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Marion W. Malstrom v. Thebon C. Olsen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARION W. MALMSTROM,
Plaintiff-Appellant,

— vs. —

THERON C. OLSEN,
Defendant-Respondent.

Case
No. 10110

APPELLANT'S BRIEF

FILED
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Clerk, Supreme Court, Utah

Appeal From the Judgment of the
Third District Court of Salt Lake County
HON. RAY VAN COTT, JR., *Judge*

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} Case
No. 10110

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action for personal injuries arising from defendant's treatment of plaintiff-appellant by roughly manipulating and jerking her head in a negligent manner.

DISPOSITION IN LOWER COURT

The case was tried, to a jury. The Court gave judgment against plaintiff, on the basis that plaintiff by her evidence, viewed in the light most favorable to her, had not established defendant's negligence.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and a new trial.

STATEMENT OF FACTS

On June 11, 1961, the plaintiff Marion W. Malmstrom and her husband visited defendant's home office in Crescent, Utah. Plaintiff is a registered nurse and her husband is an employee of Hercules Powder Company (Tr. 2, 3, 7). The defendant is a duly licensed chiropractor under Utah laws (Pre-Trial Order). Plaintiff complained to defendant of a low back pain and sought treatment for this condition. The low back pain had been experienced by plaintiff as early as 1949, and since that time, occurred intermittently. Rather than submit to surgery, she attempted to obtain relief from the pain by submitting to treatment at defendant's hands.

Defendant after hearing of plaintiff's complaint for low back pain agreed to treat her for such condition. He directed plaintiff to lay on her abdomen on his couch. During the course of the brief treatment, defendant seized plaintiff's neck with both his hands and gave her head a sharp, rough jerk (Tr. 6-50-64). She stated that the treatment "certainly hurt," and that "if I tried to move my head to the side it was very painful." She had never experienced a similar pain prior to her visit to Doctor Olsen (Tr. 7). Plaintiff had never prior or after her visits to defendant been the victim of an accident (Tr. 55).

The next day plaintiff and her husband returned to Dr. Olsen's office as requested by him. Dr. Olsen was told by Mr. Malmstrom that he had hurt his wife's neck during the first treatment and the Doctor replied, "Oh, I can fix that." The second treatment was brief, during which defendant again gave her neck a sharp, rough jerk (Tr. 8). Plaintiff's neck hurt her constantly after these treatments, and the pain extended as well from her shoulders down her arms (Tr. 10).

On July 10, 1961, she visited her family physician, Dr. Emery Argyle of Murray, Utah, telling him that she had been to a chiropractor who treated her neck roughly, and that she had experienced continued pain since that time (Tr. 10).

Dr. Argyle treated her with heat from time to time but this did not alleviate her pains. He then advised her to seek treatment from Dr. Bauman, an orthopedic specialist, with offices in the Salt Lake Clinic Building. Dr. Bauman first had plaintiff wear a cervical collar and sleep in traction at home. This treatment did not relieve her discomfort and the pains in her neck and arms increased. Her disability was at this time so great that she was unable to pursue her occupation as a nurse. Dr. Bauman then sent her to the L.D.S. Hospital for continuous traction which treatment lasted seven days without beneficial results. At this point, he advised her to seek help from Dr. Bernson, a neurosurgeon (Tr. 10-19 inclusive).

Dr. Bernson examined her and found: (1) Stiffness of the neck; (2) rigidity thereof due to muscle spasm,

causing considerable limitation of neck motion; (3) inability to raise her hands high enough to care for her hair; (4) weakness in grasp of right hand; and, (5) numbness and decrease of sensory perception present over both hands. The above symptoms indicated to the Doctor on a clinical basis that there was a compression or pressure against the fifth and sixth cervical nerve routes. The Doctor arranged for plaintiff's admission to L. D. S. Hospital where several X-rays called "discograms" were made. These pictures established that the fifth and sixth cervical discs were ruptured, which explained plaintiff's aforesaid symptoms. Doctor Bernson expressed the opinion based on his examinations and his observation during surgery that the twist of plaintiff's neck by Dr. Olsen caused the damage to the discs (Tr. 87, 88, 89, 95). Dr. Bauman was also of this opinion. Dr. Bauman added that it was possible to rupture a disc by a sharp twist of the neck (Tr. 116-117-130).

Dr. Bernson assisted by Dr. Bauman operated on plaintiff's neck. During the course of this operation, both doctors by observation were able to determine the exact conditions of the injured cervical discs and to determine that the injury was of recent origin. Dr. Bernson summarized his testimony in this respect as follows:

"But when the surrounding tissues are ruptured, the disc dries out and over a period of time it becomes fragmented and loses its normal luster or appearance. So if this had been a rupture of long duration the disc would have had the appearance that we described. Actually it was not this way. The disc looked fairly normal, the luster and the

liquid portion of the disc was still there. So on this basis I would say it was recent.” (Tr. 91)

ARGUMENT

POINT I.

PLAINTIFF’S EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO HER, ESTABLISHED THAT DEFENDANT ACTED NEGLIGENTLY.

Defendant asked for dismissal of plaintiff’s claim because allegedly no evidence was produced to show that defendant in his treatment of plaintiff failed to exercise the skill and care of recognized standards of chiropractic treatment.

Briefly stated, the facts are that plaintiff sought treatment of defendant for a low back pain. She had no injury to the fifth and sixth cervical discs at this time. Defendant by use of force twisted her neck in a sharp, rough manner causing immediate pain and discomfort. The pain and discomfort ever increased after the treatment and Doctors Bauman and Bernson, physicians and surgeons, testified that her fifth and sixth cervical discs were definitely herniated and that this injury was of recent origin. They both were of the opinion that the neck manipulation caused the injury to the discs. Plaintiff testified that the neck was not involved in any accident or any other mishap before or after the treatment which could account for her neck injury.

Farrah v. Patton, (1936) 99 Colo. 41, 59 P. 2d 76, involved an appeal from a nonsuit. The plaintiff who suf-

ferred from a stiff neck caused by painting a ceiling submitted to treatment by defendant, an osteopath. The defendant suggested that plaintiff sit on a chair, and then defendant got behind him, put both hands on his neck, gave the neck a side motion once or twice, and then gave the neck a "terrific" jerk. Instantly the plaintiff suffered "terrible" pains. Consequences followed such as partial paralysis of the face. Three years after the manipulation plaintiff had no control over the muscles in his right arm, and had other disabilities.

Plaintiff immediately was removed to a hospital and was attended by Major James O. Orbeson, an army physician, who after examination expressed the opinion that plaintiff's symptoms were the result of a severe trauma exerted at the point where the spinal cord enters the skull.

Defendant invoked, and the trial court ruled, that the question whether or not the defendant was negligent must be tested by the required standards of his own school, and that such testimony must be established by the testimony of experts.

The Supreme Court of Colorado stated that although as applied to many cases the rule was sound, it was not of universal application. In certain types of malpractice cases, the law, according to the court, is that negligence can be proved by non-expert witnesses and where recovery is sought not for negligence in making an incorrect diagnosis or in adopting the wrong standard of treatment, but for performance of an operation in a negligent

manner, any pertinent evidence having a fair tendency to sustain the charge of negligence is sufficient to take the case to the jury.

In support of its decision the Colorado court cited *Hinthorn v. Garrison*, (1921) 108 Kan. 510, 196 P. 439, involving treatment by a chiropractor who used force in his treatment. The Kansas court was of the opinion "that a chiropractor who treated a man entirely free from any trouble with his spine, who thereafter suffered as the testimony shows plaintiff did, must have been unskilled or careless."

A partial dislocation of a patient's neck by osteopathic treatment was considered so unusual that a finding of negligence was warranted, in the absence of explanation. *State ex rel. American School of Osteopathy v. Daves*, (1929) 322 Mo. 991, 18 S. W. 2d 487.

Oliver v. Ford Motor Company (1934) 267 Mich. 299, 255, N.W. 287 involved a treatment by a Swedish masseur who jerked or twisted plaintiff's head violently. The court held that the case should have been submitted to the jury. See: *Ellinwood v. McCoy et al.* (1935), 8 Cal. App. 2d 590, 47 P. 2d 796.

In the case of *Huggins v. Hicken*, (1957) 6 Ut. 2d 233,, 310 P. 2d 523, this court quoted with approval from its opinion in *Fredrickson v. Maw, et al.* (1951) 119 Utah 285, 227 P. 2d 722 holding that when facts may be ascertained by the ordinary use of the senses of lay witnesses, it is not necessary that expert testimony be produced and relied upon. The Huggins case involved post operative

care of a gall bladder operation depending upon complex scientific knowledge beyond the knowledge of the lay witnesses, and, therefore, the above quoted rule was not applied by the court because of the complex nature of the case.

In the instant case, however, the facts are not complicated and a lay witness is capable of ascertaining whether or not negligence occurred.

POINT II.

THE TESTIMONY OF DOCTORS BERNSON AND BAUMAN, GIVING RESULTS OF THEIR OBSERVATIONS OF PLAINTIFF'S CONDITION AND THEIR OPINION RESPECTING NEGLIGENCE ON DEFENDANT'S PART ESTABLISHED NEGLIGENCE BY DEFENDANT.

Pursuant to Utah laws no school known as the "chiropractic school" is recognized. A person who has a license for and holds himself out as a chiropractor holds himself out as one qualified to practice medicine in all its branches excepting materia medica, therapeutics, surgery, obstetrics, and theory and practice. Physicians and surgeons may be licensed in Utah to practice medicine and surgery in all branches thereof. In other words, a surgeon may practice in the same field as a chiropractor and in addition may practice materia medica, therapeutics, surgery, obstetrics and theory and practice. *Utah Code Annotated*, 1953, Section 58-12-3, 58-12-13.

The services rendered by a chiropractor in Utah are considered "medical services." They are such services

as might also be rendered by a physician and/or surgeon. *Shober v. Industrial Commissioner et al.* (1937) 92 Ut. 399, 68 P. 2d 756; *Walkenhorst v. Kesler*, (1937) 92 Utah 312, 67 P. 2d 654.

Doctors Bauman and Bernson being entitled to practice in the same field as Dr. Olsen were competent to testify as experts in that field. They are experts on bone structure of the body, especially the back bone, and they also are learned with respect to the spinal cord and the nerve system. The great bulk of their testimony was given as witnesses who had examined plaintiff and could relate facts from their observations, together with their evidence as expert witnesses with respect to negligence which was admissible and sufficient to establish the existence thereof.

CONCLUSION

The facts submitted by plaintiff, viewed in the light most favorable to her, were sufficient to enable the jury to determine whether or not defendant treated her in a negligent manner. It was proved by plaintiff that defendant twisted plaintiff's head in a sharp, rough manner and that as a direct result thereof injury was sustained to her fifth and sixth cervical discs.

Respectfully submitted,

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