

1990

Gary Griffiths, et al. v. J. Dallas VanWagoner : Unknown

Utah Supreme Court

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December 16, 1991

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CLERK SUPREME COURT
UTAH

Geoffrey J. Butler
Clerk, Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

Re: Gary Griffiths, et al. v. J. Dallas VanWagoner
Case No.: 900595
Re: Suzanne Lee, et al. v. Dr. Lynn Gaufin
Cases No.: 20995 and 21063

Dear Mr. Butler:

We represent the plaintiffs/appellants in the Griffiths case referred to above. During the past several months all of the briefs in that appeal have been filed with the Supreme Court (appellants' brief, respondent's brief, and appellants' reply brief, which was mailed to the Supreme Court on December 5, 1991).

The Griffiths case involves the issues of whether the medical malpractice statute of limitations and the medical malpractice statute of repose in Utah are unconstitutional as applied to minors. It has just recently come to our attention that the Utah Supreme Court has pending before it an earlier appeal, (the Lee case referred to above), which involves the same issues. We have obtained and read the briefs in the Lee case and we are concerned that those briefs do not discuss certain cases and other information that are critical to an analysis of the constitutional issues. The problem is caused largely by the fact that some of those authorities were not available when the briefs in the Lee case were prepared. (Those briefs are more than five years old, having been prepared in 1986.) Some of those critical matters, which were not discussed in the appellants' briefs in the Lee case, but which are treated in the more recent Griffiths briefs, are

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specifically as follows:

1. The Utah case of Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), decided after the briefs in Lee were filed. That is a 40 page case, which includes separate opinions of four out of the five justices and which provides the framework in which the constitutional issues in the Lee and Griffiths cases should be analyzed. (The separate opinions of the justices in the Condemarin case are reviewed on pages 26-39 of appellants' brief in the Griffiths case.)

2. The non-Utah cases of Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986); Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986); and Lyons v. Lederle Laboratories, 440 N.W.2d 769 (S.D. 1989). (Those cases are discussed on pages 16-18, 20-21 of appellants' brief in the Griffiths case.)

3. Excerpts from the recorded transcript of the legislative history of the "Utah Health Care Malpractice Act", indicating that, contrary to the supposed "findings" made by the Utah Legislature in the preamble to the Act, the Legislature did not have evidence that there was a problem with medical malpractice claims in Utah. (That information is discussed on pages 8-10 of appellants' reply brief in the Griffiths case.)

4. Information to the effect that the heavy losses suffered by medical malpractice insurers in the 1970's were caused in major part by the downturn in the stock market, that the insurers raised medical malpractice insurance premiums partially to recoup those investment losses, that the insurance industry and medical profession then began a ferocious nationwide lobbying effort that resulted in "tort reform" legislation in many states to restrict the number of suits and the amounts of recoveries in medical malpractice cases, that courts have become increasingly willing to make their own evaluations as to whether that legislation was justified, and that, in any event, the relatively few claims of minors filed after the shortened limitations period imposed on minors by that medical malpractice legislation are insignificant with respect to the costs of medical malpractice insurance. (That information is discussed on pages 1-13, 15-16 of appellants' reply brief in the Griffiths case.) Some of the authorities discussing these matters that would not have been available when appellants in the Lee case prepared their brief in early 1986 are:

Note, The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience vs. Legislative Will, 34 Vill. L. Rev. 397 (1989);

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McKay, Rethinking the Tort Liability System: A Report from the ABA Action Commission, 32 Vill. L. Rev. 1219-1221 (1987);

Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 Law and Contemp. Probs. No. 2, p. 5 (Spring 1986); and

Localio, Lawthers, Brennan, Laird, Hebert, Peterson, Newhouse, Weiler & Hiatt, Relation Between Malpractice Claims and Adverse Events Due to Negligence, The New England J. of Medicine No. 4, p. 245 (July 25, 1991)

Other authorities bearing directly on the questions at issue which are not referred to in the Lee briefs are as follows:

Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv. J. on Legis., 143-148 (1981);

Aitken, Medical Malpractice: The Alleged "Crisis" in Perspective, Medical Malpractice, Feb. 1976, p. 90; and

Cunningham & Lane, Malpractice - The Illusory Crisis, 54 Fla. Bar J., 114 (Feb. 1980).

If it would be helpful to the court if we provide copies of the pages referred to above of the appellants' brief and the appellants' reply brief in the Griffiths case, we would be happy to furnish such copies.

We request that the court read the briefs in the Griffiths case before deciding the Lee case. In view of the important constitutional issues involved, and in light of the impact that a decision in the Lee case would have on our clients, we are most anxious that the Court have before it all of the updated information available bearing on the matter. As you will note from reviewing the Griffiths briefs, probably the most significant authorities and information on the questions at issue are not found in the Lee briefs, which were written over five years ago.

Under the circumstances, we believe that the court should seriously consider consolidating the Lee and Griffiths appeals. Accordingly, we are filing a motion to consolidate under Rule 3(b) and, based on our recent conversation with the appellants' counsel in the Lee case, we anticipate that the appellants in that case will join in that motion. In the interim, however, because we do not know the current status of the Lee case, we are alerting you

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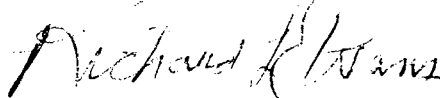
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and the Court to the situation through this letter.

We therefore request that you furnish the justices with copies of this letter and that especially the justice who has been assigned to write the opinion in the Lee case be immediately advised that the same issues that are involved in Lee are now before the court in this later Griffiths appeal.

Sincerely yours,

CHRISTENSEN, JENSEN & POWELL, P.C.


Richard L. Evans

RLE:sp

Enclosures

cc: Elliot J. Williams and Kurt M. Frankenburg
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