCA section 78-2-2 (4) and 78-2a-3(2)(j) (1953 as amended), and Rule 42 of the Utah Rules of Appellate Procedure. Appellant takes this opportunity to respond to the arguments set forth in the respective briefs of the two respondents. The remaining arguments of the Appellant are adequately covered in Appellant's Opening Brief.

STATEMENT OF ISSUES

1. In a case involving alleged negligence for failure to

diagnose breast cancer, as a matter of law, is the mere natural anger and suspicion, of a layman plaintiff having no medical background, that her diagnosing physician "screwed up," equivalent to "knowledge" of the possibility that Plaintiff sustained an injury due to negligent action on the part of her physician?

2. Under the facts of this case, construed in a light most favorable to the Plaintiff, as a matter of law, should the Plaintiff be construed to have had "constructive knowledge" that she sustained an injury due to negligence action on the part of her diagnosing physician, more than two years prior to commencing her action in this matter.

SUMMARY OF ARGUMENT

Plaintiff's suspicion of a remote possibility of negligence does not equate to the required finding that she had knowledge of the possibility that she had sustained an injury due to negligent action on the part of the Defendants. The Plaintiff has never taken the position that the statute of limitations did not begin to run until she received an expert opinion concerning the possibility of negligence on the part of the Defendants. In this case, the Plaintiff had no meaningful information relating to the possibility of negligence by the Defendants in failing to diagnose her breast cancer, until she contacted her attorney in October 1988.

The court should find that there is a genuine issue of material fact as to whether the Plaintiff should have discovered her legal injury prior to August of 1988.

ARGUMENT

POINT I:

THE PLAINTIFF DID NOT HAVE KNOWLEDGE OF THE POSSIBILITY THAT SHE HAD SUSTAINED AN INJURY DUE TO NEGLIGENCE ON THE PART OF THE DEFENDANTS, MORE THAN TWO YEARS PRIOR TO HER COMMENCING HER ACTION IN THIS MATTER.

As was discussed in our previous brief, the test for determining whether the statute of limitations should begin to run is whether the Plaintiff had knowledge of or was aware of facts that would lead her to conclude there was a possibility of negligence on the part of the Defendant doctors. Deschamps v. Pulley, 784 P.2d 471, 473-474 (Utah App. 1989).

There are three facts peculiar to this case that distinguish it from all the other previous appellate cases relating to the issue of the running of the issue of the statute of limitations in a medical malpractice law suit. They are as follows:

(1) This case is based upon negligence due to failure to diagnose breast cancer rather than upon negligence due to administering affirmative medical care in a faulty manner;

(2) The Plaintiff in this case is a layman with no medical background whatsoever;

(3) The Plaintiff in this case, despite exercising reasonable diligence in conducting

an investigation into the possibility of negligence of the defendants, was unable to obtain any helpful information concerning the possibility of such negligence from any source, prior to discussing the case with her attorney in October 1988.

These facts should be given special consideration in determining whether the statute of limitations began to run in this case prior to the late summer of 1988.

In Foil v. Ballinger, 601 P 2d 144, 147 (Utah 1979) the Utah Supreme Court recognized that:

"In the health care field it is typically the case that there is often 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 a disfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by the physician and the injuries suffered."

This is a case where the connection between the possible negligence and the injury suffered is even more obscure to the average layman. The alleged negligence arose from a failure to diagnose, rather than from negligence in administration of treatment. A causal connection between negligent medical care and physical injury is certainly more obvious where treatment has been positively rendered by some affirmative action and is thereafter followed by an adverse medical condition which did not exist until

treatment was given. In the case of a negligent diagnosis, the connection between negligent medical care and physical injury may never be recognized. The Wyoming Supreme Court considered the difficulty of making a causal connection between negligent medical care and physical injury in a situation where the alleged negligence was the failure to diagnose an affliction.

" 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 the Plaintiff obtains a correct diagnosis does not necessarily constitute notice that the earlier incorrect diagnosis was rendered negligently."

Metzger v. Kalke, 709 P. 2d 414, 419 (Wyo. 1985). In light of the difficulty in determining whether negligence has taken place in a case involving failure to diagnose a condition, it is absurd to impute knowledge of such negligence in this case to the Plaintiff, a layman with no medical background, unless the Plaintiff had obtained some additional information that would tend to show that the Defendants' failure to diagnose breast cancer in 1985 was negligent behavior.

In this case, despite making inquiries to her other doctors prior to receiving treatment of her cancer, the Plaintiff was

initially unable to obtain any helpful information relating to whether the Defendants were negligent in failing to diagnose her breast cancer in April of 1985. Thereafter, because of prolonged illness and stress brought on by the treatment and possible recurrence of the breast cancer, the Plaintiff was unable to continue her investigation until August or September 1988. Shortly after resuming her investigation into the possibility of negligence on the part of the Defendants, in October 1988, she discussed her case with her attorney, who counseled her of a possibility of negligence. Because the Plaintiff did not have knowledge or awareness of any helpful information or facts relating to the possibility of negligence on the part of the Defendants, until the late summer of 1988, the statute of limitations should not begin to run until the late summer of 1988.

The Defendants put much emphasis on the fact that in July of 1985, upon discovering that she had breast cancer, the Plaintiff was angry towards the Defendants in this case and suspected that there was a possibility of negligence on the part of the Defendants in failing to diagnose her breast cancer in April of 1985. The Plaintiff stated that she was angry with the Defendants and that she felt they had somehow "screwed up." The Defendants would have this court equate such "anger and suspicion" of the Plaintiff with "knowledge" or "awareness" of facts that would lead

her to conclude there was a possibility of negligence on the part of the Defendants. However, it is obvious that the suspicion of the possibility of negligence is present in every situation where medical care does not produce the desired results. Therefore, as common sense might lead one to believe, the 10th Circuit Appellate Court concluded that the mere suspicion of the possibility of negligence by a defendant, or the mere existence of the possibility that the Plaintiff had factual knowledge of the possibility of negligence by a defendant, is not enough to begin the running of the statute of limitations against the Plaintiff. See, Vest v. Bossard, 700 F.2d 600, 604 (Utah, 10th Cir. 1983). This court should also follow principles of common sense and sound legal reasoning and conclude that mere suspicion or anger about the possibility of negligence does not equate with knowledge or awareness of facts that would lead the Plaintiff to conclude that there was a possibility of negligence.

Plaintiff in her Opening Appellate Brief argued that the possibilities of medical negligence for which Plaintiff should be accountable and those which should trigger the statute of limitations to run are "reasonable" possibilities, not "remote" ones. The Defendants have argued that this position is not supported by the law. However, the law always requires reasonableness as the standard of behavior in any situation.

Furthermore, because the practice of medicine is not an exact science, there is always a "remote" possibility that a medical professional has been negligent when his medical care does not produce the expected results. Moreover, if a "remote" possibility of medical negligence was sufficient grounds for legal action, a claimant would be deemed to have knowledge of the possibility of negligence at the time he obtained knowledge of the physical injuries. There would be no reason for the Utah courts to have ruled that:

"Under Foil, the statutory 2-year limitations period does not commence to run until the injured person (1) knows or should know that she has sustained an injury, and (2) knows or should know that this injury was caused by negligence."

Deschamps v. Pulley, 784 P.2d at 473. If all that was required was a remote possibility of negligence a claimant would be deemed to have knowledge of the possibility of negligence when he had knowledge that he had sustained a physical injury, and the second prong of the Foil test would thus become meaningless and useless. Therefore, again, both common sense and sound legal reasoning require that the possibility of medical negligence for which Plaintiff should be accountable and which would trigger the statute of limitations to run should be a "reasonable" possibility of negligence, not merely a "remote" possibility of negligence.

In addition, the Defendant has argued that the Plaintiff had exactly the same information in the late summer and early fall of 1988 that she had in July 1985, and had obtained no additional information relating to the possibility of negligence on the part of the Defendants between July 1985 and October 1988. This statement is true in part, because the Plaintiff did not have any additional information relating to the possibility of negligence from July 1985 to October 1988. This was due to the fact that within a week or two after discovering that she had breast cancer, the Plaintiff had an operation to remove her breast and then began chemotherapy treatments to treat the cancer. Even after the chemotherapy treatments ended in February 1986, the Plaintiff continued to suffer devastating side effects from her surgery 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 1988. The Plaintiff's continuous poor health and subsequent concomitant stresses, in addition to her preoccupation with the foreseeable reoccurrence 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 August or

September of 1988. Therefore, the Plaintiff's ability to conduct a reasonable investigation into the possibility of negligence on the part of the Defendants was effectively destroyed until August or September 1988. Shortly thereafter, the Plaintiff did resume her investigation of the possibility of negligence on the part of the Defendants in this matter. In October 1988, she consulted her Attorney, Douglas M. Durbano, and obtained a preliminary opinion that there was a possibility of negligence on the part of the Defendants in this matter. Thus, in October 1988, the Plaintiff did obtain information in addition to the information she had in her possession in July 1985. Again, these facts dictate that the statute of limitations in this case should not begin to run until the late summer of 1988.

Finally, the Defendants misconstrue the Plaintiff's position in this matter, in representing that the Plaintiff has taken the legal position that she should not be construed to have discovered her legal injury until she had received an expert opinion regarding negligence from either a doctor or a lawyer in this case. The Plaintiff has never taken the position that she could not know of her legal injury until she received an expert medical opinion or legal opinion confirming malpractice. The fact remains that the Plaintiff did not have any information relating to the possibility of negligence on the part of the Defendant from any

source until she talked with her attorney in October 1988. If she had obtained any helpful and relevant information relating to the possibility of negligence on the part of the Defendants before September 1988, that information would have been relevant in determining whether the statute of limitations began to run at an earlier date. The fact that the first information received by the Plaintiff relating to the possibility of negligence on the part of the Defendants came from her attorney does not somehow make the court's ruling in Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989), that an expert medical opinion regarding medical malpractice is not required to begin the running of the statute of limitations, relevant to this case in some distorted way.

POINT II

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER PLAINTIFF HAD "CONSTRUCTIVE KNOWLEDGE" OF THE POSSIBILITY THAT SHE HAD SUSTAINED AN INJURY DUE TO NEGLIGENT ACTION ON THE PART OF THE DEFENDANTS, MORE THAN TWO YEARS PRIOR TO COMMENCING HER ACTION IN THIS MATTER.

As has been argued above, the Plaintiff did not have the "knowledge" of or an "awareness" of facts that would lead her to believe that there was a possibility of negligence on the part of the Defendants, until October of 1988. However, the Plaintiff concedes that as of July of 1985, she did have knowledge of facts which would create an obligation on her part to inquire into the

possibility of negligence. U.C.A. Section 78-12-14(1) states in relevant part:

"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.]

The key issue in this case, therefore, is whether the Plaintiff, through the use of reasonable diligence, should have obtained knowledge of facts that would lead her to conclude that there was a possibility of negligence on the part of the Defendants prior to October of 1988. The Plaintiff did submit evidence to the trial court alleging that she conducted a reasonable inquiry into the possibility of negligence on the part of the Defendants. Therefore, the real issue before the court, which is actually a factual issue to be determined by the trier-of-fact, is whether it was reasonable for the Plaintiff to discontinue her inquiry into the possibility of negligence on the part of the Defendants, from August of 1985 until August of 1988, during the period in which she was suffering from the side effects of her cancer and the treatment for her cancer, and before she could resume her normal activities in August of 1988. The Defendants have not controverted the evidence presented by the

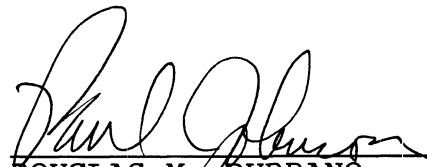
Plaintiff on this issue. Moreover, the reasonableness of the Plaintiff's inquiry into the possibility of negligence on the part of the Defendants is a factual issue, which should be determined only by the trier-of-fact in this case. Therefore, it was error on the part of the trial court to conclude that the statute of limitations barred Plaintiff's Complaint in this case. The appellate court should remand this case to the trial court to conduct a bifurcated trial on the issue of statute of limitations pursuant to Utah Code Annotated Section 78-12-47.

CONCLUSION

The suspicions and anger held by the Plaintiff towards the Defendants in this action, that such Defendants should have diagnosed Plaintiff's cancer in April of 1985, do not in and of themselves, standing alone, constitute knowledge or awareness on the part of the Plaintiff of facts sufficient to lead her to conclude there was a possibility of negligence on the part of the Defendants in this case. Therefore, it was error on the part of the trial court to rule as a matter of law that such suspicions and anger are equivalent to "knowledge" of facts that would lead Plaintiff to conclude there was a possibility of negligence on the part of the Defendants. In addition, a genuine factual issue exists as to whether the Plaintiff used reasonable diligence in conducting an inquiry into the possibility that the failure of the

Defendants to diagnose her cancer constituted negligence. Therefore, because an issue of material fact existed in this case, it was error on the part of the trial court to rule as a matter of law that the statute of limitations barred Plaintiff's action in this case. Accordingly, the Plaintiff requests the Appellate Court to reverse the order of summary judgment of the trial court, and further requests that she be awarded her court costs and attorney's fees incurred in appealing this matter.

RESPECTFULLY SUBMITTED this 10th day of September, 1990.



DOUGLAS M. DUREANO
PAUL H. JOHNSON
Attorneys for Plaintiff/
Appellant

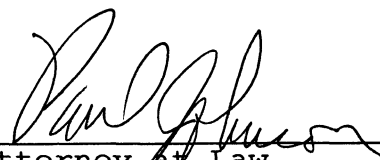
CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed and/or hand delivered four true and correct copies of the foregoing Reply Brief of Appellants upon the parties listed below by first class mail, postage pre-paid to the following:

Richard W. Campbell
CAMPBELL & NEELEY
2485 Grant Ave., Suite 200
Ogden, Utah 84401

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
P.O. Box 45000
Salt Lake City, Utah 84145

DATED this 10th day of September, 1990



Attorney at Law