

1991

Lorrie Ann Arnold v. Dr. Glade B. Curtis : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

IN AND FOR THE SUPREME COURT OF THE STATE OF UTAH

LORRIE ANN ARNOLD,
Plaintiff/Appellant,

vs.

DR. GLADE B. CURTIS,
Defendant/Appellee

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Case No. 910146

Priority No. 16

BRIEF OF APPELLANT

Appeal From Order of Summary Judgment Entered By
Third Judicial District Court
Honorable Leslie A. Lewis, District Court Judge Presiding

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FILED

JUL 19 1991

CLERK SUPREME COURT,
UTAH

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vs.	:	
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JURISDICTION

Jurisdiction is conferred upon the Utah Supreme Court to hear this appeal by Section 78-2-2(j), U.C.A. 1953, as amended ("orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction").

STATEMENT OF ISSUES AND STANDARD OF REVIEW

(a) Appellant contends that the lower court committed reversible error by failing to consider the affidavit of appellant's expert witness Dr. Kenneth McHenry. The lower court determined as a matter of law that the opposing affidavit of Dr. McHenry was served beyond the time limitation provided by Rule 4-501, U.R.J.A.; whereas service of the affidavit satisfied the service requirements for affidavits opposing summary judgment as provided by Rule 56(c) U.R.C.P.. [Record at 00160-166 (Conclusions of Law), addendum "A"]

A lower court's interpretation of a statute or rule presents a question of law. The reviewing court accords conclusions of law no particular deference, but review those interpretations for correctness. Ward v. Richfield City, 798 P.2d 665 (Utah 1990)

(b) Appellant contends that the trial court erred in ruling that the opposing affidavit of appellant's other expert witness, Dr. Donald Houston, was insufficient because it did not specifically state that he as a general surgeon was familiar with the standard of care applicable to the appellee as an obstetrician.

The court ruled that the supporting affidavit of appellee's expert witness, Dr. Gary H. Johnson, was sufficient because it stated that appellee "complied with the standards of care observed and followed by specialists in obstetrics and gynecology"; which conclusion appellant contends is inconsistent with the actual language of Dr. Johnson's affidavit and therefore amounts to an improper inference. [Record at 00160-166, para. 7, addendum "A"]

The plaintiff in a medical malpractice action must provide expert testimony to establish the standard of care by which the defendant's conduct is to be measured. Anton v. Thomas, 806 P.2d 744 (Utah App. 1991) The trial court has certain discretion to determine the admissibility of expert testimony, and to determine whether the witness is qualified to give an opinion on a particular matter. Gaw v. State Dept. of Transp., 793 P.2d 1130, 1134 (Utah App. 1990) The trial court's ruling in that respect will not be reversed unless it abused its discretion, and then only if the evidence would probably have had a substantial influence in bringing about a different result. Anton v. Thomas, 806 P.2d 744 (Utah App. 1991).

Appellant contends that the lower court's Findings of Fact and Conclusions of Law are clearly erroneous since they are without adequate evidentiary foundation, involve inferences not permitted

in the consideration of motions for summary judgment, and were induced by an erroneous view of the law.

In determining whether the trial court properly granted summary judgment as a matter of law, no deference is given by the appellate court to the trial court's view of the law; which is itself reviewed for correctness. Reed v. Reed, ___ P.2d ___, 154 Utah Adv.Rep. 6 (1991); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989); Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987). Findings of fact are considered clearly erroneous if they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law. Western Capital & Securities v. Knudsvig, 768 P.2d 989 (Utah App. 1989).

(c) Appellant contends that the trial court's exclusion of an expert witness affidavit on the basis of late designation of the witness as an expert was an abuse of discretion. It is appellant's position that affidavits opposing summary judgment are in the nature of rebuttal testimony, and that rebuttal witnesses are not required to be designated in advance. In Dugan v. Jones, 615 P.2d 1239 (Utah 1980) the exclusion of undesignated expert's testimony which was likewise in the nature of rebuttal effectively precluded appellant from presenting her case to a jury on its merits, and the exclusion was held to be erroneous.

DETERMINATIVE PROVISIONS

Rule 56(c) Utah Rules of Civil Procedure is determinative of the issue concerning timeliness of opposing affidavits, which according to that rule may be served no later than the "day prior" to the time fixed for hearing.

STATEMENT OF THE CASE

a. Nature of the Case

This is an action for medical malpractice alleging appellee's failure to timely diagnose an adenocarcinoma of the bowel during the course of routine prenatal care.

b. Course of Proceedings

This action was commenced in February, 1989. On June 18, 1990, the District Court, Judge Raymond S. Uno presiding, held a scheduling conference with both counsel of record appearing. It was verbally agreed by the parties' counsel that designation of witnesses was to be accomplished by October 31, 1990, and that discovery was to be completed by December 31, 1990.

On October 5, 1990, defendant filed a Motion for Summary Judgment supported by an affidavit from defendant's expert witness, Dr. Gary H. Johnson. Counsel for defendant thereafter verbally agreed to extend the time for plaintiff's response until December 31, 1991.

On December 31, 1990, plaintiff responded to defendant's motion by serving a memorandum and opposing affidavit from expert witness Dr. Donald Houston. On January 7, 1991, defendant filed a reply memorandum contending that plaintiff's response failed to raise any genuine issue of material fact with the affidavit of Dr. Houston for the reason that Dr. Houston, a medical doctor specializing in general surgery, could not comment on the standard of care applicable to the defendant, a medical doctor specializing in obstetrics. In response to that contention, plaintiff on January 29, 1991, filed and served another opposing affidavit from a board certified obstetrical specialist, Dr. Kenneth McHenry.

On January 29, 1991, defendant filed a Motion to Strike the affidavit of Dr. Kenneth McHenry on grounds that he had not been designated as a witness before October 31, 1990, and that the affidavit was untimely because it was filed beyond the time allowed by Rule 4-501 Utah Rules of Judicial Administration.

c. Disposition in the Lower Court

On February 22, 1991, a hearing on defendant's motions was held before the Honorable Leslie A. Lewis, District Court judge. The trial court judge refused to consider either the opposing affidavit of Dr. Houston or Dr. McHenry; the former for the reason that Dr. Houston was not an obstetrical specialist and the latter as being untimely served. The court thereupon determined that

without opposing affidavit testimony there was no opposition to the affidavit of the defendant's expert, Dr. Gary Johnson; and that in the absence of opposing expert testimony, summary judgment of dismissal was appropriate.

STATEMENT OF RELEVANT FACTS

The above Statement of the Case contains an account of the facts relevant to this appeal.

SUMMARY OF ARGUMENTS

POINT I.

Appellant contends that the opposing affidavit of her obstetrical expert, Dr. Kenneth McHenry, was timely filed according to the provisions of Rule 56(c), Utah Rules of Civil Procedure. That rule provides "[T]he adverse party prior to the day of hearing may serve opposing affidavits." Since the McHenry affidavit was served January 29, 1991, and the hearing was held nearly one month later on February 22, 1991, the trial court erred as a matter of law in determining that the affidavit of Dr. McHenry was untimely and could not be considered in the summary judgment proceeding.

POINT II.

Appellant contends that the nature of the alleged malpractice is such as to be within the knowledge and experience of any medical practitioner whether a specialist or not; and that the trial court erred in refusing to accept or consider the affidavit testimony of

Dr. Houston on the grounds that as a general surgeon he could not comment upon the standard of care applicable to appellee as an obstetrician even in a matter of general medicine not involving obstetrics.

POINT III.

Although written designation of Drs. Houston and McHenry as expert witnesses occurred after the date of the parties' in-court verbal agreement for identification of such witnesses, the trial court manifestly erred by imposing a sanction for late designation in the form of an absolute exclusion of both Dr. Houston's and Dr. McHenry's affidavits; both of which were submitted to the court by way of rebuttal, and within the time permitted by the rule applicable to summary judgment motions.

ARGUMENT

POINT I.

THE LOWER COURT ERRED AS A MATTER OF LAW BY
REFUSING TO ACCEPT OR CONSIDER THE AFFIDAVIT
OF AN OBSTETRICAL SPECIALIST, DR. KENNETH MCHENRY
AS UNTIMELY WHEN THE DOCUMENT WAS FILED AS AN
OPPOSING AFFIDAVIT IN ADVANCE OF THE HEARING DATE

Appellee argues that the affidavit of Dr. Kenneth McHenry was properly excluded by the trial court on the basis of untimely service thereof, and appellant's failure to designate that witness earlier according to the trial court's "directive". Appellant maintains that the subject affidavit was timely served according

to the provisions of Rule 56(c) U.R.C.P., as amended, and that the trial court abused its discretion by excluding the affidavit contrary to the rule or as an apparent sanction for late designation of Dr. McHenry as a witness.

Rule 56(c) Utah Rules of Civil Procedure provides that in summary judgment proceedings "[T]he adverse party prior to the day of hearing may serve opposing affidavits." Appellee argues that this provision must be read in concert with the preceding sentence which states that "The motion shall be served at least 10 days before the time fixed for the hearing." Appellee's argument suggests that only when a motion for summary judgment is served within 10 days of the time fixed for hearing may opposing affidavits be served prior to the day of hearing.¹ Appellee's argument is misplaced since the clear language of Rule 56(c) requires that motions for summary judgment shall be served at least 10 days before the time fixed for hearing. Motions for summary judgment cannot be served within that 10 day period. Any such untimely motion would be a nullity subject to a motion to strike, and would require no response by the service of opposing affidavits or otherwise. The appellee's argument asks the court to accept the illogical notion that only where a motion for summary judgment is

¹ Record at 00137-00142

served in violation of the rule (i.e., within 10 days of the time fixed for hearing) may opposing affidavits be served not later than the day prior to the hearing under Rule 56(c). In other words, appellee's argument is that if the motion is properly served(i.e., more than 10 days before the time fixed for hearing) Rule 56(c) is meaningless. There is no other or better interpretation to be given the rule than that affidavits opposing a motion for summary judgment may be served no later than the day prior to the time fixed for hearing.

Rule 56(c) of the Federal Rules is analogous to Rule 56, U.R.C.P.². Both clearly provide that opposing affidavits to be considered by the court may be served no later than the day before the hearing. In the federal context, it has been commented that Rule 56(c) should be read in conjunction with Rule 6(d), which provides that for motions in general, opposing affidavits may be served not later than one (1) day before the hearing, and which also vests in the court the power to permit opposing affidavits "to be served at some other time."³ In this case, it is clear that the opposing affidavit of Dr. Kenneth McHenry was timely served

² Reed v. Reed, ___ P.2d ___, 154 Utah Adv.Rep 6, 8 (Utah 1991) (Since the Utah Rules of Civil Procedure were patterned after the federal rules, this court may examine federal decisions to determine the meaning of the rules)

³ Moore's Federal Rules Comments, Rule 56(c).

according to the provisions of Rule 56(c), U.R.C.P. and the recent holding in Butterfield v. Okubo, 790 P.2d 94 (Utah App. 1990).

It is clear from the rule's plain language and applicable case law that in Utah affidavits opposing a motion for summary judgment may be served at any time prior to the day of the hearing. In this case, plaintiff filed and served the affidavit of Dr. McHenry on January 29, 1991, several weeks before the hearing was scheduled. In Butterfield v. Okubo, 790 P.2d 94 (Utah App. 1990) the Utah Court of Appeals considered the matter of timeliness in filing opposing affidavits under Rule 56(c), and stated:

[A]xiomatically, an affidavit in opposition to a motion for summary judgment must not merely be filed with the court; it must also be served on opposing counsel no later than the day before the hearing on the motion,... (Emphasis added)(footnote omitted)

Appellee further argues that the exclusion of the McHenry affidavit was appropriate since appellant had not designated Dr. McHenry as a witness according to the lower court's "scheduling order." In excepting to the lower court's apparent sanction of excluding opposing or rebuttal affidavit testimony, appellant directs this court's attention to the recent case of Dugan v. Jones, 615 P.2d 1239 (Utah 1980); wherein the Utah Supreme Court identified at least three factors which compelled its decision to reverse a district court's similar exclusion. All three of those factors appear to be present in this case. The Dugan court

described them as follows:

"First, the court's [scheduling] order was never reduced to writing. Although this court is not aware of an explicit statutory requirement that pretrial orders in this state be written, the practice is encouraged. ... Second, the matter was tried before the court without a jury. ... Third, the court could have used means other than exclusion to sanction [the party] for their non-compliance with the order, including imposing costs incurred by the other parties in obtaining experts." Id. at 1244 (citation omitted)

Appellee argues that the 1987 amended version of Rule 16, providing additional sanctions which may be imposed under Rule 37, were not available to the Dugan trial court when it excluded expert testimony. The 1987 amendment to Rule 16 does not supercede or invalidate the Dugan decision for the reason that even if the Dugan trial court had the alternative of imposing other sanctions now available under Rule 37, it cannot now be said that the court would have imposed them instead. Appellee's argument speculates concerning what the trial court would have done in 1980 with alternatives made available by the 1987 amendments. Such speculation of course has no place in this court's deliberations. Nevertheless, the sanction imposed by the lower court in Dugan of excluding expert testimony was found to be improper and an abuse of the trial court's discretion. Although the Dugan trial court did not have available to it the alternative Rule 37 sanctions allowed under Rule 16, it did impose a sanction which is now available under Rule

37, and that was considered by the Utah Supreme to be an abuse of discretion. In Dugan, as here, the exclusion of expert testimony which is in the nature of rebuttal effectively prevented appellant from proving her case.

Since the McHenry affidavit was served January 29, 1991, and the hearing was held nearly one month later on February 22, 1991, the trial court erred as a matter of law in determining that the affidavit of Dr. McHenry was untimely, both by reason of the dates of service and designation; and that it could not therefore be considered in the summary judgment proceeding.

There is no requirement in the rules or elsewhere that affidavits opposing summary judgment motions may only be from witnesses who have been previously designated. Opposing affidavits are in the nature of rebuttal testimony, and to disallow an opposing affidavit for lack of prior designation would be tantamount to refusing to allow a rebuttal witness to testify because he had not been designated previously. Rebuttal witnesses need never be designated before they are called to testify. The trial court committed manifest error in failing to consider the affidavit of Dr. McHenry for that reason.

It is apparent that the trial court interpreted the Butterfield decision to mean something other than it says regarding the serving of affidavits. There is no other conclusion to be

drawn from the decision than that opposing affidavits may be served no later than the day before the hearing. Plaintiff satisfied that requirement by serving the opposing affidavit several weeks before the hearing. There is no requirement in the rules or elsewhere that opposing affidavits must be filed at the same time as opposing memoranda. In this case, the questioned affidavit was obviously crucial to the summary judgment issue at hand. The Trial Court itself indicated that if the Dr. McHenry affidavit was considered it could "arguably rise to the level of defeating defendant's motion for summary judgment." [Record at 00158, pg 20] Exclusion of that affidavit therefore produced the summary judgment.

In Utah, a lower court's Findings of Fact and Conclusions of law are considered "clearly erroneous" if they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law.⁴ Appellant maintains that the lower court erred in determining that appellant's late designation of witnesses somehow violated an earlier scheduling "order" of the court. Specifically, the lower court found that there existed a scheduling "order" [Record at 00160-166, paragraph 4, addendum "A"], as where no such order had in fact ever been served upon the parties as is reflected by its unexecuted mailing certificate [Record at 00045-00046,

⁴ Western Capital & Securities v. Knudsvig, 768 P.2d 989, 991 (Utah App. 1989).

addendum "B"]. The trial court concluded as a matter of law that the scheduling "order" precluded the designation of appellant's expert witnesses when it occurred. [Record at 00160-166, para. 5, addendum "A"]. The trial court further concluded that the affidavit of Dr. McHenry could not be considered because it was not timely served under the provisions of Rule 4-501 of the Utah Rules of Judicial Administration [Record at 00160-166, para. 5, addendum "A"].

The lower court's findings and conclusions are clearly erroneous in both respects since no scheduling "order" was ever served upon the parties, and Rule 4-501 does not control the filing of affidavits in opposition to motions for summary judgment under Rule 56(c) U.R.C.P.. Those facts standing alone, and when considered under the "clearly erroneous" standard of review, justify reversal and remand.

POINT II.

THE LOWER COURT ERRED AS A MATTER OF LAW BY
DETERMINING THAT PLAINTIFF'S EXPERT WITNESS,
DR. DONALD HOUSTON WAS NOT QUALIFIED TO TESTIFY
REGARDING THE APPLICABLE STANDARD OF CARE
REQUIRED OF THE DEFENDANT

The trial court determined that appellant failed to demonstrate that Dr. Houston, as a medical doctor specializing in general surgery, was knowledgeable and competent to testify

concerning the standard of care applicable to an obstetrical specialist; and that appellant had therefore failed to raise any issue of material fact sufficient to preclude summary judgment.

The trial court, in its Findings of Fact, determined that the affidavit of appellee's expert witness, Dr. David H. Johnson, stated that "the care the defendant provided complied with the standards of care observed and followed by specialists in obstetrics and gynecology,...", when in fact the actual language of the affidavit contains no such statement. [Record at 00160-166, para. 7, addendum "A"]. The affidavit of Dr. Johnson, who specializes in both obstetrics/gynecology and oncology, does not state what the trial court found to be a fact and used as a basis for granting summary judgment. The affidavit actually states [Record at 00062-00084, para. 8, addendum "C"]:

"...it is my opinion that the medical care and treatment rendered by Dr. Glade B. Curtis to Lorrie Ann Arnold complied in all respects with the standards of professional care, learning, skill and treatment ordinarily possessed and used by practitioners in good standing in this and similar communities in 1986. (emphasis added)

It is obvious that the trial court construed the quoted affidavit statement to mean that the care rendered by the appellee to the appellant complied in all respects with the standards applicable to obstetricians, when in fact the affidavit refers only to the standards applicable to "practitioners". Since Dr. Johnson

has more than one specialty, the standard of care to which he refers may be that common to any one of his several specialties. By its interpretation of the affidavit contents, the trial court construed the term "practitioners" to include obstetricians; while the term in its common meaning actually applies to physicians in all specialties including surgery, obstetrics, and general practice. Although the affidavit contains language to the effect that the obstetrical care rendered appellant was appropriate, appellant maintains that the recognition and diagnosis of rectal cancer is not something peculiar to the practice of obstetrics; but is rather within the realm of general medical practice common to all practitioners. The obstetrical care rendered appellant is not in controversy. The appellant's claim is that appellee failed to timely diagnose an adenocarcinoma of the bowel. Recognizing and dealing with rectal cancer does not particularly involve the activities of an obstetrician, or any other specialist. The condition is one which should be recognized and dealt with by any competent medical practitioner regardless of his specialty.

There is no suggestion from any source that the standard of care in diagnosing rectal cancer is peculiar to the specialized practice of obstetrics. Dr. Johnson's affidavit merely states that he is "familiar with the standards of appropriate medical practice involved in the evaluation and treatment of patients presenting for

prenatal care and the development, as in this case, of colorectal cancer". The affidavit does not state what the appropriate medical practice is. In view of the fact that Dr. Johnson has more than one specialty, and that one of those specialties (oncology) involves the specialized diagnosis and treatment of tumors, he is undoubtedly familiar with the higher standards of a cancer specialist. As applied to this case, the statement is ambiguous since it can be read as relating to either the practice of obstetrics or oncology.

In reviewing a grant of summary judgment, the appellate court analyzes the facts and inferences to be drawn therefrom in the light most favorable to the losing party. Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987). In this case, the trial court incorrectly drew an inference against the appellant which was that Dr. Johnson had addressed the standard of care of an obstetrician, when in fact the standard of care he described was that for medical "practitioners" and not for obstetricians specifically. Appellee has extensively argued the need for expert testimony from the specific medical specialty involved, but has not provided any testimony which particularly describes the applicable standard of care for an obstetrician. It is only Dr. McHenry's affidavit that specifically addresses the standards applicable to an obstetrician. Under Utah law, all inferences

which can be drawn from the affidavit of Dr. Johnson must be viewed in a light most favorable to the appellant. From the fact that Dr. Johnson has more than one specialty and is therefore familiar with more than one standard of care, it is reasonable to infer that his failure to specifically state that his evaluation of the case was based upon the standard of care for an "obstetrician" means that his statement relates to the standards in one of his other specialties. In any case, the appellant is under Utah law entitled to all reasonable inferences, or in other words the "benefit of the doubt" where summary judgment is involved.

In this case expert medical testimony is required to establish the standard of care, departure from the standard, and a proximately caused injury. The question is by what standard of care the appellee's conduct is to be measured. It is appellant's position that in a case such as this issues of diagnosis, treatment, or referral to another physician; matters common to all practicing medical doctors regardless whether they practice a specialty. Testimony in such cases from another physician who happens to practice in the same specialty is not required, but the testimony of any competent medical doctor familiar with the standards of care applicable to all medical doctors, whether specialists or not, should be sufficient. An example to consider may be the recognition of cardio-pulmonary arrest, a life-

threatening condition which any competent physician should be able to recognize and address, regardless of his specialty.

At the very least, the trial court could and should have allowed plaintiff to provide foundational testimony to that effect if the court had any doubt concerning the competence of a physician specializing in surgery to comment upon the standards applicable to another physician specializing in obstetrics where the diagnosis of rectal carcinomas common to all practitioners is involved. There is nothing in the record which suggests that the recognition of rectal carcinomas is something peculiar to the practice of obstetrics.

In Walkenhorst v. Kesler, 92 Utah 312, 67 P.2d 654 (1937), the Utah Supreme Court affirmed a trial court's ruling which allowed the testimony of a medical doctor concerning the standard of care in an action against a chiropractor, since it was shown that the chiropractor "stepped out of the 'chiropractic field' and into the field of medicine." By an extension of that reasoning, a specialist faced with signs and symptoms of disease, the recognition of which is common to the general practice of medicine, should at least be held to the minimum standards of care applicable to all practicing medical doctors, specialist and generalists as well. For example, if the appellant presented to an obstetrical specialist with obvious signs and symptoms of a severed artery or

a compound fracture of the arm which the specialist failed to recognize or act upon, the patient should not be required to establish the specialist's departure from the applicable standard through testimony of another obstetrician, since those conditions do not involve specialized knowledge or expertise but rather disorders within the common knowledge of all medical practitioners. Any medical doctor, whether a specialist or general practitioner, who has obtained a basic medical education and holds himself out as a practitioner should be held to the same standard of care in the diagnosis of common disorders. While the specialist may develop greater knowledge and skill in some particular area or areas, he remains first and foremost a medical doctor who should be held to the same standards as all medical doctors where such common disorders are involved.

In this case, the trial court committed manifest error by determining as a matter of law that the standard of care by which the appellee's conduct is to be measured is a standard which is unique to his specialty, which can only be described by another specialist in the same field; and again by disregarding the only available evidence specifically dealing with the standards of a specialist. The trial court further erred by inferring that Dr. Johnson's affidavit addressed the standard of care applicable to "obstetricians" when it did not say so, and only because obstetrics

happened to be one of Dr. Johnson's several specialties.

The trial court erred in requiring that the applicable standard of care for the recognition and diagnosis of that disorder must be established only by the testimony of another physician in the same specialty; and erred again in refusing to consider a specialist's opposing affidavit which clearly defines the applicable standard of care and the appellee's departure from it. The medical issue in this case involves such basic, general, medical knowledge and practice as to which any competent medical doctor, whether a specialist or not, should be competent to testify. Dr. Houston has provided such testimony as a medical practitioner specializing in general surgery. If a specialist from the same specialty does testify as has Dr. McHenry, his testimony should at least be considered. If considered, either or both of those physicians' affidavits must at least be considered to raise issues of fact which preclude summary judgment.

In order for a nonmoving party to successfully oppose a motion for summary judgment and send the issue to a fact-finder, it is not necessary for that party to prove its legal theory; it is only necessary for the nonmoving party to show facts controverting the facts stated in the moving party's affidavit. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah App. 1988). This the appellant has done by serving the opposing affidavits. If

either or both were considered by the District Court as required by law, or if the inference drawn was against the movant as required by law, summary judgment of dismissal would be improper.

POINT III.

**THE LOWER COURT ERRED AS A MATTER OF LAW IN
REFUSING TO ACCEPT OR CONSIDER THE AFFIDAVITS
OF EITHER OF PLAINTIFF'S EXPERT WITNESSES ON
THE BASIS OF LATE DESIGNATION OF THE WITNESSES**

Appellant does not dispute that written designation of Dr. Donald Houston as an expert witness occurred after the date of the parties' in-court verbal agreement regarding designation of such witnesses. Dr. Houston had however been identified earlier in answers to interrogatories, and his participation as an expert witness certainly came as no surprise to the appellee. The trial court manifestly erred by imposing a sanction for "late designation" in the form of an outright exclusion of Dr. Houston's affidavit testimony. Appellee's argument that there in fact existed a "scheduling order" has only arisen on this appeal. Appellee's Motion to Strike filed in the lower court [Record at 00124-00127] addressed the requirement of filing a designation of witnesses. Appellee's motion was not accompanied by the scheduling "order" because no such "order" had ever been served upon the parties. Since no such "order" was ever served, it was error to consider non-compliance with its deadlines as justifying summary

judgment of dismissal. That is however what the trial court's action has effectively done.

The Utah Supreme Court addressed this issue in Dugan v. Jones, 615 P.2d 1239 (Utah 1980), reversing a trial court's ruling which excluded expert testimony on a damage issue. The relevant facts in Dugan are nearly identical to those presented here. In that case, a pretrial conference was held at which it was verbally agreed that experts were to be identified by a certain time. Neither party submitted a formal pretrial order, nor did the court prepare one itself. During trial, the trial court excluded the testimony of an expert witness for failure to identify the witness in accordance with the pretrial verbal agreement.

As indicated above, the Utah Supreme Court significantly described at least three factors which compelled its decision to reverse because of the exclusion. All three of those factors appear to be present in this case:

"First, the court's order was never reduced to writing. Although this court is not aware of an explicit statutory requirement that pretrial orders in this state be written, the practice is encouraged. ... Second, the matter was tried before the court without a jury. ... Third, the court could have used means other than exclusion to sanction [the party] for their noncompliance with the order, including imposing costs incurred by the other parties in obtaining experts." Id. at 1244 (citation omitted)

In Dugan, as here, the effect of the trial court's exclusion of the expert's testimony appeared in the trial judge's finding that "there is no competent evidence introduced from which the Court could find [in favor of the plaintiff]." According to the authority of Dugan, the trial court in the present case committed manifest error by excluding in its entirety the testimony of expert witnesses in opposing affidavits as a sanction for belated, or even no designation. If any sanction were appropriate, it should be something less than the outright dismissal which resulted from the trial court's election to totally disregard all opposing affidavits.

CONCLUSION

For any or all of the foregoing reasons, the trial court's grant of summary judgment of dismissal represents manifest error which should be corrected by reversal and remand.

DATED this 16th day of July, 1991.

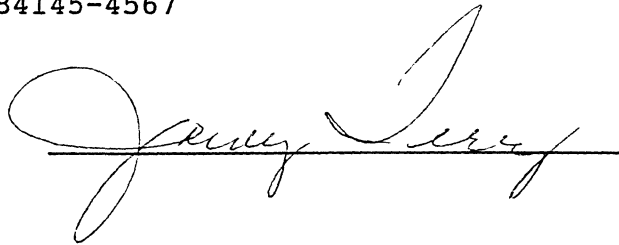
Anthony M. Thurber

ANTHONY M. THURBER
Attorney for Appellant
By Robert F. [Signature]

CERTIFICATE OF MAILING

This is to certify that on this 16th day of July, 1991, I mailed, postage pre-paid, a true and correct copy of the foregoing Appellant's Brief to the following:

Elliott J. Williams
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84145-4567

A handwritten signature in cursive script, appearing to read "Jerry Jerry", is written over a horizontal line.

ADDENDUM

ELLIOTT J. WILLIAMS - A3483
WILLIAMS & HUNT
Attorneys for Defendant
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Telephone: (801) 521-5678

FILED DISTRICT COURT
Third Judicial District

MAR 18 1991


Deputy Clerk

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

LORRIE ANN ARNOLD,
Plaintiff,

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT

v.

DR. GLADE B. CURTIS,
Defendant.

Civil No. 890900890-CV
Judge Leslie A. Lewis

The Motion for Summary Judgment of defendant Dr. Glade B. Curtis came on regularly for hearing on the 22nd day of February, 1991, the Honorable Leslie A. Lewis presiding. Anthony M. Thurber, Esq. appeared on behalf of plaintiff Lorie Ann Arnold. Elliott J. Williams, Esq. appeared on behalf of defendant Dr. Glade B. Curtis.

The Court having reviewed the pleadings and records on file herein, having heard oral argument of counsel and being fully advised in the premises, now enters the following:

FINDINGS OF FACT

1. This is a medical malpractice action in which the plaintiff alleges that she has sustained loss, injury and damage

EXHIBIT "D"

as a consequence of an alleged failure of the defendant to make a timely diagnosis of an adenocarcinoma of the bowel.

2. The defendant is a medical doctor who is a specialist in obstetrics and gynecology. Dr. Curtis began providing obstetrical care to the plaintiff in September 1986, and continued as her obstetrician until her pregnancy was terminated in January 1987.

3. The plaintiff commenced this action in February 1989, and on April 23, 1990 certified the case as ready for trial representing that all discovery had been completed.

4. On June 18, 1990, the Court, Judge Raymond S. Uno presiding, held a scheduling conference with both counsel of record in attendance. With the concurrence of counsel, the Court ordered designation of all witnesses by October 31, 1990, and completion of additional discovery by December 31, 1990. The trial of the case was scheduled to begin on March 5, 1991.

5. No motions have been made at any time to request a change in the Court's scheduling Order or a continuance of the trial.

6. On October 31, 1990, the defendant filed and served his designation of witnesses which identified, among others, Gary H. Johnson, M.D., as an expert witness. Although plaintiff in Answers to Interrogatories previously identified Don Houston, M.D. as a potential expert witness, no designation of witnesses was filed as ordered by the Court.

7. On October 5, 1990, defendant filed a Motion for Summary Judgment supported by the Affidavit of Gary H. Johnson, M.D., a specialist in obstetrics and gynecology and in gynecologic oncology. In Dr. Johnson's opinion, as stated in his affidavit, the care the defendant provided complied with the standards of care observed and followed by specialists in obstetrics and gynecology and, in any event, an earlier diagnosis of the adenocarcinoma would not have changed the outcome.

8. On December 31, 1990, the plaintiff responded to the defendant's motion with the Affidavit of Don Houston, M.D., who is a specialist in general surgery. Dr. Houston stated that he is familiar with the standards of care "utilized by medical practitioners," but his affidavit is devoid of any assertion that he is familiar with the standards of care of a specialist in obstetrics and gynecology or that such standards are identical to those standards with which he is familiar.

9. On January 7, 1991, the defendant filed his Reply Memorandum arguing that Dr. Houston's affidavit failed to establish a sufficient foundation of knowledge about the standards of care applicable to an obstetrician/gynecologist to permit his opinion to create a genuine dispute as to any material fact.

10. On January 29, 1991, in response to the defendant's Reply Memorandum, plaintiff filed an "Additional Witness Designation" identifying, for the first time, Dr. Kenneth

McHenry, an obstetrician/gynecologist, as an expert witness. On that date the plaintiff also filed an affidavit from Dr. McHenry. The defendant moved to strike the affidavit due to the plaintiff's untimely designation of the witness and untimely submission of his affidavit.

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

CONCLUSIONS OF LAW

1. To establish a prima facie case, the plaintiff in a medical malpractice action is ordinarily required to provide competent expert testimony to establish that the defendant deviated from the applicable standard of care and that the departure from standard proximately caused the plaintiff's injuries. Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980). The issues presented in this case are clearly beyond the knowledge of laymen and thus expert testimony is required.

2. The standard of care by which the defendant's conduct is to be measured in this action is the standard of care observed and followed by physicians practicing the specialty of obstetrics and gynecology. Practitioners of other specialties would not ordinarily be competent to testify as experts on the standard of care applicable to this case. Burton v. Youngblood, 711 P.2d 245 (Utah 1985). An exception would be allowed if the party offering a witness establishes that the witness in another specialty is knowledgeable about the standard of care of an

obstetrician/gynecologist with respect to the matters at issue and that the standards of the different specialties on those issues are the same. Martin v. Mott, 744 P.2d 337, 339 (Utah App. 1997).

3. The defendant has provided competent expert testimony from Gary H. Johnson, M.D., that the care and treatment the plaintiff received from the defendant complied with applicable standards of care and that an earlier diagnosis of the adenocarcinoma would not have altered the plaintiff's outcome.

4. The plaintiff has failed to provide sufficient foundation to demonstrate that Dr. Don Houston, a general surgeon, is knowledgeable and competent to testify about the standard of care of an obstetrician/gynecologist with respect to the matters at issue in this case. Consequently, the affidavit of Dr. Houston fails to raise a material issue of fact as to whether the defendant's care was appropriate or whether the plaintiff sustained any injury as a consequence of any delay in diagnosis. Burton v. Youngblood, supra; Martin v. Mott, supra; Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1987).

5. The plaintiff's designation of Dr. McHenry as an expert witness is untimely as it was made long after the deadline imposed by the Court's scheduling Order. No motion was made to extend that deadline. The plaintiff also failed to comply with Rule 4-501 of the Utah Rules of Judicial Administration in filing the affidavit of Dr. McHenry after the deadline for responding to

the defendant's Motion for Summary Judgment had expired. For these reasons, the Court will not consider the affidavit of Dr. McHenry and consequently it will not preclude the imposition of summary judgment. Summerhays v. Holm, 468 P.2d 366 (Utah 1970).

6. On the state of the record there is no genuine issue as to any material fact and defendant Dr. Glade B. Curtis is entitled to judgment in his favor and against plaintiff Lorrie Ann Arnold, no cause of action.


Based on the foregoing Findings of Fact and Conclusions of Law the Court now enters the following:

JUDGMENT

The Motion for Summary Judgment of defendant Glade B. Curtis be, and the same is, hereby granted and judgment is hereby entered in favor of the defendant and against plaintiff, no cause of action.

DATED this 18th day of March, 1991.

BY THE COURT:


LESLIE A. LEWIS
District Judge

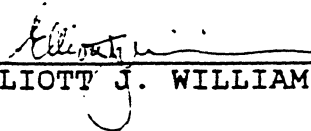
AFFIDAVIT OF SERVICE

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

ELLIOTT J. WILLIAMS, being duly sworn, says that he is counsel for defendant herein; that he served the attached Findings of Fact, Conclusions of Law and Judgment in Case No. 890900890-CV, before the Salt Lake County District Court, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

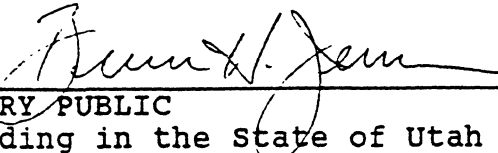
Attorney for Plaintiff:
Anthony M. Thurber
Judge Building, Suite 735
8 East Broadway
Salt Lake City, Utah 84111

and causing the same to be mailed first class, postage prepaid, on the 7th day of March, 1991.



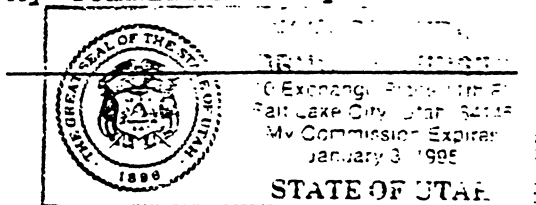
ELLIOTT J. WILLIAMS

SUBSCRIBED AND SWORN TO before me this 7th day of March, 1991.



NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:



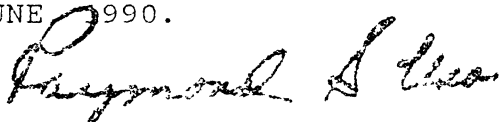
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ARNOLD, LORRIE ANN :
PLAINTIFF, :
-VS- : SCHEDULING ORDER AND
CURTIS, GLADE B DR : TRIAL NOTICE
DEFENDANT. : CASE NO. 890900890 CV
: HONORABLE RAYMOND S UNO

PURSUANT TO THE SCHEDULING CONFERENCE HELD ON JUNE 18, 1990
THE FOLLOWING DATES WERE SET AND MATTERS DISCUSSED:

1. THIS CASE IS SET FOR TRIAL ON MARCH 5, 1991 AT 10:00 A.M.
2. ANTICIPATED TRIAL TIME IS 04 DAYS.
3. THE CASE IS SET FOR JURY TRIAL. COUNSEL ARE TO
SUBMIT AN AGREED SET OF JURY INSTRUCTIONS TO THE COURT BY
FEBRUARY 4, 1991. OBJECTED TO INSTRUCTIONS ARE TO BE SUBMITTED
SEPARATELY.
4. ALL DISCOVERY INCLUDING RESPONSES MUST BE CONCLUDED BY
DECEMBER 31, 1990
5. ALL DISPOSITIVE MOTIONS ARE TO BE HEARD BY JANUARY 18, 1991
6. EXHIBIT AND WITNESS LISTS ARE TO BE EXCHANGED BY
OCTOBER 31, 1990
7. A FINAL PRETRIAL SETTLEMENT CONFERENCE WILL BE HELD ON
FEBRUARY 4, 1991 AT 9:00 A.M. TRIAL COUNSEL AND CLIENTS, OR
AN INDIVIDUAL WITH AUTHORITY TO SETTLE THIS CASE ARE TO BE
PRESENT. OUT OF STATE PARTIES MUST BE AVAILABLE BY PHONE AT THE
TIME OF THE PRETRIAL SETTLEMENT CONFERENCE.
8. FAILURE TO APPEAR AT THE PRETRIAL SETTLEMENT CONFERENCE
MAY RESULT IN A DEFAULT.
9. THE FOREGOING DATES SHOULD BE CONSIDERED FIRM SETTINGS
AND WILL NOT BE MODIFIED WITHOUT COURT ORDER, AND THEN ONLY
UPON A SHOWING OF MANIFEST INJUSTICE. COUNSEL ARE INSTRUCTED TO
STAY IN CONTACT WITH THE CLERK OF THIS COURT AS THE TRIAL DATE
APPROACHES REGARDING THE TRIAL SETTING.
10. IF PLAINTIFF'S COUNSEL ANTICIPATES THAT EVIDENCE AT TRIAL
WILL SHOW DAMAGES OF LESS THAN \$10,000, COUNSEL SHOULD PERPARE AN
ORDER TRANSFERRING THE CASE TO THE CIRCUIT COURT.

DATED THIS 18TH DAY OF JUNE 1990.


DISTRICT COURT JUDGE

COPIES MAILED TO PARTIES AT THE ADDRESSES INDICATED ON THE
ATTACHED MAILING CERTIFICATE.

60311

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE
ATTACHED SCHEDULING ORDER AND TRIAL NOTICE, BY FIRST CLASS MAIL,
POSTAGE PREPAID, TO THE FOLLOWING:

THURBER, ANTHONY M.
ATTORNEY FOR PLAINTIFF
8 EAST BROADWAY
SUITE 735
SALT LAKE CITY UT 84111

WILLIAMS, ELLIOTT J.
ATTORNEY FOR DEFENDANT
10 EXCHANGE PLACE,
ELEVENTH FLOOR
SALT LAKE CITY UT 84145

DATED THIS _____ DAY OF _____ 19____

DEPUTY CLERK

00010

ELLIOTT J. WILLIAMS (A3483)
ELIZABETH KING (A4863)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

LORRIE ANN ARNOLD,
Plaintiff,

vs.

DR. GLADE B. CURTIS,
Defendant.

AFFIDAVIT OF GARY H. JOHNSON,
M.D.

Civil No. 890900890-CV

Judge Raymond S. Uno

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

GARY H. JOHNSON, M.D. being first duly sworn, deposes and
states as follows:

1. My name is Gary H. Johnson, M.D. and the information
contained in this Affidavit is true and is based on my personal
knowledge.

2. That I am a medical doctor with a specialty in
Obstetrics/Gynecology and Oncology. I am licensed to practice
medicine in the State of Utah, with my offices located in Salt
Lake City, Utah.

EXHIBIT "A"

3. That I was involved in the practice of medicine in obstetrics and gynecology in the State of Utah during 1986, the time in question in the Complaint of Lorrie Ann Arnold.

4. That I am familiar with the standards of professional care, learning, skill and treatment ordinarily possessed and used by obstetricians in this and similar communities in 1986. Specifically, I am familiar with the standards of appropriate medical practice involved in the evaluation and treatment of patients presenting for prenatal care and the development, as in this case, of colorectal cancer.

5. That I have been board certified by the American Board of Obstetrics/Gynecology. My education and training are outlined in my curriculum vitae attached hereto.

6. That my opinions set forth in this Affidavit are based upon my review of:

- (a) The Complaint filed in this matter; and
- (b) The medical records of Lorrie Ann Arnold.

7. That the medical records set forth above in paragraph 6(b) are the type of records generally relied upon by physicians in their day-to-day practice to determine the history, care and treatment of patients.

8. That from my total review of the medical records and other information received, and based upon my experience and expertise as an obstetrician and as an oncologist, it is my opinion that the medical care and treatment rendered by Dr. Glade

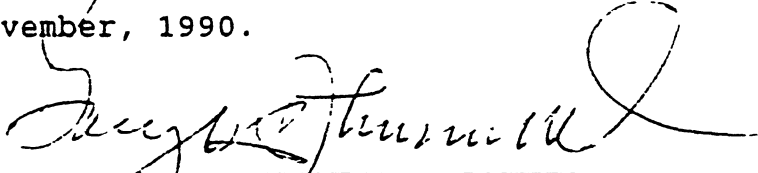
B. Curtis to Lorrie Ann Arnold complied in all respects with the standards of professional care, learning, skill and treatment ordinarily possessed and used by practitioners in good standing in this and similar communities in 1986.

9. That based upon Dr. Curtis' records, the obstetrical care rendered to Lorrie Arnold was appropriate; he acted responsibly and appropriately to the patient's complaints.

10. That in any event, had an earlier diagnosis been made, the outcome would have been the same as the infant could not have been delivered sooner.

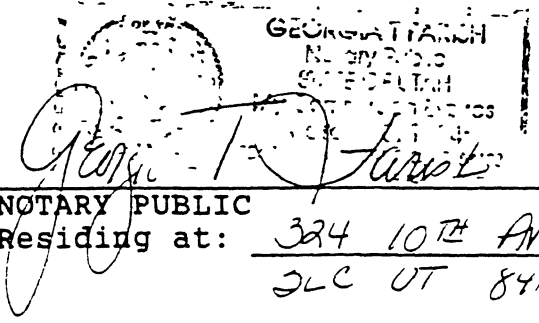
11. That Dr. Curtis' diagnosis and treatment of the colorectal cancer was timely and appropriate; and that based upon my review of the medical records as previously referenced, the allegations of medical negligence and malpractice against Dr. Curtis are not supported by the documentation.

DATED this 30 day of November, 1990.



Gary H. Johnson, M.D.

SUBSCRIBED AND SWORN to before me this 30th day of November, 1990.



NOTARY PUBLIC

Residing at: 324 10th AVE

JLC UT 84113

My Commission Expires:

March 10, 1994