1966

William N. Christiansen v. Vincent L. Rees, Doe I and Doe II, and The Salt Lake Clinic : Respondent's Brief

In the Supreme Court of the State of Utah

WILLIAM N. CHRISTIANSEN,

Plaintiff-Appellant,

- vs -

VINCENT L. REES, DOE I and DOE II, and the SALT LAKE CLINIC, a professional corporation,

Defendants-Respondents.

Case No. 10731

RESPONDENTS' BRIEF

Appeal from Judgment of the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Leonard W. Elton, Judge

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NATURE OF THE CASE

This is an action, instituted in 1965, for medical malpractice in the performance of surgery in 1955, during which it is claimed a portion of a surgical needle was left in appellant's body.

DISPOSITION IN LOWER COURT

After the pretrial hearing, and upon consideration of appellant's deposition and the memoranda of authorities submitted by counsel, the court entered a judgment of dismissal with prejudice because the action was barred by the Statute of Limitations.

STATEMENT OF FACTS

Appellant's statement of facts is incomplete, since it fails even to mention most of the facts upon which the judgment of the lower court was based. Respondents therefore now set forth additional facts, with supporting citations to appellant's deposition, a copy of which was considered by the court under stipulation by the parties (R. 9), and the original of which has since been published and made a part of the record here as page 14.

Respondent Dr. Rees performed surgery upon appellant in 1951 and 1952 and on April 12, 1955, he excised a portion of appellant's rectum. After release from L.D.S. Hospital in Salt Lake City, appellant returned to his home in Mayfield, Utah, and never again communicated with Dr. Rees or his associates (Deposition 9, 10, 11, 14). Appellant's post-operative medical care was rendered by Dr. Davidson, a physician practicing in central Utah.

There has been no doctor-patient relationship or communication beween appellant and respondents since the hospital discharge in April 1955 (Deposition 14).

From the time of the operation of April, 1955, until at least the date of his deposition, November 11, 1965, appellant has had a continuing pain near the anus and tail bone. There has been no change in the location

or nature of the pain (Deposition 12, 13, 22). It covers an area of about one inch or a little more and appellant can feel pain at the same point each time he sits flat or so that the area is being pressed, and he can feel pain at the same point if he presses it with his fingers (Deposition 12, 13, 38, 42). It is a steady, constant pain, which appellant has experienced "through the ten years since the operation" (Deposition 22).

In July, 1962, seven years after the operation, the cause of the pain was diagnosed as a small piece of a surgical needle in the appellant's body which the appellant now alleges was left there during the 1955 operation.

The long period of time which elapsed from the operation to the time the needle was discovered was due to the fact that the appellant made no significant effort to discover the needle in spite of the fact that he experienced continuous pain at the point of the incision. He asked Dr. Davidson about it "on and off" and described to him the pain "and all about it" (Deposition 19). He never returned to the respondent's office or called or wrote to complain of the pain or to attempt to discover its cause (Deposition pp. 13-14, 44), even though he has come to the Salt Lake area at least once a year ever since the operation (Deposition p. 44).

The appellant sought medical assistance only in regard to unrelated ailments, so that any reference to the

pain was casual or incidental to the main purpose of the visit. The only physicians he saw during the seven year period were Drs. Stewart, Endsley, Rumel, Viko and Davidson (Deposition, p. 23). He saw Dr. Stewart for a lung condition (Deposition, p. 16), Dr. Endsley was consulted for a kidney stone condition, Drs. Viko and Rumel were seen in regard to a chest condition (Deposition, p. 23), and the appellant's family physician, Dr. Davidson, was consulted after the short period of post-operative care only in regard to a kidney stone condition (Deposition, p. 17), and the pain was mentioned to Dr. Davidson only casually and not upon every visit (Deposition, pp. 19, 44). Thus, if it were not for these other ailments, the needle would remain undiscovered as its discovery was incident to the kidney stone condition (Deposition, p. 15). The casual manner in which the pain was mentioned was undoubtedly a great factor in not creating the alarm on the part of these doctors to lead them to take the necessary steps to discover the needle at an earlier date.

The lack of concern on the part of the appellant in discovering the needle was despite the fact that he experienced continuous pain which was fixed in the area of the operation (Deposition, p. 13). The appellant's testimony in regard to the seven-year delay in discovering the needle is as follows (Beginning at Page 19 of his deposition):

"A. I asked Davidson on and off if it would get better. He said that as time went on it should, but it has not.

Q. Did you describe to him the pain and all about it?

A. Yes.

Q. Did he ever suggest to you that you go back to the Salt Lake Clinic and complain about it?

A. No.

Q. Or back to Dr. Rees and complain about it?

A. No.

Q. It is your memory of this chain of events, that this pain first became noticeable to you, the pain in your sit down area someplace, became noticeable to you after the 1955 operation?

A. Yes.

Q. You never had it before?

A. No.

Q. And after the bandages were no longer needed to be changed, and the rectum incision had healed, then you felt this pain from that time forward?

A. Yes.

. . . . .

Q. When several months went by and it didn't heal, and you had the pain all along, you decided then there must be something wrong, but you didn't know what it was, is that it?

A. That is it.

Q. You didn't make complaint to Davidson about that for a year or more?

A. I've always complained that there was pain there.

Q. Did he examine the area?

A. He would feel over it, look at it, but he never took x-rays.

Q. And you never, to repeat again, you never either wrote, phoned or went in personally to the Salt Lake Clinic or Dr. Rees to complain about this pain that didn't go away?

A. No, I didn't."

Later, near the end of his deposition, appellant was asked, and he testified, beginning at Page 42, as follows:

"Q. Now in the period from 1955 up to the time that you filed the suit, as I understand your testimony, you have had throughout that period this pain that is actually in your sit-down area or seat, and you have told me covers an area of about one inch or more that you, yourself, can feel if you press on it, is that true?

A. That is true.

. . . . .

Q. Now why not between the period of 1955 and '62, when the thing was continuing to bother you, why didn't you go back to the man that operated on you?

A. Well, we had our doctor down there and we consulted him, not maybe every time we were there about it, but I thought that would be sufficient.

Q. And that would be Dr. Davidson?

A. Yes.

Q. Were you sent to Dr. Davidson by Dr. Rees?

A. No, he asked who the family doctor was at the time.

Q. He wanted somebody to be able to change the bandages?

A. Yes.

Q. Did you ever intend to bring this matter of this continued pain over the one-inch area or whatever the area is in, to Dr. Rees' attention but you never got around to it?

A. As I told you before, I never seen Dr. Rees from the time I left his office until this date.

Q. Did you have in mind to do that, but just never got around to doing it?

A. Well, when you are out like we are you don't have that privilege every day, to contact them and ask them that question.

Q. Are you telling me that in seven years, in a seven-year period, you never went back to Salt Lake City?

A. Yes, I was there.

. . . . .

Q. In the periods I spoke about were you there at least once a year?

A. I imagine.

Q. Did you ever apply for an appointment at the clinic to see Dr. Rees in that period from 1955 to 1962 about the pain in your seat, the period of seven years?

A. No."

There is no explanation or reason advanced in the record for the three-year delay, after discovery of the needle, before the suit was filed. The total time since the alleged negligent act and the time the appellant filed the suit is 10¼ years.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN DISMISSING THE APPELLANT'S ACTION BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS.

The development of the law on the question of when the statute of limitations begins to run in a malpractice action can be easily followed by reference to the annotations in 74 A.L.R. 319 (1931); 144 A.L.R. 209 (1943); 80 A.L.R. 2d 370 (1961). These annotations reveal that the general rule in the United States is that the statute of limitations begins to run in malpractice actions from the time of the negligent act. There are two generally recognized exceptions to this general rule: (1) if negligent treatment continues after the negligent act that directly caused the damage, the statute does not begin to run until the treatment terminates; (2) if the defendant knows of the damage caused by his own negligence, and attempts to conceal it from the plaintiff, or affirmatively misleads the plaintiff, the statute is tolled during the period of the fraud.

Neither of the above exceptions to the genral rule is involved in the instant case. The annotations point out a minority rule, represented by the California cases cited in the appellant's brief, that the statute of limitations does not begin to run until the damage is discovered by the plaintiff.

Utah has clearly rejected the California discovery rule and has followed the view of the majority of jurisdictions. In *Passey v. Budge,* 85 Utah 37, 38 P.2d 712 (1934), the defendant had negligently left a piece of metal in the plaintiff's throat during a tonsillectomy. The doctor-patient relationship continued up until two years before the plaintiff commenced suit. However, the Court found that the purpose of the plaintiff's continuing visits to the defendant's office had no connection with the throat condition. The plaintiff did not discover the condition until 1932, which was 7 years after the operation.

Upon appeal, plaintiff argued that the four-year statute of limitations did not bar the action since the statute did not begin to run until the doctor-patient relationship had terminated. The Court recognized the validity of the "continuing treatment" exception to the general rule, but held that since the continuing treatment did not relate to any of the effects of the metal object, the statute commenced to run from the time of the operation. Hence, the Supreme Court held that the statute of limitations was not tolled during the time that the plaintiff was unaware of his claim.

In *Peteler v. Robison,* 81 Utah 535, 17 P.2d 244 (1932), the Utah Supreme Court applied the continuing treatment exception, and thus found the statute to be no bar to the action. However, by way of dictum, the court stated:

> "Had we a case where the only negligence alleged was the negligent and unskillful operation in removing the tonsils, and nothing more, let it be assumed that the cause of action accrued at the time of the commission and completion of such operation, and, if an action based on such negligence alone was not commenced within four years thereafter, the bar of the statute would be complete, though the consequential damages or injuries resulting from such negligence were not ascertained or made manifest until after the statute had run."

Appellant attempts to avoid the effect of *Passey v. Budge* by contending the opinion of the Court on the statute of limitations problem was mere *obiter dictum.* The reported decision contradicts appellant's contention. Plaintiff-appellant in that case argued only two points: First, that the trial court erred in holding that "the cause of action was barred by the statute of limitations" and, second, that it was error to hold the evidence was insufficient as a matter of law (38 P.2d at page 14, first column). The Supreme Court, in those portions of its opinions found on pages 714-717, directly discussed the limitations issued and rejected the appellant's claim of error. See page 717.

Appellant here attacks also the *Peteler* case upon the same ground — that its language on the limitation issue was only *dicta.* Again, the Supreme Court itself disagrees. In *Passey v. Budge,* the Court referred to the language of the *Peteler* case on the limitation issue as "the doctrine of the Peteler v. Robison" case, and stated that the "principle of law laid down in that case is correct." (Page 717, first column, in 38 P. 2d.)

Neither of these cases has been overruled or modified by the Supreme Court. The facts and principles of *Passey v. Budge* are strikingly similar to the case at bar, and while appellant asks, in the name of "substantial justice" that he be allowed to submit his case to a jury, the Supreme Court, in *Passey,* clearly stated:

> "It must be remembered that the statute of limitations is a legal, and not an equitable, defense. It is available, regardless of equities, if the facts are such as to warrant the interposition of the plea."

Even if the equities were to be considered, they are in favor of the respondent, Dr. Rees. Substantial justice should not require a person to defend a claim which is more than 10 years old and which has run two and one-half times the limitation period. This is especially true in the circumstances of this case where the delay could have been prevented by the exercise of even a slight degree of diligence on the part of the appellant.

The appellant argues that this Court should defer to the views of the California court and reverse its present position. However, as is clear from the latest annotation, 80 A.L.R. 2d 368, the position of California among the jurisdictions ruling on the question is unique, to the extent that there is a section in the annotation, at page 390, headed "California Rule."

Moreover, the very cases cited by appellant from California, and others not cited, recognize that even if a plaintiff has not discovered that he has a cause of action, the statute will nevertheless start to run if the plaintiff has knowledge of facts which should put him on inquiry as to the existence of a cause of action.

Illustrative is *Stafford v. Shultz*, 259 P.2d 494 (Calif. 1952), in which the defendants negligently treated plaintiff's leg, causing serious infection which eventually resulted in amputation of the leg. The negligent acts occurred long before the one-year period of the California statute of limitations. The plaintiff had knowledge of the deteriorating condition of his leg more than one year before suit was filed, but did not learn that the defendant's negligence was the cause of this condition until a later date which was within the one year period of the California statute. The California District Court of Appeal held that the statute began to run from the time that the plaintiff knew of the condition of his leg, since that knowledge should have put him on inquiry

as to any possible claim against the defendant. Hence, the suit was barred, and demurrers to the complaint were properly sustained, despite the fact that the plaintiff was actually unaware of his claim.

On appeal to the Supreme Court of California, the principle upon which the ruling was based was upheld but the Supreme Court reversed the decision upon the ground that the complaint under attack alleged fraud and misrepresentation by the defendants, which allegation presented "sufficient facts to toll the statute of limitations." *Stafford v. Shultz* (Calif. 1954), 270 P. 2d 1. In its decision, the Supreme Court of California expressly recognized that, absent other considerations such as the allegation of fraud and misrepresentation, the statute runs from the date of the negligent act. This year, that court relied upon *Stafford v. Shultz* in deciding an action for legal malpractice. *Alter vs. Michael* (Calif. 1966), 413 P.2d 153.

In *Hurlimann v. Bank of America National Trust & Savings Association,* 297 P.2d 682 (Calif. 1956), the court stated that a plaintiff, in order to benefit by the California discovery rule, must show that he is not at fault for not making an earlier discovery of his claim, and that he had no knowledge of facts that should have put him on inquiry. Other jurisdictions which follow the California rule also require that the plaintiff show that he had no knowledge of facts that should have put

him on inquiry as to any possible claims for damages. *E. G. Hahn v. Claybrook*, 100 Atl. 83 (~~No. Dak. 1965~~); *Weinstein v. Blanchard*, ~~102~~ Atl. ~~609~~ (N.J. ~~1959~~). Appellant has made no such showing by his pleadings or testimony in this case.

The Montana case cited by appellant, *Johnson v. St. Patrick's Hospital,* 417 P.2d 469 (Montana 1966), and the commentary on the case quoted by appellant in his brief, clearly qualify the discovery rule, limiting its application to siutations where the plaintiff was diligent in his attempts to discover his injury.

It is thus clear that in cases in which courts have applied the discovery rule and tolled the statute, the plaintiff involved either alleged exceptions to the general rule or that he was diligent in discovery and prosecuting his caim. However, in the instant case, the plaintiff made no effort to find the cause of the pain which he experienced after the 1955 operation. The pain was constant, it was in a small area, it did not shift its location, and appellant never had it before. Despite all this, the pain was mentioned only incidentally in connection with treatment for other unrelated ailments. Although he had ample opportunity, he made no attempt to see the respondent or to take any other action to ascertain the problem.

Had the appellant made any real effort to discover the source of his pain, or had he brought it to the attention of the respondent, his cause of action would almost certainly have been discovered within the four year limitation period.

The latest California cases respondents have been able to find reaffirm the proposition that the plaintiff may still be barred, despite the "California rule", if he knows facts which would reasonably put him on notice of inquiry. See opinions of Supreme Court of California in *Stafford v. Shultz,* 270 P.2d 1, cited in *Thompson v. Fresno,* 381 P.2d 924.

Plaintiff also cited Arizona and Colorado cases to support his position. However, it should be noted that neither of the cases cited from these jurisdictions adopt the California rule. The cases were decided under the exceptions to the majority rule. In *Rosane v. Senger,* 149 P.2d 372 (Colo. 1944), the court found that the defendant had fraudulently concealed his negligence from the plaintiff, and on this ground held the statute had not commenced to run. Similar grounds were the basis of the Arizona decision in *Morrison v. Action,* 198 P.2d 590 (Ariz. 1948).

Furthermore, it has been held that the doctrine of *laches* may preclude recovery in spite of the adoption of the California rule. The Supreme Court of Idaho ap-

parently adopted the California discovery rule in *Billings v. Sisters of Mercy of Idaho,* 389 P.2d 224 (Idaho 1964). It is noted, however, the Idaho court specifically ruled that failure to use due diligence, after being put on notice of facts which should incite inquiry, might bar the claim. Later, in a federal diversity case, the Ninth Circuit interpreted the Idaho Court as adopting the discovery rule with some reservation. The Federal Court held that a claim which was nine years old may be barred by the doctrine of *laches,* in spite of the fact that during the nine years the plaintiff was unaware of his claim. *Owens v. White,* 342 F.2d 817 (9th Circuit 1965).

In the instant case, actual discovery was made in 1962, and suit was filed more than three years later. Thus, the claim was more than ten years old at the time the suit was filed, and therefore, even under the discovery rule, the equitable doctrine of *laches* should bar this suit.

The entire issue involved in the instant case may be disposed of by reference to the Utah statutes. The issue involved arises because of the appellant's argument that there is no designation in our statutes as to when the four year limitation period of Section 78-12-25 should begin to run. However, a careful reading of the code reveals that there is such a designation. Utah Code Section 78-12-1 prescribes that the various limitation periods stated throughout Chapter 12 of Title 78 shall

commence to run "after the cause of action shall have accrued . . ." The Supreme Court of Kansas has construed identical statutory language to mean that the limitation periods must run from the date of the negligent act, precluding the court from designating any other point of time. *Hill v. Hayes*, 395 P.2d 298 (Kansas 1964).

The legislative history of the statute of limitations provision applicable in the instant case is enlightening on this problem. Prior to 1951 the personal injury statute of limitations provided that:

> "An action for relief not otherwise provided for must be commenced within the four years after the cause of action shall have accrued." Title 104-2-30, Utah Code Annotated 1943.

In 1951 the Legislature enacted what is called the "judicial code" in which Title 104, among others, was repealed and the present statute was enacted. In place of the section quoted above, the Legislature provided that there must be instituted within four years "an action for relief not otherwise provided for by law." Other sections of the statutes of limitation were not changed.

An examination of these other statutes reveals specific instances where the legislature has provided that the statute of limitations does not run until the plaintiff discovers the facts which give rise to his cause of action. See Title 78-12-26. The first section of that statute pro-

vides that the cause of action for damages for injury to real property "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass."

The next section of 78-12-26 provides the cause of action does not accrue until the owner of the livestock in question "has actual knowledge of such facts as would put a reasonable man upon inquiry . . ."

It is interesting to note that the legislature did not make any provision for either actual discovery or "due diligence" in the four-year statute governing personal injury actions. The failure of the legislature so to do has been held to be significant by the Supreme Court of New Mexico in the malpractice case of *Roybal v. White,* 383 P.2d 250 (1953), where the court held that since the legislature enacted a discovery rule to apply in some circumstances, the courts are not free to apply a similar rule in other circumstances where the legislature chooses not to act. The court said:

> "We cannot supply what the legislature has omitted. We are convinced that if the legislature had intended the principle of discovery to apply to tort actions, it would have specifically so provided, as it did with regard to discovery in cases of fraud and in actions for injuries to or conversion of property."

The same result was reached in a case involving a sponge left in a patient in *Lindquist v. Mullen,* 377 P.2d 724 (Wash. 1954), and in a case involving negligent treatment of a shoulder condition in *Hill v. Hays,* 395 P.2d 298 (Kan. 1964).

The rulings of the above cases have been adopted, in principle, by the Supreme Court of Utah in its 1960 decision of *Auerbach v. Samuels,* 349 P.2d 1112, in which the plaintiff sought to avoid the effect of limitations in an attempt to establish a constructive trust for unpaid legacies claimed under a will. Citing Title 78-12-26, Utah Code Annotated 1953, the Supreme Court affirmed a lower court dismissal of the action and held that in the absence of extrinsic fraud, the statute of limitations runs from the time of the distribution of the estate. The court concluded:

> "Even under the plaintiffs' theory of wrongful distribution and constructive trust, the period within which an action must be commenced begins to run from the time the person entitled to the property knows, *or by reasonable diligence and inquiry should know,* the relevant facts." (Emphasis supplied.)

The appellant attempts to avoid the holding of the *Roybal, Lindquist, Hill* and *Auerbach* cases by citing *Attorney General v. Pomeroy,* 93 Utah 426, 73 P.2d 1277 (not 73 Utah 46, 72 P.2d 1277 as cited by the appellant), as standing for the proposition that the Court may ignore

the absence of a discovery rule in a statutory provision and superimpose its own views in place of the missing language. However, the case in no way supports the appellant's contention. The case merely holds that the statute is tolled if the defendant conceals the cause of action from the plaintiff. The case is in accord with the well-established exceptions to the general rule in malpractice cases and is not involved in the instant case.

The appellant argues that despite the fact that the legislature enacted a discovery rule in some of the time limitation statutes but failed to do so in the applicable statute, the legislature nevertheless intends the discovery rule to apply. The argument is based on conjecture, and is contrary to the established principles of statutory construction. It is well established that where a particular provision is contained in one portion of the code and is absent in another, the legislature intended to exclude it from the latter statute. *Costello v. Farrell,* 48 N.W. 2d 557 (Minn. 1951); *Blackeslee Storage Warehouses, Inc. vs. City of Chicago,* 17 N.E. 2d 1 (Ill. 1938). Furthermore, when a statute has a long and consistent construction by the courts, the failure of the legislature to alter the statute to preclude the construction is evidence that it acquiesces in the construction. *Alexander v. Bennett,* 5 Utah 2d 163, 298 P.2d 823, cert. denied, 353 U.S. 923 (1956); *Danis v. New York Central Railroad,* 117 N.E. 2d 39 (Ohio 1954); *Fehr v. General Accident Fire and Life Assurance Corp.,* 16 N.W. 2d 787 (Wisc. 1944).

The limitation applicable in the instant case, Utah Code Annotated 78-12-25 (1953), was amended in 1951 without adding any provision for a discovery rule. See Laws of Utah, 1951, Chapter 58, Section 3. It is established that when the legislature amends or re-enacts legislation using similar wording, it is implied that the legislature intends to accept the prior construction of the portions of the statute which are effectively retained. *Anderson v. Cook,* 102 Utah 265, 130 P.2d 278 (1942); *Masich v. United States Smelting, Refining & Mining Co.,* 113 Utah 101, 191 P.2d 612 (1948).

CONCLUSION

It is graphically clear from appellant's own testimony that for more than ten years prior to the filing of this suit, he had a problem of continuing pain, in a small area which he could touch with his finger, that was in the area of the operation in question, that he had ample opportunity to take action concerning it, but that he simply failed to do anything about it. Even after discovering the presence of the broken surgical needle in 1962, appellant did not file this suit until three more years had passed.

Under such circumstances, it is abundantly apparent that, even under the more liberal rule followed by some states, appellant should be barred from proceeding with this action, and since the only Utah authority in point,

the case of *Passey v. Budge,* holds clearly that the statute of limitations has run, the judgment of the lower court was correct and it should be affirmed.

Respectfully submitted,

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