

2003

Lucy Johnson aka Lucy Macleod v. Gary Watts M.D., and Douglas Kohler, M.D. : Brief of Appellee

Utah Court of Appeals

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**IN THE COURT OF APPEALS
STATE OF UTAH**

LUCY JOHNSON aka LUCY
MACLEOD,

Appellant and Plaintiff,

vs.

GARY WATTS, M.D.,

Appellee and Defendant

and

DOUGLAS KOHLER, M.D.

Defendant.

**BRIEF OF APPELLEE GARY WATTS,
M.D.**

Court of Appeals Case No. 20031019-CA

District Court Case No. 010400391

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PARTIES TO THE PROCEEDINGS

The caption of this case identifies all parties to this proceeding.

JURISDICTIONAL STATEMENT

The court of appeals has jurisdiction over this appeal pursuant to Utah Code Annotated section 78-2a-2(2)(j).

STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Should the grant of summary judgment to appellee Gary Watts, M.D. (“**Dr. Watts**”) be affirmed because, as a matter of law, appellant has failed to state a claim for negligent referral?
2. Should the grant of summary judgment to Dr. Watts be affirmed because, as a matter of law, appellant has failed to show a causal connection between Dr. Watts’ treatment of appellant from November 6-9, 1998 and the injuries she claims to have suffered?
3. Should the grant of summary judgment to Dr. Watts be affirmed because, as a matter of law, appellant failed to show a causal connection between Dr. Watts’ treatment of her to any harm or injury she claims to have suffered after her discharge from the hospital on November 24, 1998?

This court reviews “the trial court’s decision to grant summary judgment for correctness, viewing the facts in the light most favorable to the losing party. [This court] also review[s] the trial court’s determinations of law for correctness.” View Condo. Owners Ass’n v. MSICO, L.L.C., 2004 UT App 104, ¶14 (citation omitted). These issues were preserved below in Dr. Watts’ motion for summary judgment and accompanying memoranda. (R. 218-19; 220-81; 402-10.)

CONTROLLING AUTHORITY

Utah R. Civ. P. 56(c) (stating summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

STATEMENT OF THE CASE

Appellant Lucy Johnson (“**Ms. Johnson**”¹) appeals from an order of summary judgment in favor of defendant Dr. Watts. Ms. Johnson sued her nephew, Dr. Watts, a radiologist, contending that he negligently referred Ms. Johnson to co-defendant Douglas Kohler, M.D. (“**Dr. Kohler**”), a surgeon. Ms. Johnson also claimed that if Dr. Watts had not referred her to Dr. Kohler, she would not have undergone surgery to remove her gallbladder. Finally, Ms. Johnson argued that Dr. Watts’ care of Ms. Johnson for a 2 1/2 day period after the surgery, in Dr. Kohler’s absence, was negligent.

On July 7, 2003, the Fourth District Court issued a memorandum decision granting summary judgment to Dr. Watts, and on July 22, 2003 entered an order dismissing Ms. Johnson’s claims against Dr. Watts with prejudice. On October 24, 2003 the order

¹ During the pendency of this litigation, plaintiff divorced and resumed her use of the name “Lucy Johnson.” Throughout the litigation, however, plaintiff was referred to by all parties as “Lucy MacLeod.” In her opening brief, appellant referred to herself as “Ms. Johnson.” For purposes of simplicity, Dr. Watts will follow appellant’s lead and refer to her as “Ms. Johnson.”

granting summary judgment was certified as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. This appeal followed.

STATEMENT OF FACTS

The Facts Underlying Ms. Johnson's Medical Malpractice Claim

In or about October 1998, Ms. Johnson contacted her nephew, Dr. Watts, and asked him to help her secure a diagnosis and treatment for her complaints of stomach pain. (R. 280; id. 268; id. 250-51.) Dr. Watts is board certified in radiology and provides medical services in radiology at Utah Valley Regional Medical Center (“UVRMC”) and elsewhere. (R. 252-56.) Dr. Watts arranged for testing to be done by Dr. Wynn Hemmert (“**Dr. Hemmert**”), a gastroenterologist. (R. 249-50; id. 268.)

Dr. Watts also arranged for a surgical consultation with Dr. Kohler. (R. 267.) Dr. Kohler evaluated Ms. Johnson and determined that her gallbladder should be surgically removed. (R. 248.) On November 3, 1998, Dr. Kohler operated on Ms. Johnson and removed her gallbladder. Dr. Watts did not participate in the surgery. (R. 245-47.) Ms. Johnson did not completely recuperate after the surgery, and she contacted Dr. Watts to ask for his assistance because Dr. Kohler was out of town. (R. 268.) Dr. Watts readmitted Ms. Johnson to UVRMC on November 6, 1998. (R. 244.) After Ms. Johnson was readmitted to the hospital, Dr. Watts provided supportive care and observed her until Dr. Kohler returned to UVRMC on November 8, 1998. (R. 240-43.) On November 9,

1998, Dr. Kohler performed a second surgery on Ms. Johnson, during which a small perforation in her bowel was found. (R. 238-39.)

After the second surgery, Ms. Johnson remained in the hospital until November 24, 1998, when she was discharged. (R. 265-66.) After being discharged, Ms. Johnson returned to her home and recuperated over the next nine months. (R. 263-64.) Ms. Johnson testified that she has experienced problems with fatigue, weight gain, scarring, and physical strength after her treatment at UVRMC. (R. 262-64.) Ms. Johnson also believes that her divorce and the debts allegedly incurred by her ex-husband are related to the surgery. (R. 258-61.)

Ms. Johnson's Expert Testimony

Darwood Hance, M.D. ("**Dr. Hance**") was Ms. Johnson's radiology expert and is board certified in radiology and nuclear medicine. (R. 236.) Dr. Hance testified that Dr. Watts, as a radiologist, had no role in the decision to operate on Ms. Johnson. Rather, Dr. Watts referred Ms. Johnson to Dr. Kohler, who determined that Ms. Johnson needed surgery. (R. 227-28; 235.) Dr. Hance testified that he is not qualified to offer opinions regarding general surgery issues. (R. 234.)

Dr. Hance does not know whether Ms. Johnson had any medical complications or complaints after her discharge from UVRMC on November 24, 1998. (R. 231.) Dr. Hance also does not know whether Ms. Johnson's condition improved after her discharge from the hospital on November 24, 1998. (R. 230.) Dr. Hance testified that he would not

offer any opinion that connects the treatment provided at UVRMC in 1998 to any of Ms. Johnson's current complaints. (R. 229; 231.)

Dr. David Anaise ("**Dr. Anaise**") was Ms. Johnson's expert in general surgery. In response to a question regarding Ms. Johnson's current condition and medical complaints, Ms. Johnson's attorney objected, stating "Objection. He's not an expert on damages, he's not called on as an expert on the extent of damages." Despite the objection from Plaintiff's counsel, Dr. Anaise testified as follows:

Question: Dr. Anaise, have you been asked to render opinions with respect to the causation of any injuries or any complaints that Ms. Johnson has as they relate to any of the events that took place from November 3rd, 1998 through the conclusion of the discharge from her second hospitalization?

Answer: I think I'm rendering an opinion about one particular damage and that was the high probability of having the bowel obstruction. That I thought was directly caused by the surgery that preceded. I was not asked to comment, but mentioned in passing things like hypoglycemia or fluid management and pneumothorax, and so on, because I thought they were going to be covered by the other experts.

Question: Doctor, apart from her supposed increased likelihood of suffering from a bowel obstruction of some sort, do you intend to testify at trial that to a reasonable degree of medical probability any of Ms. Johnson's complaints or problems are proximately caused by any of the events from November 3rd to November 24th, 1998?

Answer: I was not prepared for this question and I think it's covered by other experts.

Question: Do you intend to testify at trial as I just indicated, that to a reasonable degree of medical probability any of Ms. Johnson's current complaints, problems, are

proximally caused by the events that took place between November 3rd and November 24th, 1998?

Answer: I'm not prepared to testify to that at this junction. I was led to believe that other experts would cover that. I think it would be redundant, at most.

Question: The answer, as you sit here today?

Answer: The answer is no.

(R. 220-21 (objections and responses thereto omitted).)

Dr. Anaise also testified that once Ms. Johnson's bowel was nicked in the first procedure and her operative wound was closed, a second surgery was necessary to address the perforation. (R. 222.) Dr. Anaise did not testify that advice or care provided by Dr. Watts after the first surgery but before the second surgery caused or is related to any injury or damage to Ms. Johnson.

The Trial Court's Grant Of Summary Judgment To Dr. Watts

Dr. Watts moved for summary judgment on all claims, arguing that Ms. Johnson had failed to establish a prima facie case of negligence against Dr. Watts. (R. 218-81.) Specifically, Dr. Watts argued that Ms. Johnson had failed to prove that his alleged deviation from the applicable standard of care was the proximate cause of her alleged injuries. (R. 273-75.) Dr. Watts also argued that Ms. Johnson had failed to establish by expert testimony that she suffered an actual, rather than a speculative or future, injury. (R. 272.)

In her opposition, Ms. Johnson argued that reasonable inferences drawn from the testimony of Dr. Barton and Dr. Hance created an issue of material fact as to whether Ms. Johnson would have suffered any injury “if Watts had not negligently referred plaintiff to Kohler, the surgeon.” (R. 333.) In support of this argument, Ms. Johnson submitted an affidavit from her radiology expert, Dr. Hance (the “**Hance Affidavit**”). (R. 321-33.)

Dr. Watts moved to strike the Hance Affidavit, arguing that certain paragraphs should be stricken for lack of foundation, and that other paragraphs should be stricken because they are contradicted by or are inconsistent with Dr. Hance’s prior deposition testimony. (R. 396-401.) In particular, Dr. Watts argued that paragraphs 7(g) and 7(h) of the Hance Affidavit should be stricken because Dr. Hance had conceded that he is not qualified to offer opinions regarding surgical issues, including the question of whether Ms. Johnson should have been operated on by Dr. Kohler. (R. 399-400.) Dr. Watts also argued that paragraphs 7(l)-(n) should be stricken because as a radiologist, rather than a surgeon, Dr. Hance lacked foundation to imply that a surgeon would have operated on Ms. Johnson sooner than November 9, 1998. (R. 399.) Finally, Dr. Watts argued that the trial court should reject Dr. Hance’s attempt, in paragraphs 7(l)-(n) of his affidavit, to “supplement” his deposition testimony by asserting that Ms. Johnson suffered certain injuries as a result of Dr. Watts’ treatment. (R. 396-98.)

In his reply memorandum in support of summary judgment, Dr. Watts argued that Ms. Johnson had failed to provide expert testimony to support her claim that Dr. Watts

should be held liable for damages in connection with the decision to remove her gallbladder, because it was uncontested that Dr. Kohler alone was responsible for the decision to perform surgery. (R. 406-07.) Dr. Watts also argued that Ms. Johnson had not presented expert testimony to connect her alleged complications after the second surgery on November 9 to any treatment provided by Dr. Watts. (R. 404-06.) In addition, Ms. Johnson failed to present expert testimony suggesting that a surgeon would have operated on her any sooner than surgery was in fact performed, on November 9. (R. 404-05.) Finally, Dr. Watts pointed out that in her opposition memorandum, Ms. Johnson did not dispute that she had suffered no permanent or lasting damage as a result of her treatment at UVRMC from November 3 to 24, 1998, and also that Ms. Johnson had failed to provide expert testimony to connect Dr. Watts' treatment of her at UVRMC to any damage after November 24, 1998. (R. 403-04.)

On June 16, 2003, the trial court heard oral argument on Dr. Watts' motion for summary judgment. (R. 1015.) Argument on Dr. Watts' motion to strike the Hance Affidavit, as well as on other pending motions, was also scheduled for that day. The trial court asked to hear argument on the summary judgment motion first, and ultimately did not hear argument on or reach the various other pending motions, including the motion to strike the Hance Affidavit.

On July 7, 2003 the trial court issued a memorandum decision granting summary judgment to Dr. Watts on all claims. (R. 806-11.) Regarding the claim that Dr. Watts

negligently referred Ms. Johnson to Dr. Kohler, the trial court determined that there was a lack of proximate cause between Dr. Watts' referral to Dr. Kohler and the damages claimed by Ms. Johnson. In sum, the trial court ruled that

[b]ecause Dr. Watts' involv[e]ment with Ms. [Johnson's] care ended with his referral to an experienced surgeon, Dr. Kohler, there is no causal connection between any harm Ms. [Johnson] suffered from surgery and Dr. Watts['] initial referral. Where Dr. Kohler acted independent of Dr. Watts, there is a break in the chain of causation. Ms. [Johnson] has failed to provide evidence sufficient to establish even a prima facie case of negligence.

(R. 809.)

Regarding the claim that Dr. Watts negligently treated Ms. Johnson during the days when Dr. Kohler was out of town following the first surgery, the trial court ruled that

Ms. [Johnson] did not provide expert testimony that Dr. Watt's [sic] failure to consult with Dr. Kohler until November 9 actually caused specific complications. There is no evidence showing that surgery should have, or would have, been performed if Dr. Watts had contacted the surgeon earlier. The facts as provided in [Dr. Hance's] affidavit do not establish that Dr. Watts' actions caused any additional damages to the plaintiff not already remaining from the first surgery. Accordingly, . . . there is no evidence of causation[.]

(R. 808.) The trial court did not rule on Dr. Watts' motion to strike the Hance Affidavit.

On July 22, 2003, the trial court entered an order dismissing Ms. Johnson's claims against Dr. Watts. (R. 815-17.)

SUMMARY OF THE ARGUMENT

Both factually and conceptually, it makes sense to consider Ms. Johnson's allegations in this suit as two separate claims. Ms. Johnson's first claim is based on Dr. Watts' referral of Ms. Johnson to Dr. Kohler, and her second claim is based on Dr. Watts' treatment of Ms. Johnson during November 6-8, 1998, while Dr. Kohler was out of town.

Summary judgment in favor of Dr. Watts on the first claim should be affirmed because, as a matter of law, Ms. Johnson has not made out a claim for negligent referral. Ms. Johnson has not contended that Dr. Watts and Dr. Kohler were partners or agents, that Dr. Watts knew that a referral to Dr. Kohler was likely to result in negligent treatment, or that Dr. Watts participated in either the decision to operate on Ms. Johnson or in the surgery itself. Summary judgment should also be affirmed because, as the trial court ruled, Ms. Johnson did not present evidence from which a reasonable inference could be drawn that Dr. Watts' referral to Dr. Kohler was the proximate cause of Ms. Johnson's claimed damages. Finally, summary judgment should be affirmed because discouraging treating physicians from making referrals to competent, qualified specialists would have disastrous effects on the provision of health care to Utah's citizens.

With regard to Ms. Johnson's second claim, summary judgment should be affirmed because, as the trial court recognized, Ms. Johnson was unable to present any

evidence to show that surgery would have been done earlier if Dr. Watts had contacted a surgeon. Ms. Johnson also failed to present evidence to show that Dr. Watts' failure to consult with Dr. Kohler sooner actually caused specific complications, or that Dr. Watts' actions caused any additional damages to Ms. Johnson that would not already have occurred as a result of the first surgery.

ARGUMENT

I. DR. WATTS SHOULD NOT BE HELD LIABLE FOR THE ALLEGED NEGLIGENCE OF DR. KOHLER, A SPECIALIST TO WHOM DR. WATTS REFERRED MS. JOHNSON.

Ms. Johnson would have this court accept her contention that by the very act of referring her to Dr. Kohler, Dr. Watts ensured that she would then undergo surgery. For that reason, she argues, Dr. Watts should be held liable for Dr. Kohler's alleged negligence. (Aplt. Br. at 16-17, 25.) Stated briefly, the centerpiece of Ms. Johnson's argument on this point is that "without a surgical referral, there would have been no surgery and no injury." (*Id.* at 25.) In Ms. Johnson's view, then, any referral to a surgeon carries with it the probability—even a guarantee—that surgery will ensue. This theory, of course, makes little sense, and completely discounts a surgeon's province to evaluate a particular patient and decide whether surgery is appropriate. Ms. Johnson's claim was properly dismissed because not every referral to a surgeon will result in surgery.

Ms. Johnson's oversimplification of the role of a referral from one physician to a specialist, and her concomitant attempt to hold Dr. Watts liable for Dr. Kohler's alleged negligence, should be rejected for at least three reasons. First, Ms. Johnson has not alleged an actionable case of negligent referral, even if such a cause of action is found to exist under Utah law. Second, as the trial court found, there is no evidence to support a conclusion that Dr. Watts' referral to Dr. Kohler was the proximate cause of Ms. Johnson's alleged injuries from the first surgery. And third, adopting Ms. Johnson's position would deter physicians from making referrals to qualified specialists when a patient's needs call for such a referral, and thus would have far-reaching negative consequences for the health care of Utah citizens.

A. There Is No Cause Of Action For Negligent Referral. Even If This Court Finds Such A Cause Of Action Exists Under Utah Law, As A Matter Of Law Ms. Johnson Has Not Alleged Facts Sufficient To Make Out That Cause Of Action.

Summary judgment on Ms. Johnson's first claim should be affirmed because she is not entitled to recover against Dr. Watts for Dr. Kohler's alleged negligence in performing the first surgery.² A majority of courts across the country have held that a "physician who calls in or recommends another physician or surgeon is not liable for the

² Whether there is a cause of action for negligent referral under Utah law was discussed at the summary judgment hearing, but was not briefed by either party below. (R. 1015 at 33-38.) Under the affirm on any grounds doctrine, this court can affirm the grant of summary judgment to Dr. Watts "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court . . . was not raised in the lower court, and was not considered or passed on by the lower court." Bailey v. Bayles, 2002 UT 58, ¶10, 52 P.3d 1158 (quoting Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225).

other's malpractice, at least where there was no agency or concert of action, or no negligence in the selection of the other physician or surgeon."³ W.R. Habeeb, Liability of One Physician or Surgeon for Malpractice of Another, 85 A.L.R.2d 889, *3 (2003); see, e.g., Estate of Traynor v. Bloomsburg Hosp., 60 F. Supp. 2d 412, 415-16 (M.D. Pa. 1999) (stating "if the general practitioner does not realize that the specialist's care is inadequate, he or she is not necessarily liable, but may be liable if a general practitioner . . . should have recognized the inadequacy and taken appropriate steps"); Billebault v. DiBattiste, 1998 US Dist LEXIS 7399, *15 (E.D. Pa. 1998) ("[U]nder normal circumstances a referring physician's duty to a patient is extinguished once another physician exercises independent medical judgment as to the patient's medical care in performing a surgical procedure."); Reed v. Bascon, 530 N.E.2d 417, 421 (Ill. 1988) ("The general rule is that a referring physician will not be liable for the other physician's negligence unless there is some control of the course of treatment of one by the other, agency or concert of action, or negligence in the referral."); Hopkins v. Mills-Kluttz, 77 S.W.3d 624, 627-28 (Mo. Ct. App. 2002) ("A referral of a patient by one physician to another competent physician, absent partnership, employment, or agency, does not impose liability on the referring physician."); Ruane v. Stillwell, 600 N.Y.S.2d 803, 804 (N.Y. App. Div. 1993); Weidner v. Nassau, 1993 Pa. D. & C. LEXIS 8, ** 2 (1993) (holding "[a] referral is not negligent if the referring physician exercises due care in

³ Although this rule has been followed in scores of cases across the country, Dr. Watts has been unable to find a Utah case discussing this cause of action.

making the recommendation,” and “a physician who merely recommends another is not liable for the other’s negligence or malpractice”).

One rationale underlying this majority position is that a physician owes a fiduciary relationship to his or her patient. The physician-patient “relationship is predicated on the proposition that the physician has special knowledge and skill in diagnosing and treating diseases and injuries and that the patient has sought and obtained the services of the physician because of this expertise.” Carson v. Fine, 867 P.2d 610, 617 (Wash. 1994); see also 61 Am. Jur. 2d Physicians & Surgeons § 166. This fiduciary relationship creates “certain obligation[s] on the part of the physician,” the primary obligation being to “exercise . . . due care and skill in the treatment of [the] patient.” 61 Am. Jur. 2d Physicians & Surgeons § 167. This duty of due care “includes, among others, [the physician’s] obligation . . . to refer [the patient] to a specialist if necessary.” Id. (emphasis added).

Because part of Dr. Watts’ duty to Ms. Johnson was to refer her to a specialist once he determined that he could not provide the care she needed, and because Ms. Johnson has not made out a claim for negligent referral, as a matter of law Ms. Johnson is not entitled to recover against Dr. Watts for the damages she claims resulted from either Dr. Watts’ referral to Dr. Kohler or the surgery Dr. Kohler subsequently performed on her.

Even if this court concludes that Utah law favors a cause of action for negligent referral, it should do so within the contours of the well-established majority position described above. Under that rule, a referring physician would be liable for a specialist's negligence only if the referring physician knew the specialist was likely to provide negligent care, or if the referring physician and the specialist shared an agency or partnership relationship, or if the referring physician participated in the specialist's decision regarding a course of treatment. The undisputed facts show that none of these conditions are met in this case.

First, Dr. Watts believed that Dr. Kohler was a qualified and able physician, and did not know or have any reason to know that Dr. Kohler's care of Ms. Johnson was likely to be negligent. Dr. Watts testified in his deposition that

[i]n fact, I asked [Dr. Kohler] to see my aunt because of his competence. He's a good surgeon. He's got a very low complication rate, and I'm sure did the best he could at the time of the surgery. . . . I have great confidence in Dr. Kohler, and I still consider him to be a very good surgeon.

(Deposition of Gary Watts, M.D. at 74:3-11. This page of Dr. Watts' deposition testimony is included in the addendum to this brief as Exhibit A.) Ms. Johnson has not produced any evidence to suggest that Dr. Watts knew or should have known that Dr. Kohler's treatment might potentially be negligent.

Second, Ms. Johnson has not produced any evidence to suggest that Dr. Watts and Dr. Kohler shared an agency or partnership relation, and in fact they did and do not.

Finally, the undisputed facts show, and Ms. Johnson acknowledges, that Dr. Watts played no role in Dr. Kohler's decision to perform surgery on Ms. Johnson and did not participate in the surgery in any way. (Aplt. Br. at 16; R. 245-47; R. 388.)

In sum, as a matter of law Dr. Watts should not be held liable for responding to his aunt's request for help; realizing that he was not the appropriate physician to determine the course of treatment for her complaint; and referring his aunt to a competent, knowledgeable specialist.

- B. Dr. Watts' Referral Of Ms. Johnson To A Qualified Specialist Was Not The Proximate Cause Of Her First Or Second Surgery, Nor Was It The Proximate Cause Of Her Claimed Damages From Those Surgeries. Dr. Watts Did Not Participate In The Decision To Perform Surgery On Ms. Johnson.

As the trial court recognized, Ms. Johnson was unable to provide expert testimony to establish that Dr. Watts' referral of her to Dr. Kohler was the proximate cause of her claimed damages. (R. 808-09.) Dr. Watts, who is a radiologist, referred Ms. Johnson to Dr. Kohler because he recognized that he was not able to treat her ailment. Dr. Watts did not play any part in the decision to perform surgery on Ms. Johnson. (Aplt. Br. at 16; R. 245-47; R. 388; R. 811.) That decision was Dr. Kohler's alone, and Dr. Kohler's decision that Ms. Johnson needed surgery was an independent break in the chain of causation Ms. Johnson would have this court draw between Dr. Watts' referral and the allegedly negligent surgery performed by Dr. Kohler. Because Ms. Johnson cannot present expert testimony to establish proximate cause, summary judgment should be

affirmed. See, e.g., Bansasine v. Bodell, 927 P.2d 675, 676 (Utah Ct. App. 1996) (stating trial court may rule on proximate cause as a matter of law if “there is no evidence to establish a causal connection, thus leaving causation to jury speculation”).

Ms. Johnson attempts to create an issue of fact by referring to the Hance Affidavit, which, she contends, shows that if Dr. Watts had consulted Ms. Johnson’s primary care physician, Dr. Salisbury, no surgical referral would have been necessary. (Appt. Br. at 15-18.) At best, the Hance Affidavit is sheer speculation on this point. Moreover, Dr. Hance testified that, as a radiologist, he is not competent to testify as to surgical issues. (R. 387.) The Hance Affidavit is not sufficient to create a genuine issue of disputed material fact; Ms. Johnson has truly presented “no evidence upon which a reasonable jury could infer causation[.]” Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1292 (Utah 1996).

C. Utah Law Should Not Favor A Policy Of Discouraging Physicians From Referring Patients To Qualified Specialists When The Referring Physician Is Unable To Properly And Completely Treat The Patient’s Complaints.

Ms. Johnson’s contention that a referring physician should be held liable for a specialist’s alleged negligence—even when the referring physician played no part in deciding on the specialist’s course of treatment—would have far-reaching and seriously negative policy effects for the provision of healthcare to Utah’s citizens. If Ms. Johnson’s position were accepted by this court, every physician who refers a patient to a specialist would be liable for the decisions made and treatment provided by that

specialist. The very purpose of referring a patient to a specialist is to facilitate a more specialized review of the patient's symptoms, diagnosis, and treatment. If Ms. Johnson's position were adopted, treating physicians would face an extreme disincentive to refer a patient to a specialist. This, of course, would do harm to the patients themselves: physicians would either refuse to treat patients unless they knew for certain, at the outset, that they were able to treat the complaint; or they would decline to make proper and necessary referrals to competent specialists. Both of these outcomes should be avoided.

In sum, as a matter of law, Ms. Johnson is not entitled to recover against Dr. Watts for Dr. Kohler's alleged negligence. Ms. Johnson has not alleged facts that would bring her claim within the scope of a negligent referral cause of action, even if that cause of action exists under Utah law. Ms. Johnson cannot produce any evidence to suggest that the mere act of referring her to a surgeon meant that surgery would necessarily ensue. And finally, adopting Ms. Johnson's position would discourage treating physicians from consulting specialists in an effort to better care for their patients. For these reasons and the reasons argued by Dr. Watts below, this court should affirm the grant of summary judgment and hold that Dr. Watts' referral of Ms. Johnson to a qualified and competent specialist does not create liability on Dr. Watts' part for Dr. Kohler's alleged negligence.

II. DR. WATTS SHOULD NOT BE HELD LIABLE FOR ANY DAMAGES ALLEGEDLY FLOWING FROM MS. JOHNSON'S SECOND SURGERY.

On appeal, Ms. Johnson argues that there is a triable issue of material fact on the question of whether Dr. Watts' care of Ms. Johnson after her readmission to the hospital

on November 6, 1998 caused additional damages. Specifically, she argues that the testimony of Dr. Hance and Dr. Barton shows that Ms. Johnson might have suffered “increased severity of infection, larger abscess, additional medical bills, additional hospitalization, additional pain, additional scarring, fever[,] and toxicity” as a result of Dr. Watts’ alleged delay in calling in a surgeon after Ms. Johnson was readmitted on November 6. (Aplt. Br. at 25.) This argument should be rejected and summary judgment affirmed.

Ms. Johnson does not deny that a second surgery was required as a result of the perforation to her bowel during the first surgery. As argued above, Dr. Watts cannot be held responsible for any damage or injury caused by the first surgery, including the perforation and the need for a second surgery to repair the perforation. As a result, Dr. Watts cannot be held responsible for any damage or injury caused by the necessity of a second surgery. Dr. Watts provided no treatment to Ms. Johnson after November 8, 1998. Accordingly, Ms. Johnson was required to prove that Dr. Watts’ treatment of her between November 6 and November 8 caused an actual and specific injury. Ms. Johnson did not meet this burden.

There is no evidence in the record and no expert has testified that any complication suffered by Ms. MacLeod was actually related to a “delay” in surgery between November 6 and November 8. Even accepting every fact set forth by Ms. Johnson, the only damages that she can claim in connection with her November 6

through November 8 hospitalization are a marginal increase in the size of an abscess and some unquantified increase in infection. There is no expert testimony connecting these real or potential conditions to any other post-surgical complication, injury, or damage. Although Dr. Barton testified that there was some increased risk of complication during this time period, he did not testify that the “delay” actually caused a specific complication. And as Ms. Johnson conceded during the briefing of Dr. Watts’ summary judgment motion, the mere risk of a complication is not sufficient to support a claim for damages.⁴ While Ms. Johnson experienced hypoglycemia, fluid overload, and pneumothorax after the second surgery and prior to her discharge, there is no expert testimony connecting these physical conditions to treatment provided by Dr. Watts.

Ms. Johnson suggests that if she had undergone surgery prior to November 9 she might have avoided post-surgical complications. However, no expert has testified how many days prior to November 9 a surgeon would have taken Ms. Johnson in for surgery if Dr. Watts had requested a consultation on November 6, 1998. In fact, no expert has testified that Dr. Kohler or any other surgeon would have operated sooner than November 9. Dr. Hance conceded in his deposition that he is not qualified to offer opinions regarding surgical issues. (R. 387.) Accordingly, Dr. Hance is not competent to testify

⁴ See Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 973 (Utah 1993).

that Ms. Johnson should or would have been taken to surgery any sooner than November 9, 1998.⁵

Similarly, while Dr. Barton stated that a second surgery was necessary, he did not testify that the second surgery should have been performed any sooner than November 9, 1998. (R. 315.)⁶ Dr. Watts cannot be held responsible for any alleged complications associated with a “delay” in surgery given the absence of expert testimony stating that a consultation on November 6 would have led to surgery before November 9. Because Ms. Johnson cannot demonstrate a connection between Dr. Watts’ treatment and any actual harm or injury sustained by her, summary judgment is appropriate.⁷

⁵ A Motion to Strike the Affidavit of Darwood Hance, M.D. was filed concurrently with Dr. Watts’ reply in support of his memorandum for summary judgment. The basis for the motion was that Dr. Hance lacks foundation to offer opinions regarding surgical issues and that Dr. Hance’s affidavit is inconsistent with his deposition testimony. The trial court did not rule on Dr. Watts’ motion to strike the Hance Affidavit.

⁶ Dr. Barton was asked: “If an earlier diagnosis . . . of perforated viscus had been made . . . earlier than November 9, you’ve indicated that surgery is the only choice in such a situation . . .?” Dr. Barton replied, “I think so.” (R. 315.) While Dr. Barton’s answer does suggest that a surgery would be necessary to treat the perforation, Dr. Barton did not state that surgery would necessarily have been performed on the same day the perforation was diagnosed.

⁷ If this court concludes that there is a triable issue of material fact on the question of whether Dr. Watts’ alleged delay in securing a surgical consultation caused Ms. Johnson any damages during the November 6 to 8 time period, it should first remand for the limited purpose of obtaining a ruling on Dr. Watts’ motion to strike the Hance Affidavit. If the Hance Affidavit is stricken, this court should affirm the summary judgment. If the Hance Affidavit is not stricken, this case should be remanded for the sole purpose of determining the nature and extent of Ms. Johnson’s alleged damages, if any, arising from Dr. Watts’ treatment of her from November 6-8, 1998.

III. MS. JOHNSON HAS CONCEDED THAT SUMMARY JUDGMENT IS APPROPRIATE ON ANY CLAIMS THAT HER POST-NOVEMBER 24, 1998 DAMAGES WERE CAUSED BY DR. WATTS.

In deciding this case, this court should hold that Dr. Watts is not liable for any alleged damages occurring after Ms. Johnson's November 24, 1998 discharge from the hospital. As part of his summary judgment motion, Dr. Watts argued that Ms. Johnson failed to provide any testimony to connect his treatment to any harm or injury she claims to have suffered after her discharge from the hospital on November 24, 1998. (R. 403-04.) Specifically, Ms. Johnson failed to produce any expert testimony to show that any actual injury or damage was caused by Dr. Watts' alleged negligence. By failing to oppose this argument, Ms. Johnson has conceded that she cannot recover for the possibility of future complications resulting from the surgeries. See Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 973 (Utah 1993).

In her opposition to Dr. Watts' motion for summary judgment, the only damages or injuries Ms. Johnson identified allegedly occurred during her hospitalizations, from November 3-24, 1998. (R. 334-36.) Thus, even assuming there was expert testimony to support a nexus between Dr. Watts' alleged negligence and Ms. Johnson's injuries or damages, Dr. Watts is entitled to partial summary judgment ruling that Ms. Johnson

cannot recover against him for any claimed injury or damage that may have occurred after her discharge on November 24, 1998.⁸

CONCLUSION

Summary judgment on Ms. Johnson's first claim should be affirmed because Ms. Johnson has not alleged facts sufficient to make out a claim for negligent referral, even assuming there is such a cause of action under Utah law. In addition, Dr. Watts' referral of Ms. Johnson to Dr. Kohler was not the proximate cause of Ms. Johnson's injuries. Any holding discouraging physicians from making referrals to competent specialists when their patients' needs require referrals would do a great disservice to the citizens of Utah.

Summary judgment on Ms. Johnson's second claim should be affirmed because Ms. Johnson failed to present expert testimony to connect Dr. Watts' treatment of her

⁸ Although not addressed explicitly by the trial court in its memorandum decision, implicit in the ruling is a finding that Dr. Watts is not liable for any damages Ms. Johnson claims to have suffered after November 24, 1998. The trial court found that "[a]s a matter of law, . . . Dr. Watt's [sic] referral was not the cause of any damage suffered by the plaintiff," (R. 808), and that Ms. Johnson had not established that "Dr. Watts' actions caused any additional damages to the plaintiff not already remaining from the first surgery." (*Id.*) In addition, the trial court found that Ms. Johnson "did not provide expert testimony that Dr. Watt's [sic] failure to consult with Dr. Kohler until November 8 actually caused specific complications." (*Id.*) Parsed, the trial court found that Dr. Watts was not liable for damages flowing from the first surgery; that Dr. Watts was not liable for any damages resulting from the unproven "delay" in surgery from November 6-8; and that Ms. Johnson did not suffer any damages other than those caused by the first surgery. As a result, it is reasonable to imply in the trial court's decision a finding that Ms. Johnson did not suffer any damages following her November 24, 1998 discharge from the hospital.

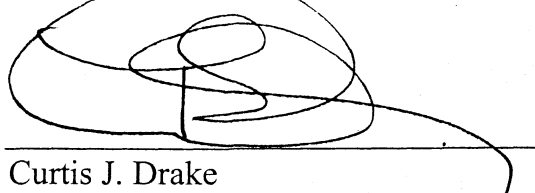
from November 6-8 to any actual harm or injury she sustained. Finally, this court should also hold that, as a matter of law, Dr. Watts is not liable for any injuries or damages allegedly suffered by Ms. Johnson following her discharge from the hospital on November 24, 1998.

ADDENDUM

The addendum to Ms. Johnson's opening brief contains all the parts of the record required by Rule 24(a)(11) of the Utah Rules of Appellate Procedure. Accordingly, Dr. Watts refers the court to that addendum, along with the record on appeal. See Utah R. App. P. 24(b)(2). In addition, Dr. Watts has attached one additional page of his deposition testimony as Exhibit A.

DATED this 14th day of June, 2004.

Snell & Wilmer L.L.P.

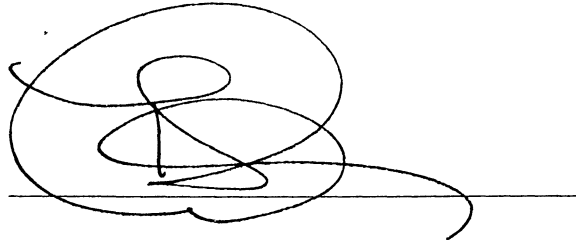
A large, stylized handwritten signature in black ink, appearing to be 'CJ Drake', written over a horizontal line.

Curtis J. Drake
Scott A. DuBois
Tawni J. Sherman
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2004, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE GARY WATTS, M.D.** to be mailed, via U.S. First Class Mail, postage prepaid, to the following:

Clark Newhall
Law Office of Clark Newhall, M.D., J.D.
P.O. Box 284
Salt Lake City, Utah 84110-0284

A handwritten signature in black ink, appearing to be 'Clark Newhall', written over a horizontal line.

ADDENDUM

EXHIBIT A

COPY OF TRANSCRIPT

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY
STATE OF UTAH

LUCY MacLEOD,

Plaintiff,

Civil No. 01400391

Judge Anthony W. Schofield

vs.

GARY WATTS, MD,

Defendant.

~~~~~  
VIDEOTAPE DEPOSITION OF GARY WATTS, M.D.  
~~~~~

TAKEN AT: The Utah Valley Medical Center
 1034 North 500 West
 Provo, Utah

DATE: November 30, 2001

TIME: 1:19 p.m.

REPORTED BY: Kelly L. Wilburn, RPR



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1 A. Dr. Kohler has a terrific reputation--

2 Q. Okay.

3 A. --here in this valley. In fact, I
4 asked him to see my aunt because of his
5 competence. He's a good surgeon. He's got a
6 very low complication rate, and I'm sure did he
7 the best he could at the time of the surgery.
8 And I felt badly that things turned the way they
9 did. But I have great confidence in Dr. Kohler,
10 and I still consider him to be a very good
11 surgeon.

12 Q. Okay.

13 A. May I just add one thing--

14 Q. Please.

15 A. --in regard to the conversation? She
16 did indicate to me on that phone conversation
17 that financial considerations were such that she
18 did not feel that she could withdraw from the
19 suit.

20 Q. Oh, okay. Tell me what she said about
21 that, if you recall.

22 A. That's basically what I just said is
23 how I recall.

24 Q. Okay. Did she mention what financial
25 considerations she was concerned about?



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