

1990

Gary Griffiths, Kevin G. Meeham, and Patrick B.
Meeham, and Marian J. Meeham v. J. Dallas
Vanwagoner : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY GRIFFITHS, as guardian	:	
ad litem for KEVIN G. MEEHAN,	:	
and PATRICK B. MEEHAN; and	:	Case No. 900595
MARIAN J. MEEHAN,	:	
	:	Priority No. 16
Plaintiffs and Appellants,	:	
	:	
vs.	:	
	:	
J. DALLAS VANWAGONER,	:	
	:	
Defendant and Respondent.	:	

ADDENDUM TO APPELANTS'
BRIEF ON APPEAL

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE PAT B. BRIAN

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FILED

MAY 29 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY GRIFFITHS, as guardian	:	
ad litem for KEVIN G. MEEHAN,	:	
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(30) "Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

(31) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

History: L. 1976, ch. 23, § 3; L. 1985, ch. 242, § 56.

Meaning of "this act". — The phrase "this act", referred to in the introductory language, means Laws 1976, Chapter 23, which enacted this chapter.

Compiler's Notes. — Section 58-13-17, re-

ferred to in Subsection (6), was repealed by Laws 1953, ch. 94, § 1. A definition of "certified nurse midwife" now appears in § 58-44-4.

Section 58-8-9, referred to in Subsection (8), was repealed by Laws 1979, ch. 13, § 1. A definition of "practice of dental hygiene" now appears in § 58-7-1.1.

78-14-4. Statute of limitations — Exceptions — Application.

(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, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GARY GRIFFITHS, as guardian ad
litem for KEVIN G. MEEHAN, and
PATRICK B. MEEHAN; and MARIAN
J. MEEHAN,

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Plaintiffs,

vs.

J. DALLAS VanWAGONER,
Defendant.

Civil No. 89-0900111-CV
Judge Pat B. Brian

This action came on regularly for hearing on September 28, 1990, before the above-entitled Court, the Honorable Pat B. Brian, presiding. The plaintiffs appeared by and through their counsel, Roger Christensen and Richard Evans of Christensen, Jensen & Powell, and defendant appeared by and through his counsel, Elizabeth King of Snow, Christensen & Martineau. Defendant moved for dismissal of plaintiffs' Complaint for failure to comply with the relevant statute of limitations encoded in Section 78-14-4, Utah Code Ann. (1953 as amended), and

plaintiffs moved to strike defendant's statute of limitations defenses.

After hearing oral argument and reviewing the memoranda on file, the Court now makes the following:

FINDINGS OF FACT

1. On July 27, 1981, Mrs. Marian J. Meehan delivered premature twins.

2. In their Complaint, plaintiffs allege treatment by Dr. VanWagoner resulted in brain damage to the twins following premature labor and delivery.

3. The Notice of Intent to Commence a Medical Malpractice Action was dated August, 1988.

4. Since 1976, Utah has adopted a two-year discovery or four-year limitations period for medical malpractice actions.

No malpractice action against a health care provider may be brought unless it is commenced within two years after 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.

Section 78-14-4(1), Utah Code Ann. (Supp. 1976).

5. In 1979, the Utah Legislature amended this statute of limitations as follows:

The provisions of this section shall apply to all persons, regardless of minority or other legal disability any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

Section 78-14-4(2), Utah Code Ann. (Supp. 1979).

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This action is a medical malpractice action against a health care provider, which is governed by the Utah Health Care Malpractice Act, Section 78-14-4(1), et seq., Utah Code Ann. (1953 as amended).

2. The statute of limitations encoded in Section 78-14-4(1) applies regardless of minority or any other legal disability pursuant to Section 78-14-4(2).

3. Plaintiffs were required as a matter of law to initiate their medical malpractice claim within four years after the date of the alleged neglect.

4. Plaintiffs' Complaint, initiated seven years after the medical care here at issue, is absolutely time-barred by the applicable statute of limitations.

5. This Court must bow to the presumption of the validity of the Legislature's action in amending the applicable statute of limitations so as to specifically apply the statute regardless of disability or minority. This Court does not presume to second-guess the Legislature and will, therefore, not assess the strength or weaknesses of plaintiffs' constitutional claims.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, as well as on the memoranda submitted by the parties, the Court denies the plaintiffs' Motion to Strike defendant's statute of limitations defenses and grants the defendant's Motion to Dismiss and orders that plaintiffs' Complaint be, and the same is hereby, dismissed with prejudice pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, with each party to bear its own costs.

DATED this 29 day of October, 1990.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Pat B. Brian", written over a horizontal line.

Pat B. Brian
District Court Judge

AFFIDAVIT OF MAILING

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

MARIE B. VAN WENSVEEN, being duly sworn, says that she is employed in the law office of Snow, Christensen & Martineau, attorneys for defendant J. Dallas VanWagoner, M.D. herein; that she served the attached Notice of Entry of Order of Dismissal With Prejudice (Case No. 890900111CV, Salt Lake County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Attorneys for Plaintiff
Roger P. Christensen, Esq.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Salt Lake City, Utah 84107

and causing the same to be mailed first class, postage prepaid, on the 5th day of December, 1990.

Marie B. Van Wensveen

SUBSCRIBED AND SWORN to before me this 5th day of
December, 1990.

Linda M. Hamilton
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

5-5-91

IN THE SUPREME COURT
STATE OF UTAH

* * * * *

STEVEN H. BLUM, as Guardian ad)
litem of SCOTT NILES, a minor)
and mental incompetent,)

Plaintiff,)
Appellant,)

vs.)

Case No. 20288

RODNEY A. STONE, M.D., WESTERN)
GYNECOLOGICAL AND OBSTETRICAL)
CLINIC, and COTTONWOOD)
HOSPITAL MEDICAL CENTER,)
jointly and severally,)

Defendants,)
Respondents.)

* * * * *

APPELLANT'S BRIEF ON APPEAL

* * * * *

On Appeal From the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Phillip R. Fishler Presiding

* * * * *

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FILED

MAR 27 1985

Clerk, Supreme Court, Utah

created and the purposes sought to be accomplished by the statute. That is, the classification (in this case abrogation of the tolling provisions § 78-12-36(1) for minor victims of medical malpractice only) must be directly and rationally related to the accomplishment of the legislative purpose. The main objectives of Utah's Medical Malpractice Act as set forth in § 78-14-2 were to decrease or stabilize the cost of medical malpractice insurance and thereby decrease or stabilize health care costs generally; as well as to ensure the continued availability of insurance to Utah physicians, and quality health care to Utah citizens.

Appellant has attempted to determine the basis for Utah's medical malpractice legislation in 1976 and 1979 without success. So far as we can tell, there is none. What little legislative history there is for the Act consists of self-serving declarations from malpractice insurers that there was a "problem." No explanation for the cause of the problem was given the legislators, and the record is devoid of any examples from Utah. With regard to the so-called "long-tail" problem with claims of minors, one New York case is cited. [Portions of the Legislative history from 1976 are attached in the addendum at Tab 8.]

The only evidence that is available indicates that the "long-tail" problem with claims of minors did and does not

exist in Utah; and that the cost of malpractice insurance premiums plays an infinitesimal role in the cost of health care.

Reliable information about medical malpractice claims on behalf of minors in Utah is impossible to come by. Malpractice carriers either do not keep or will not divulge the information. The only reliable information comes from a study by the National Association of Insurance Commissioners [hereinafter, "NAIC Report," See, Tab 10]. That study surveyed all closed medical malpractice claims on a nationwide basis during the period 1975 through 1978. That, of course, is the period during which the alleged Utah malpractice crisis that motivated the subject legislation was at its height. The study was funded by the insurance industry and the voluminous information included came from insurance carriers' malpractice case files. As such, the report is considered the most authoritative to date on recent malpractice claims experience in the country.

During the three and one-half year period between 1975 and 1978, a total of 237 "claims" (not necessarily lawsuits) were made against Utah physicians, only 84 of which resulted in any payment to plaintiffs. Of those, only four awards were in excess of \$100,000, and the total of all payments was \$1,813,452; an average of \$21,589 per paid claim, and only \$7,652 per claim made. [NAIC Report at pg. 121]. During this

Duplicates page 19

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same period of alleged "crisis," Aetna, then the major Utah carrier of malpractice insurance, collected over \$15,000,000 in insurance premiums.

For minors, the figures for 1975-1978 are as follows: total claims - 17 (7.25%), total paid claims - 9 (10.7%); average number of months from incident until report for paid claims - twelve months. [NAIC Report at pg. 115].

Where is the long-tail problem that motivated the Utah Malpractice Act so that "liability insurance premiums can be reasonably and accurately calculated?" [§ 78-14-2]. The long-tail problem, as any reasonable person would expect, was and is non-existent. The parents or guardians of an injured infant will naturally assert its cause of action as soon as possible in most instances. It is only in the very rare case where the child's legal injury is not discoverable for four years, or where the parents are ignorant or unmotivated that infants need the protection of a tolling statute such as § 78-12-36(1).³ Those rare instances will cause no harm to insurance companies who routinely grossly

³That appears to be exactly the type of situation that prevailed in this case, as evidenced from the following excerpt from Dave Niles deposition:

Q: Did you share your wife's suspicion in 1969 that the care she had received from Dr. Stone during delivery was not appropriate?

3(Continued)

A: I recall her visiting the physician she talked about in OB and her coming home and telling me about the doctor's comment and her noticing that it said a normal delivery. I think that we thought or talked amongst ourselves of a sense of, if this is normal, I'm not sure why anyone wants to continue to have babies. That was about the extent of it. We did not, I think, discuss that's abnormal and we should seek some kind of legal counsel. Mainly because at that time in our lives, it was something we really didn't want to get into and it just wasn't high on our list of priorities. [Depo. of Dave Niles at pg. 16 (emphasis added)].

And from the deposition of Elynn Niles:

Q: Having had (knowledge of Scott's injury) for more than ten years and having had the burden of caring for Scott for all of those ten years, can you tell me why it was that it was 1980 that you first saw a lawyer?

A: Yes, first its a matter of survival, coping day by day, and that's not the prevalent thing on your mind at the time. Its learning to cope with the situations and the trauma you're going through. And that went on for quite a long time, and also the fact that not being financially able to do anything anyway, to even call a lawyer or anything, and not knowing what resources to use. We were young. We were 25. It was just a matter of trying to survive for awhile, and we knew absolutely nobody in [Minnesota] and we were all by ourselves and just trying to survive. [Depo. of Elynn Niles at 59.]

(The Niles moved to Minneapolis nine days after Scott's delivery.)

overestimate future losses in order to offset investment income.⁴

In a document entitled Medical Care Cost Containment Proposals, prepared by the Utah State Medical Association in March of 1984, (attached in the addendum at Tab 11), the true causes of increased health care for the period 1974 through 1982 were presented by physicians themselves as follows:

(a) General inflation -	59%
(b) Medical care inflation including technology (over and above general inflation)	11%
(c) An increasing and aging population	8%
(d) Modern medical care financing and the effect of government health programs	<u>20%</u>
TOTAL Before Effect of Increased Cost of Malpractice Premiums	<u>98%</u>

What effect, then, has the increased frequency of tort claims and average awards had on health care costs? The figures and analysis presented by the Utah State Medical

⁴By year-end 1983, the Utah Medical Insurance Association ("UMIA"), Utah's primary malpractice carrier, had paid out a total of \$2.7 million on claims in its five-year history. During the same period it had collected over \$15 million in premiums, and earned \$4.3 million in investment income. Yet, for 1983 alone, UMIA claimed \$3.3 million in unpaid losses (more than its five-year total), to bring its total unpaid losses as of the year-end 1983 to over \$8.5 million. (Sources: UMIA financial statement for 1983, and Best's Insurance Reports for property-casualty companies, 1983 and 1984.) Note that these disproportionate projections all took place during a period when minors' causes of action were statutorily limited to a maximum of four years.

Association demonstrates that it is negligible, most probably less than 1%, and it is not difficult to realize why this is so. Malpractice awards and defense costs are paid by insurance companies. Insurance companies are not part of the health care system, they are independently operated and immensely successful businesses which, through issuance of malpractice insurance and collection of premiums, play an indirect and insignificant role in health care costs. The occasionally large verdicts and settlements that receive a great deal of publicity and attention are not health care costs. The only cost to health care consumers involved in a million dollar judgment against a physician is the premium that physician pays annually for malpractice insurance.

The fact that an alleged medical malpractice "crisis" never existed, or abated, was the basis for several states' conclusions that their malpractice acts were unconstitutional. In Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978), the North Dakota Supreme Court struck down that state's entire malpractice act, in part, on the basis of a finding that no crisis existed. The court stated:

The evidence in the case before us, however, indicates that either the legislature was misinformed or subsequent events have changed the situation substantially. [Id. at 136].

The court in Arneson utilized the intermediate test for equal protection analysis. In Boucher v. Sayeed, 459 P.2d 87 (R.I.

1893), the court utilized the lower-tier rational-basis standard in finding its entire malpractice act unconstitutional. The court stated:

Because no obvious crisis exists to support the challenged legislation, we shall . . . decline to speculate about unexpressed or unobvious permissible state interests.

Absent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants. The statute constitutes special class legislation enacted solely for the benefit of specially defined defendant health-care providers. [Id. at 93].

See also, Jones v. State Board of Medicine, (District Court findings on remand discussed supra). This court has also stated unequivocally that the original factual predicate for a statute and any subsequent change from the situation which prompted the legislation are relevant to equal protection analysis. See, discussion of Malan v. Lewis, infra.

The evidence available clearly demonstrates that there is no factual predicate for the discriminatory classification created by § 78-14-4, and that abrogation of minors' rights guaranteed by § 78-12-36(1) will not substantially further the objectives of the malpractice act. Therefore, § 78-14-4 should be found unconstitutional as a denial of equal protection insofar as the statute applies to minors.

Respectfully submitted this 27TH day of MARCH,
1985.


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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered, 4 true
and correct copies of the foregoing APPELLANT'S BRIEF ON APPEAL
to the following on this 27th day of March, 1985:

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