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

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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

APPELLANT'S REPLY 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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Clerk, Supreme Court, Utah

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Lest it be taken that the Appellant agrees with the Respondent's recitation of fact, the Appellant deems it essential to make several corrections.

In the first place, the Respondents' statement concerning the facts is in violation of the stipulated facts made for the purpose of the arguments raised at the pretrial hearing. At that hearing there was raised for the first time an oral motion to dismiss for reason that the action was barred by the statute of limitations.

At no time prior to this appeal did the Respondents (Defendants) argue or claim laches or lack of diligence.

In fact the Respondents' (Defendants') memorandum of authorities is quoted verbatim to establish the limited issues on which the court considered the matter:

"At the pretrial hearing of April 28, 1966, defendants urged this claim was barred by the four-year statute of limitations, Title 78-12-25, Utah Code Annotated 1953. The Court took the matter under advisement, pending receipt of briefs from counsel. Defendants now respond to plaintiff's memorandum of authorities. Plaintiff's statement of "admitted facts" is accepted, for purposes of this motion, with the following additional facts, taken from plaintiff's deposition, which deposition Defendants now move the Court to publish"

The deposition was published only as it pertained to the Statute of Limitations issue. The Respondents at that time did not claim a defense of laches.

The Appellant believes that "facts" when stipulated on a Motion to Dismiss should not exceed the stipulation nor should they be viewed in any light not favorable to the Appellant's contention. For example: (1) Respondents describe the needle as a "small" piece of surgical needle (P. 3 of Respondents' brief). The fact is the radiologist described it as "a portion of a surgical needle." Stipulated fact. (2) "The long period of time which elapsed from the operation was due to the fact that the Appellant made no significant effort to discover the needle." (Brief P. 3) This was not an issue to be considered by the trial judge and is furthermore not the fact. It should be remembered that the only "evidence" relied upon by the Respondents

was the deposition of Mr. Christiansen, and that not for the purpose for which it is now urged. The Appellant, in the deposition, asked only one or two questions concerning another connected disability arising out of the surgery. He assumed he would have a chance at the trial to make his explanations concerning treatment and his reasons for seeking medical treatment. A deposition is not per se conclusive evidence that overcomes the plaintiff's pleading. The Appellant assumed the deposition was only for discovery purposes and did not realize he had to try his case at that time. The fact is that there were reasons why Mr. Christiansen did not learn of the needle earlier, but that answer should be reserved for the trial.

The point of our reply brief is that we want the facts on appeal and the argument on appeal restricted to the issue raised by both the Appellant and Respondents, and that is WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN? The question of what the Appellant did or did not do concerning the needle after the surgical procedure was not an issue in the court below. To repeatedly argue "facts" not stipulated, not covered by the deposition and outside of the issue on which summary judgment is granted is not a fair approach to the problem.

To say that the "appellant has made no such showing (referring to an explanation of why he didn't discover the cause of his problem earlier) by his pleading or testimony in this case" (Brief, P. 15) is to beg the question. In the first place, one does not plead evidenciary fact; and in the second place, the Appellant has not offered any testimony.

The problem, as submitted, was a legal problem. The Plaintiff should be allowed to present the "facts" at the trial.

Respectfully submitted,

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