1965

Marion W. Malstrom v. Thebon C. Olsen : Petition for Rehearing

Utah Supreme Court

Richards, Bird and Hart; Attorney for Appellant;
Hanson & Baldwin; Attorneys for Respondent;

IN THE SUPREME COURT

of the

STATE OF UTAH

MARION W. MALMSTROM,
Plaintiff and Appellant,

vs.

THERON C. OLSEN,
Defendant and Respondent.

Case No.
10110

PETITION FOR REHEARING

HANSON & BALDWIN
Kearns Building
Salt Lake City, Utah
Attorneys for Respondent
Theron C. Olsen

RICHARDS, BIRD & HART
Newhouse Building
Salt Lake City, Utah
Attorneys fr Appellant
Marion W. Malmstrom

TABLE OF CONTENTS

AUTHORITIES CITED

TEXTS CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

MARION W. MALMSTROM,
Plaintiff and Appellant,

vs.

THERON C. OLSEN,
Defendant and Respondent.

Case No. 10110

PETITION FOR REHEARING

BASIS FOR PETITION FOR REHEARING

The respondent, Theron C. Olsen, respectfully submits the decision of the Court rendered herein on March 19, 1965 reversing the trial court's nonsuit judgment in favor of the respondent does not apply the proper legal standard in determining whether appellant had produced sufficient evidence to allow the jury to determine the respondent's alleged malpractice, and that this Court should grant respondent's petition for rehearing and consider its previous decision.

ARGUMENT

POINT I

THE COURT DID NOT APPLY A PROPER STANDARD IN DETERMINING WHETHER THE APPELLANT HAD PRESENTED SUFFICIENT EVIDENCE FROM WHICH A JURY COULD CONCLUDE THE RESPONDENT WAS GUILTY OF MALPRACTICE.

It is respectfully submitted that the evidence offered at the trial of the instant case will not support a judgment of malpractice based upon a theory that the actions of the respondent and the claimed resulting injury were such that a jury could reasonably conclude the respondent had departed from accepted treatment standards for chiropractors.

The fact as presented in the trial court showed that the appellant went to respondent, a chiropractor, because of previous back pain. She sought treatment for her back although she had not previously experienced difficulty with her neck. She received a treatment, including the manipulation of her neck, which treatment including the neck treatment was similar to what she had experienced in the past (R-113, 114). The only change was that she experienced a pain in her neck. She did not become ill, vomit, or faint. That the treatment given at that time by the respondent was not so obviously improper, appears from the fact that the appellant returned the next day for further treatment (R-48). She then experienced somewhat the same treatment as the day before. Again there was no immediate impairment or onset of pain. Supporting the conclu-

sion that appellant, a nurse, did not conclude that anything extraordinary had occurred as a result of the treament is the fact that thereafter she went on a vacation for nine days, and experienced no additional discomfort, but rather the pain subsided (R-92).

At no time did the appellant, who is the only one ouside of the respondent most likely to know how much force was used in manipulating her neck, testify that the respondent "violently" jerked her neck. She simply said the treatment involved rough jerks (R-47, 49).

The Court apparently feels that this evidence flagrantly demonstrates a failure to use proper chiropractic standards that a layman can conclude the conduct of respondent was malpractice. In support of the majority conclusion, the Court relies on *Walkenhorst v. Kesler*, 92 Utah 312, 67 P.2d 654 (1937) and *Fredrickson v. Maw*, 119 Utah 385, 227 P.2d 772 (1951). It is apparent from a reading of these cases that they do not involve facts similar to those in the instant case, nor provide any basis for a conclusion that the facts in this case justify a decision of malpractice merely because of the alleged results. In *Walkenhorst*, the defendant, a chiropractor, stepped outside his field and sought to diagnose a disease. He failed to recognize an obvious infection and inflamation of the hip which would be recognizable as something more than rheumatism. Such facts are in no way comparable to the instant case.

In the *Fredrickson* case, a surgeon left materials in a wound. This is a recognized and obvious exception to the general rule requiring expert testimony of malpractice. McCoid, *Liability of Medical Practitioners*, Professional Negligence, p. 74 (1960). The facts in *Fredrickson* support no conclusion of negligence in this instant case. Consequently, the precedent directly relied on by the majority of the Court affords no legal basis for the conclusion reached.

The majority cites the case of *Farrah v. Patton*, 99 Colo. 41, 59 P.2d 76 (1936) as being "very similar" to the instant case. Again, reading of that case shows that it is in opposite to the facts here presented. In *Farrah*, the plaintiff experienced a "terrific jerk" or "yank" on the neck followed by the immediate onset of intense pain, paralysis and vomiting. Further, the defendant himself acknowledged he had been a "little rough". This case is obviously not "very similar" to the instant case and, in fact, is obviously greatly different and more aggravated in action and symptom. Further, the Court fails to note a subsequent Colorado case where the facts were almost identical with those in the instant case. In *Klimkiewicz v. Karnick*, 372 P.2d 736 (Colo., 1962), the Colorado Supreme Court *reversed* a judgment for plaintiff under the facts of the instant case because the trial court had instructed the jury in a manner that would have allowed a finding of negligence without a finding of

some departure from recognized chiropractic treatment. In its opinion, the Court stated the facts and noted that the standard of care for the profession must be proved. It stated:

> "The plaintiff does not claim improper diagnosis; she expressly admits that the technique that defendant alleges he used as proper chiropractic treatment and that the method which demonstrated as that used was proper. Thus we find that plaintiff's complaint is confined to the fact that defendant gave her arm a 'tremendous yank'. This was part of the admitted 'proper chiropractic treatment'. In giving this 'tremendous yank' as related by plaintiff, or in applying 'a mild firm extension . . . to the arm', as related by defendant — no matter which version is correct — the defendant's actions were those of a doctor under contractural obligations, and the propriety of the same must be measured by the rules governing one in his position."

No proof of the standard of care for the chiropractic profession was offered in the instant case.

The Court has simply allowed the result to sustain a finding of negligence without showing a departure from procedure or that the result could not have occurred with proper procedure. This is contraray to all medical jurisprudence under similar facts. A practitioner does not warrant his results; it must be shown by substantial evidence not "conjecture or speculation". *Anderson v. Nixon*, 104 Utah 262, 139 P.2d 216 (1943). Chiropractics by

definition involves the palpation and manipulation of the body, *Kalkenhorst v. Kesler*, supra, which is the treatment respondent performed. Nor does the fact that a ruptured disc resulted demonstrate the abandonment of proper technique since a ruptured disc may result from trivial impact or actions associated with less than accepted pressure tolerance. Gelfand-Magana, *Courtroom Medicine-The Low Back*, §§ 11.42-44; *Ballard & Ballard v. Pelaia*, 73 So.2d 840 (Fla., 1954), where the Florida Court stated:

> ". . . It is common medical knowledge that a ruptured disc frequently arises from an apparently trivial injury."

Indeed such factors as previous back trouble, pre-disposition, age, degeneration, skeletal problems are factors that may effect an action resulting in a ruptured disc. These factors, the correct treatment to be used under the circumstances and the question of whether the results and circumstances show negligence obviously are areas where judgment, experience, medical conditioning and training are involved and thus an area requiring expert testimony not lay supposition.

It is difficult to see how the majority can distinguish the legal basis of the case of *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P.2d 1108 (1959) from the instant case. There, this Court required expert testimony to prove negligence from a cast which was too tight. A tight cast involves the question of pres-

sure, the use of judgment and medical technique. Palpation and manipulation of the spine also concern the same elements thus necessitating expert testimony on the issue of negligence.

The only conclusion that follows is that in case against medical doctors, the legal standard of proof of negligence is different from that of a chiropractor, a conclusion which is legally unsound. Such a result defeats logic and obviously could not have been intended. This Court should on rehearing adopt the minority position and affirm the trial court.

CONCLUSION

It seems inescapable that the majority of the Court have confused the concept of proof of negligence with proof of proximate cause and thus greatly expanded the exception to the general rule that malpractice must be shown by expert testimony. In doing so, the Court is making a legislative judgment based on a policy of holding chiropractors responsible for their results without any real proof of negligence except from the results, which is a tautological result. It is submitted the majority of the Court has erred and rehearing should be granted.

Respectfully submitted,

HANSON & BALDWIN
Kearns Building
Salt Lake City, Utah
Attorneys for Respondent
Theron C. Olsen