

2004

Michael Sutter v. Stan Benson : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

MICHAEL SUTTER,

Plaintiff and Appellant,

v.

STAN BENSON, M.D.,

Defendant and Appellee.

COPY

Case No. 20040483 - CA

BRIEF OF THE APPELLANT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH
THE HONORABLE G. RAND BEACHAM
CIVIL CASE NUMBER 010500832

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 2004 0483-CA

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FILED
UTAH APPELLATE COURTS

JAN 19 2005

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STATEMENT OF JURISDICTION

This appeal is from a Summary Judgment entered in the Fifth Judicial District Court by the Honorable G. Rand Beacham finding that Plaintiff's complaint was filed after the expiration of the applicable statute of limitations.

The Utah Court of Appeals has jurisdiction in this matter pursuant to an Order of the Utah Supreme Court issued pursuant to Section 78-2-2(4).

STATEMENT OF ISSUES

There are two separate issues in this case:

- 1) Does an Unsigned Minute Entry dispose of a case?
- 2) Do the tolling provisions of the Utah Medical Malpractice Act, Utah Code Section 78-14-12(3)(a), apply to the one-year statute of limitations provided by Utah Code Section 78-12-40 – the Savings Statute?

STANDARD OF REVIEW

There are no facts in dispute; this issue involves a question of law and should be reviewed under the “Legal Correctness” standard.¹

¹ Norman v. Arnold, 2002 UT 81, ¶15, 57 P.3d 997
Stokes v. Wagoneer, 1999 UT 94, ¶6, 987 P.2d 602

DETERMINATIVE STATUTES

Utah Code Section 78-14-12(3)(a):

The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

Utah Code Section 78-12-40:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Applicable provisions of Rule 4-504 of the Rules of Judicial Administration²

- (1) In all rulings by a court, counsel for the party or parties obtaining a ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.
- (3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.
- (7) No orders, judgments, or decrees based upon stipulation shall be signed and entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk of the stipulation was made on the record.

² Applicable at the time of this case.

STATEMENT OF THE CASE

A Complaint was filed in the Fifth District Court by Michael Sutter alleging medical malpractice against Dr. Stan Benson and the Dixie Regional Medical Center. Service was made on the Dixie Regional Medical Center; service had not, yet, been made on Dr. Stan Benson.

Counsel for the Dixie Regional Medical Center filed a Motion to Dismiss based upon Plaintiff's failure to have a Prelitigation Hearing pursuant to the provisions of Utah Code Section 78-14-12. In lieu of argument, the parties stipulated to have the case dismissed without prejudice – which would allow Plaintiff the opportunity to have a Prelitigation Hearing and, then, re-file the case pursuant to the provisions of Utah Code Section 78-12-40 (providing a one-year statute of limitations to re-file a case not decided upon the merits).

A Prelitigation Hearing was, subsequently, conducted; and a Certificate of Compliance was issued.

Plaintiff, then, filed a new Complaint against Dr. Stan Benson and the Dixie Regional Medical Center. Service was made on both Defendants.

Dixie Regional Medical Center was dismissed.

Defendant Stan Benson filed a Motion for Summary Judgment asserting that the second Complaint was filed beyond the expiration of the one-year statute of limitations provided by Utah Code Section 78-12-40.

The Court granted Defendant Stan Benson's Motion for Summary Judgment.

STATEMENT OF FACTS

- 1) Mr. Michael Sutter timely filed a Notice of Intent to Commence Legal Action against Dr. Stan Benson and the Dixie Regional Medical Center.
- 2) Mr. Sutter, subsequently, filed a Complaint alleging medical malpractice against Dr. Stan Benson and the Dixie Regional Medical Center.
- 3) Service was made upon the Dixie Regional Medical Center; Dr. Benson had not, yet, been served.
- 4) Although Mr. Benson timely filed a Notice of Intent to Commence Legal Action upon Dr. Benson and the Dixie Regional Medical Center pursuant to Utah Code Section 78-14-8, Mr. Benson failed to timely file a Request for a Prelitigation Hearing as required by Utah Code Section 78-14-12.
- 5) Counsel for the Dixie Regional Medical Center filed a Motion to Dismiss based upon Mr. Benson's failure to request a prelitigation hearing.
- 6) A Hearing on the Motion to Dismiss was set for April 20, 2000.
- 7) Recognizing the case could not proceed without a Prelitigation Hearing, counsel for Plaintiff and counsel for the Dixie Regional Medical Center agreed to submit a Stipulation to dismiss the case without prejudice so that Plaintiff could request and have a Prelitigation Hearing and, then, re-

file the case within one year after its dismissal pursuant to the provisions of Utah Code Section 78-12-40.³

- 8) A Stipulation of Dismissal was submitted to the Court on April 19, 2000 – the day before the scheduled Hearing – so that the Court would find the Stipulation in the file at the time of the Hearing.⁴
- 9) None of the parties was present at the Hearing on April 20, 2000 – the parties having submitted the Stipulation to the Court in lieu of being present (counsel for the Dixie Regional Medical Center being from out-of-town did not want to have to travel to appear in St. George).
- 10) The Minutes of the Hearing on April 20, 2000, stated: “HEARING – There being no one present and a Stipulation to Dismiss (Without Prejudice) [sic] being filed. Court orders this matter dismissed.”⁵
- 11) On May 9, 2000, Plaintiff mailed a second Notice of Intent to Commence Legal Action to Dr. Benson and the Dixie Regional Medical Center in order to re-start the process to request a Prelitigation Hearing.
- 12) On May 11, 2000, Mr. Sutter filed a Request for a Prelitigation Hearing.
- 13) A Prelitigation Hearing was held on September 21, 2000.
- 14) On November 15, 2000, the Panel Opinion was signed.

³ The “Savings Statute”

⁴ Order Granting Stan Benson, M.D.’s Motion for Summary Judgment ¶9

⁵ Order Granting Stan Benson, M.D.’s Motion for Summary Judgment ¶10

- 15) On November 16, 2000, the Division of Occupational and Professional Licensing issued the Prelitigation Panel Opinion and a Certificate of Compliance.
- 16) Prior to filing a new Complaint, and recognizing that Plaintiff had one year, pursuant to Utah Code Section 78-12-40, to re-file a Complaint from the date the initial case had been dismissed, Plaintiff's counsel contacted the Court Clerk via telephone to ascertain the date the initial case had been dismissed in order to calculate the expiration date of the one-year statute of limitations provided by Utah Code Section 78-12-40.
- 17) Plaintiff's counsel knew that a Hearing had been held on April 20, 2000, (at which time Defendant's Motion to dismiss had, likely, been granted based upon the parties' Stipulation); however, Plaintiff's counsel did not know when the opposing counsel had submitted a formal Final Order for the Court's signature nor when that Order had been signed and entered.
- 18) Plaintiff's counsel was informed by the Court Clerk over the telephone that the case had been dismissed on April 24, 2000.
- 19) Accordingly, Plaintiff re-filed a new Complaint on April 23, 2001.
- 20) After being served, Defendant Stan Benson, subsequently, filed a Motion for Summary Judgment asserting that the claim was time-barred for failure to file within the one-year statute of limitations provided by Utah

Code Section 78-12-40 asserting that the initial case had, actually, been dismissed on April 20, 2000 – the date of the Hearing on the initial case.

21) Upon a review of the Court’s case file, it was discovered that an unsigned Minute Entry had been entered on the date of the Hearing indicating that the Court had ordered that the case be dismissed; however, there were no subsequent filings (Orders, etc.) in the Court’s file – no formal Order had been submitted to the Court, and no signed Order existed in the file!

22) Unable to locate any documentation in the Court’s file indicating that the case had been dismissed on April 24, 2000 – as Plaintiff’s counsel had been informed by the Court Clerk over the telephone, Plaintiff’s counsel searched the Court’s computer’s data file for any additional information; therein, Plaintiff’s counsel discovered a computer-generated document entitled “CASE HISTORY” which stated: “CASE DEPOSITION – 4/24/2000 Dismsd [sic] w/o prejudice by Judge G. RAND BEACHAM”.⁶

23) A Hearing was, subsequently, held on Defendant’s Motion for Summary Judgment asserting that the new Complaint had not been timely filed.

24) At the Hearing, discussion was heard regarding the lack of a formal Order. Furthermore, the Court entertained Plaintiff’s observation that, even if the initial case had been dismissed on April 20, 2000 (the date of

⁶ A Copy is attached.

the Hearing on the initial case), the one-year statute of limitations in which to re-file the case had been tolled pursuant to the provisions of Utah Code Section 78-14-12 – which provides that the applicable statute of limitations is tolled during the Prelitigation Hearing process; therefore, the applicable one-year statute of limitations had not expired.⁷

25) The Court concluded that, although no formal Order had been signed, the initial case had been dismissed on April 20, 2000 (the date of the Hearing on the initial case at which no parties were present) and that, accordingly, Plaintiff's new Complaint had not been timely filed.

26) Defendant (the prevailing party) prepared and submitted a proposed Order granting Defendant's Motion for Summary Judgment.

27) Plaintiff's counsel submitted an objection to said Order indicating that Defendant's proposed Order failed to address the Court's decision on the application of the tolling provisions to the one-year statute of limitations.

28) The Court signed an Order prepared by Defendant's counsel. The Court, also, prepared and entered a Memorandum Decision addressing

⁷ Although the issue had not been briefed by the parties before the Hearing, Plaintiff's counsel had informed Defendant's counsel of the issue before the date of the Hearing and both parties were prepared and did make arguments during the Hearing regarding the effect of the tolling provisions on the case.

Plaintiff's argument that the applicable one-year statute of limitations had been tolled during the Prelitigation Hearing process.

SUMMARY OF THE ARGUMENT

A case is not disposed of unless and until an Order is signed and entered.

Many past Utah appellate cases clearly indicate that an unsigned minute entry does is not a final judgment and does not dispose of a case.

In this case, because there is only an unsigned minute entry granting Defendant's Motion to Dismiss and there is no signed order, there has been no final judgment entered and the case, technically, is still open.

Accordingly, the one-year statute of limitations provided by Utah Code Section 78-12-40 has not, yet, begun to run!

Thus, Plaintiff has timely filed the second complaint.

Even if the case has been closed as the result of an unsigned minute entry, the one-year statute of limitations in which to re-file a complaint was tolled during the Prelitigation Hearing process and Plaintiff's second complaint was timely filed.

DETAIL OF THE ARGUMENT

FIRST ISSUE

IS AN UNSIGNED MINUTE ENTRY A FINAL JUDGMENT

One issue in this case is whether the initial case has ever been formally disposed of because there has never been a signed Order entered by the Court.

This issue has been addressed by this Court on numerous occasions in the past. The important purpose of requiring a formal signed Order is to provide a definitive time for the final disposition of a case.

Plaintiff argues that there needs to be a formal SIGNED Order to dispose of a case.

The Defendant and the trial court, apparently, suggest that the Court's oral granting of the Motion to Dismiss during a Hearing is sufficient to dispose of a case and that no formal Order need be signed and/or entered by the court.

There must be some order in the administration of justice – can there be one date that a case is disposed of if no formal Order is signed and entered and a different date if a formal Order is later signed and entered by a Court?

For example, in this case, if Defendant's counsel had, subsequent to the Hearing, submitted an Order to the Court for the Court's signature (as required by Rule 4-504 of the, then applicable, Rules of Judicial Administration) this case would have been disposed of on date that Order was signed and entered by

the Court; yet, because no formal written Order was submitted to the Court for the Court's signature, the date the case is deemed disposed of is the date the Court stated it granted Defendant's motion during a Hearing.

Such an administration of justice would create chaos!

As stated in the case of Lukich v. Utah Const. Co.⁸:

If there is a judgment, there is a right way to show it.

In Ron Shepherd Insurance, Inc. v. Shields,⁹ the Court noted:

[A]n unsigned minute entry was made which reads in pertinent part:

This case is before the court for hearing on defendant's motion for summary judgment, . . . The motion is argued to the court by counsel and submitted. The court being fully advised grants the motion . . .¹⁰

The Court, further, noted that:

At no time did Judge Lewis sign an order granting defendant's motion for summary judgment or a judgment entering summary judgment in favor of defendants.

The Court, addressing the issue, stated:

⁸ Lukich v. Utah Const. Co., 150 P. 298 (Utah 1915)

⁹ Ron Shepherd Insurance Inc. v. Shields, 882 P.2d 650 (Utah 1994)

¹⁰ Ron Shepherd Insurance at 652

That ruling appeared only as an unsigned minute entry. It is well settled that '[a]n unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of [appeal] {sic}.' [citations omitted] {sic} Because Judge Lewis never signed an order granting defendants' motion for summary judgment nor entered judgment thereon, there is not a final order or judgment by Judge Lewis to be considered.

In Swenson Associates Architects, P.C. v. State . . .,¹¹ where a party argued that a signed minute entry constituted the 'first signed order' and that the final order was "simply superfluous," the Court stated:

This court has recognized that in appropriate circumstances, a signed minute entry *may be* [sic] a final order for purposes of appeal. [citations omitted] However, such treatment is appropriate only where "the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement." [citations omitted] It must be clear that that "which is offered as the record of a judgment is really such and not an order for a judgment or a mere memorandum from which the judgment

¹¹ Swenson Associates Architects, P.C. v. State By and Through Div. Of Facilities Const., 889 P.2d 415 (Utah 1994)

was to be drawn." *Hartford Accident & Indem. Co. v. Clegg*, 103 Utah 414, 420, 135 P.2d 919, 922 (1943) (quoting 33 C.J. *Judgments* § 118 (1924)).¹²

The Court went on to note:

In *Hartford Accident & Indemnity Co.*, this court held that a minute entry signed by the trial court stating that "[t]he within entitled matter having been by the court taken under advisement, the court now renders its decision that judgment be entered against the plaintiff and in favor of the defendant," *id.* at 419, 135 P.2d at 921, was not itself a final order.¹³

In the case of State v. Gerrard,¹⁴ the Supreme Court stated:

While we have not found a Utah criminal case dealing with this specific issue, the law is well settled in the state that the statements made by a trial judge are not the judgment of the case and it is only the signed judgment that prevails.¹⁵

In Watson v. Odell,¹⁶ the Supreme Court made an important observation:

[O]n the 28th day of August [1917], . . . [the trial court] granted

¹² Swenson at 417 {emphasis added}

¹³ Swenson at 417 {emphasis added}

¹⁴ State v. Gerrard, 584 P.2d 885 (Utah 1978)

¹⁵ Gerrard at 887

¹⁶ Watson v. Odell, 176 P. 619 (Utah 1918)

the motion for nonsuit in an oral opinion in which the court gives its reasons at length why the motion should be granted, which opinion ends as follows:

"For these reasons the motion for nonsuit is granted, and an order may be entered dismissing the case."

It further appears that the plaintiff's counsel, desiring to appeal from the judgment dismissing the action, and discovering that no formal judgment of dismissal had been entered, on the 2d day of March, 1918, requested the clerk of said court to enter a formal judgment of dismissal; that the clerk, pursuant to said request, on said day caused a blank form of judgment of dismissal to be filled out and filed in his office; that said judgment was not entered in any book or record until the 20th day of March following; that counsel for plaintiff, assuming that the judgment had been formally entered on said 2d day of March, duly served and filed a notice of appeal in due form on said day.

Upon the record the defendants now contend that, if it be held that the ruling of the district court granting the motion for nonsuit and ordering the action dismissed is an appealable judgment, then the notice of appeal which was served and filed as aforesaid was not

served and filed within the time required by our statute, namely, within six months from the entry of judgment, and hence this court has no jurisdiction of the appeal. Upon the other hand, they contend that if it be held that the order of August 29, 1917, is not an appealable judgment, then this appeal is premature, since the judgment filed by the clerk on March 2, 1918, was not entered until March 20, 1918.

This court has held that an order similar to the one made by the district court on August 29, 1917, is not a final and appealable judgment. *Lukich v. Utah Construction Co.*, 46 Utah, 317, 150 Pac. 298. In the same case reported in 48 Utah, 452, 160 Pac. 270, it was further held that the time for an appeal begins to run from the actual entry of the judgment of dismissal. Those cases have repeatedly been followed by this court in rulings from the bench, and numerous appeals have been dismissed because no formal judgment of dismissal had been entered. The rule laid down in those cases has thus become the settled practice of this court. Counsel for neither side question the soundness of those cases, and we can see no reason why the rule should not be adhered to. It is the only safe course to pursue. No one should be left in doubt

respecting the record of a judgment nor where it is entered or can be found.¹⁷

In the case of State v. Jiminez,¹⁸ the Court noted:

We must dismiss defendant's appeal because his notice of appeal was prematurely filed. . . . In *Swenson Associates Architects v. State*, 889 P.2d 415, 416 (Utah 1994), the plaintiff filed a timely post-trial motion, which was denied in a signed minute entry. The plaintiff filed his appeal within thirty days of this minute entry but four days before the court issued its written order denying the new trial motion. We ruled that this court lacked jurisdiction because the plaintiff had filed his notice of appeal before the trial court entered its order.¹⁹ Defendant seeks to distinguish this case from *Swenson* on the ground that the unsigned minute entry entered by the trial court in the instant case did not direct either counsel to prepare a formal written order denying the motion, as was the case in *Swenson*. That distinction is unavailing since the minute entry in this case was unsigned, and we have consistently dismissed

¹⁷ Watson at 619 {emphasis added}

¹⁸ State v. Jiminez, 938 P.2d 264 (Utah 1997)

¹⁹ The Court, here, is referring to the formal written Order – even though there was a signed minute entry.

appeals from unsigned minute entries. *See, e.g., South Salt Lake v. Burton*, 718 P.2d 405 (Utah 1986) (citing numerous cases holding same) [sic].²⁰

In Utah Farm Production Credit Ass'n v. Watts,²¹ the Court noted:

Since the prepared order was never signed by the court and the ruling only appears as an unsigned minute entry, we have no jurisdiction to rule on this issue.

In Ahlstrom v. Anderson,²² the Court noted:

That same day, an unsigned minute entry was entered by the clerk indicating that the motion had been denied. No final order was thereafter signed or entered in the record. An unsigned minute entry is not a final appealable order. [citations omitted]

In Sather v. Gross,²³ the Court recognized that an unsigned minute entry does not constitute a final judgment:

The trial court granted the motion by an unsigned minute entry . . .

No order appears in the record and apparently none was entered.

An appeal can be taken only from the entry of a final judgment

²⁰ Jiminez at 265 {emphasis added}

²¹ Utah Farm Production Credit Ass'n v. Watts, 737 P.2d 154, 162 (Utah 1987)

²² Ahlstrom v. Anderson, 728 P.2d 979 (Utah 1986)

²³ Sather v. Gross, 727 P.2d 212, 213 (Utah 1986)

that concludes the action. [citations omitted] An unsigned minute entry does not constitute a final judgment for purposes of appeal and this Court has no jurisdiction to consider the merits of plaintiff's appeal.

In South Salt Lake v. Burton,²⁴ the Court noted:

After trial, the court clerk recorded in a minute entry: "The court thereupon finds in favor of the plaintiff and against the defendant and order the previously imposed sentence reinstated." . . . [T]he minute entry was not signed by the judge. An unsigned minute entry is not susceptible of enforcement and does not constitute a final judgment for purposes of appeal to this Court.

In Utah State Tax Com'n v. Erikson,²⁵ the Court stated:

We have consistently held that a minute entry, unsigned by the court and not susceptible of enforcement, does not constitute a final, appealable order.

In Wisden v. City of Salina,²⁶ the Court noted that an unsigned minute entry does not constitute a final judgment:

In an unsigned minute entry . . . the district court granted

²⁴ South Salt Lake v. Burton, 718 P.2d 405, 406 (Utah 1986)

²⁵ Utah State Tax Com'n v. Erikson, 714 p.2d 1151, 1152 (Utah 1986)

²⁶ Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985)

summary judgment in favor of the City of Salina. No judgment or order signed by the judge as required by Utah R.Civ.P. 58A(b) and (c) appears in the record. An unsigned minute entry does not constitute a final judgment. [citations omitted]

In Wilson v. Manning,²⁷ the Court noted:

An unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of Utah R.Civ.P. 72(a) [regarding appeals].

There are many more cases which have similarly ruled on the issue.

²⁷ Wilson v. Manning, 645 P.2d 655 (Utah 1982)

SECOND ISSUE

TOLLING OF THE APPLICABLE STATUTE OF LIMITATIONS

Even if the case the was concluded on the date an unsigned minute entry was entered (April 20, 2000), the applicable one-year statute of limitations provided by Utah Code Section 78-12-40 was tolled during the Prelitigation Hearing process and Plaintiff's new complaint was, accordingly, timely filed.

Utah Code Section 78-14-12(3)(a) provides:

The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

The applicable statute of limitations in this situation was the one-year statute of limitations provided by Utah Code Section 78-12-40 – which reads:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the

same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Thus, when Plaintiff filed a request for a Prelitigation Hearing, the statute of limitations was tolled “until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection.”²⁸

Plaintiff filed a request for a Prelitigation Hearing on May 11, 2000, the Division issued the panel opinion on November 16, 2000; according to the provisions of Utah Code Section 78-14-12(3)(a), the applicable statute of limitations was tolled (which, in this circumstance, was the one-year statute of limitations provided by Utah Code Section 78-12-40). Therefore the one-year statute of limitations was tolled from May 11, 2000 until sixty days after the Division issued the panel opinion. The Division issued the panel opinion on November 16, 2000; thus, the statute of limitations was tolled until January 15, 2001 – sixty days after the Division issued the panel opinion.

At the time the request for the Prelitigation Hearing was filed (May 11, 2000) and the statute of limitations was tolled, three hundred forty-four days remained on the one-year statute of limitations, when the statute of limitations

²⁸ Utah Code Section 78-14-12(3)(a)

began running again on January 15, 2001, three hundred forty-four days remained from that time in which Plaintiff could re-file a complaint. Thus, Plaintiff could re-file a complaint through December 25, 2001. Since Plaintiff filed a new complaint on April 23, 2001, Plaintiff was well within the applicable statute of limitations to file a new complaint.

CONCLUSION

Case law clearly requires that a formal Order be signed and entered to dispose of a case. Since no such Order has ever been signed, technically, the initial case filed by the Plaintiff has never been closed.

Plaintiff's second complaint is, thus, timely filed.

Furthermore, the applicable statute of limitations was tolled during the Prelitigation Hearing process; therefore, the new complaint was timely filed.

Richard M. Hutcheon

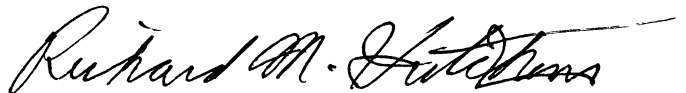
PROOF OF SERVICE

I certify that on this date I caused to be mailed a copy of the foregoing
(with attachments) to:

COUNSEL FOR APPELLEE:

BRIAN P. MILLER
SNOW, CHRISTENSEN & MARTINEAU
P.O. Box 45000
Salt Lake City, Utah 84145

SIGNED AND DATED this 19th day of January, 2005.

A handwritten signature in black ink, reading "Richard M. Hutchins", written over a horizontal line.

RICHARD M. HUTCHINS
ATTORNEY FOR APPELLANT

ADDENDUM

MINUTE ENTRY

FIFTH DISTRICT COURT-ST GEORGE COURT
WASHINGTON COUNTY, STATE OF UTAH

MICHAEL SUTTER,	:	MINUTES
Plaintiff,	:	MOTION TO DISMISS
	:	
vs.	:	Case No: 990501775 PI
	:	
STAN BENSON MD Et al,	:	Judge: G. RAND BEACHAM
Defendant.	:	Date: April 20, 2000

Clerk: diannem

PRESENT

Video

Tape Number: 00-0139 Tape Count: 2:39

HEARING

There being no one present and a Stipulation to Dismiss (Without Prejudice) being filed. Court orders this matter dismissed. (2:39 ends)

CASE HISTORY

FIFTH DISTRICT COURT-ST GEORGE COURT
WASHINGTON COUNTY, STATE OF UTAH

MICHAEL SUTTER	:	CASE HISTORY
Plaintiff,	:	
	:	
vs.	:	Case No: 990501775 PI
	:	
STAN BENSON MD	:	Judge: G. RAND BEACHAM
	:	
Defendant.	:	Date: [REDACTED]

CASE DISPOSITION

04/24/2000 Dismsd w/o prejudice by Judge G. RAND BEACHAM

[The date in the Caption has been blacked out because that date is generated by the computer and always displays the current date – the date the document is view and/or printed – the date blacked out was February 13, 2003 – which, simply, was the date the document was printed.]

ORDER GRANTING STAN BENSON M.D.'S
MOTION FOR SUMMARY JUDGMENT

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY
STATE OF UTAH

MICHAEL SUTTER,
Plaintiff,
vs.

**ORDER GRANTING STAN BENSON,
M.D.'S MOTION FOR SUMMARY
JUDGMENT**

STAN BENSON, M.D., and IHC
HOSPITALS, INC. dba DIXIE REGIONAL
MEDICAL CENTER,
Defendants.

Civil No. 010500832

Judge G. Rand Beacham

This matter came before the Court for ruling on May 22, 2003, pursuant to applicable a Notice to Submit and Request for Ruling. Before the Court for review was Stan Benson, M.D.'s ("Dr. Benson") Motion for Summary Judgment. The Court, having reviewed the file and all of the memoranda filed both in support of and in opposition to the pending motion and also having reviewed other evidence attached as exhibits to the memoranda, having heard oral argument and otherwise being fully informed, finds as follows:

The Court, after reviewing all of the memoranda, exhibits and evidence in the file and provided by the parties and after hearing argument on this Motion finds that the following are undisputed facts:

1. On or about May 26, 1997, plaintiff presented to the emergency department at Dixie Regional Medical Center for treatment of a large swollen mass in his right arm.

2. Attempting to drain the apparent abscess, Dr. Benson made a small incision on its surface. The incision revealed a ruptured brachial artery. Consequently, later on May 26, 1997, plaintiff underwent surgery to repair the artery.

3. Plaintiff claims that as a result of Dr. Benson's incision and subsequent surgery on May 26, 1997, he suffered personal injury, incurred medical expenses, lost wages and other benefits of employment, suffered pain and anguish of mind and body, and sustained permanent disfigurement.

4. On May 26, 1999, the last day in which to initiate an action against defendants prior to the running of the two-year statute of limitations for medical malpractice actions and pursuant to the Utah Health Care Malpractice Act ("Malpractice Act"), Utah Code Annotated § 78-14-8, plaintiff mailed a notice of intent to commence action to Dr. Benson.

5. Because plaintiff's notice of intent was served less than ninety days prior to the expiration of the statute of limitations, plaintiff's time for commencing his malpractice action was extended 120 days from the date of service of the notice of intent. See Utah Code Annotated § 78-14-8. As a result, plaintiff's statute of limitations in which to commence his malpractice action was extended to September 23, 1999.

6. Thereafter, however, plaintiff failed to file a request for prelitigation hearing with DOPL, as required by the Malpractice Act, Utah Code Annotated § 78-14-12.

7. On September 22, 1999, apparently believing that he had complied with the prelitigation requirements of the Malpractice Act, plaintiff filed a complaint naming Dr. Benson. Dixie Regional Medical Center was served with a summons and the complaint, however, Dr. Benson was not served with a summons or complaint.

8. Dixie Regional Medical Center moved to dismiss based upon a failure to comply with the prelitigation requirements of the Malpractice Act. Plaintiff thereafter apparently realized that he had failed to file a request for prelitigation hearing and that he did not have the required certificate of compliance from DOPL in order to proceed.

9. On April 19, 2000, plaintiff filed a “Stipulation of Dismissal (without prejudice)” signed by plaintiff’s attorney and Brinton Burbidge, counsel for Dixie Regional Medical Center.

10. On April 20, 2000, at the hearing scheduled for Dixie Regional Medical Center’s Motion to Dismiss, the Court ordered plaintiff’s Complaint dismissed without prejudice, stating that “[t]here being no one present [at the hearing] and a Stipulation to Dismiss (Without Prejudice) being filed. Court orders this matter dismissed.”

11. On April 24, 2000, the Court’s clerk apparently filed a document containing the phrase “Case disposition is dismsd w/o prejudice.”

12. On May 9, 2000, plaintiff mailed his second notice of intent to Dr. Benson.

13. On May 11, 2000, plaintiff then filed a request for prelitigation panel review.

14. On September 21, 2000, a prelitigation hearing was held.

15. On November 15, 2000, the prelitigation panel issued its opinion.

16. On November 16, 2000, DOPL issued a certificate of compliance to plaintiff.

17. April 20, 2001, according to Utah Code Ann. § 78-12-40, was the deadline for plaintiff to refile his Complaint.

18. On April 23, 2001, plaintiff refiled his Complaint against defendants.

19. On June 11, 2002, IHC Hospitals, Inc., d/b/a Dixie Regional Medical Center, was dismissed by order of the Court.

Plaintiff did not oppose or dispute any of the above facts set forth by Dr. Benson as undisputed either in his brief or at the hearing.

Plaintiff claims that the date of dismissal of his first Complaint, Civil No. 990501775, was effective April 24, 2000, the date on which a clerk's computer entry of the fact of dismissal was apparently made. Dismissal did not occur on April 24, 2000, but occurred on April 20, 2000, according to the minute entry which documented the Court's order of dismissal rendered from the bench at the hearing on the same date at which no party or attorney appeared. The clerk's computer entry of the fact of dismissal may have been made on April 24, 2000, but that did not constitute the dismissal of Civil No. 990501775, the dismissal having already occurred on April 20, 2000.

The Court is also unpersuaded by plaintiff's argument that Civil No. 990501775 is still not dismissed because no one complied with Rule 4-504, Utah Rules of Judicial Administration. The Court does not view Rule 4-504 as authority for the proposition that a court's orders from the bench are not effective for any purpose until entered in writing. The case authorities cited by plaintiff deal with the time of entry of judgment for the purposes of calculating the time for appeal. The Court is persuaded that Utah Code Ann. § 78-12-40 established the deadline for plaintiff to refile his complaint, and that such deadline was not met by plaintiff's refiled complaint in this action.

Plaintiff also asserted during the hearing that the applicable statute of limitations restricting the time in which plaintiff could refile his complaint following its first dismissal was Utah Code Ann. § 78-12-40 (party permitted one year from dismissal not on the merits to refile complaint). Plaintiff then asserted that this one-year period was tolled during the required prelitigation

proceedings pursuant to Utah Code Ann. § 78-14-12(3)(a) which provides, in pertinent part, as follows: "The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until . . . 60 days following the division's issuance of an opinion"

Plaintiff made this argument for the first time at the hearing. The Court also heard argument from counsel for Dr. Benson and received references to multiple cases on this issue. Based on the cases cited by Dr. Benson's counsel and arguments made to the Court, the Court rejects plaintiff's argument.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that for the above reasons and those contained in Stan Benson, M.D.'s memoranda filed with the Court and arguments and citations made to the Court at the Hearing held May 22, 2003, defendant Stan Benson, M.D.'s Motion for Summary Judgment is granted. The parties are to bear their own attorney's fees and costs.

DATED this 4 day of ~~August~~ ^{May}, 2003.

BY THE COURT:

JUDGE G. RAND BEACHAM

Honorable G. Rand Beacham
District Court Judge

APPROVED AS TO FORM:

Richard M. Hutchins
Attorney for plaintiff

MEMORANCUM DECISION

RE SECTION 78-14-12(3)(a)

RY RS

IN THE FIFTH DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

MICHAEL SUTTER,)	
)	
Plaintiff,)	MEMORANDUM DECISION
)	RE SECTION 78-14-12(3)(a)
)	
vs.)	Civil No. 010500832
)	Judge G. Rand Beacham
STAN BENSON, M.D. et al.,)	
)	
Defendants.)	

The Court's Ruling on Defendant's motion for summary judgment was entered June 11, 2003. Defendant thereafter submitted an order for Plaintiff's review, and Plaintiff filed an objection to the proposed order on June 27, 2003. Defendant's counsel then submitted two forms of orders to the Court, but did not file a memorandum in response to Plaintiff's objection, and a notice to submit, until March 8, 2004.

Between the entry of the Ruling and the date of this memorandum decision, the Court has taken some time to reconsider its Ruling. This reconsideration was prompted by the decision of the Utah Supreme Court in McBride-Williams v. Huard, 2004 UT 21 affirming this Court's ruling on a savings statute issue in another case, and by this Court's research in connection with a ruling on a Rule 60(b) motion in Pugh v. Dozzo-Otero, Civil No. 020502154, Fifth District Court for Washington County, State of Utah. The Court has now

concluded, however, that nothing in either of these cases affects the Court's Ruling in this case.

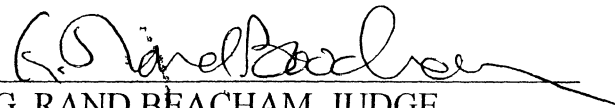
Plaintiff's objection to Defendant's proposed order is based on an argument first made by Plaintiff in the hearing on Defendant's motion for summary judgment. Plaintiff argued that the one-year period in which Plaintiff could refile his complaint following its first dismissal was further tolled (i.e., it stopped running) for sixty days during the prelitigation proceedings, pursuant to Utah Code Ann. § 78-14-12(3)(a). This Court, like all others, generally declines to consider arguments of which a party has given no notice before a motion hearing, for the reason that it is fundamentally unfair to allow a party to be ambushed at a hearing by an argument which could, and should, have been made known in a memorandum. Nevertheless, when the result of a motion may be the dismissal of a party's claims on a basis other than the merits, some attention may be paid to an argument which may preserve those claims, even when that means the other party has been blind-sided. Fortunately, Defendant's counsel was also prepared to respond on the merits of Plaintiff's belated argument, with opposing legal authorities and analysis which the Court found persuasive.

In addition, dictum in a decision rendered by the Utah Supreme Court after the Court's Ruling in this case appears to have some bearing on Plaintiff's tolling argument. In Jensen v. IHC Hospitals, Inc., 2003 UT 51, ¶ 15, n. 5, 82 P.3d 1076, the court appears to have

interpreted § 78-14-12(3)(a) to extend a statute of limitations which would otherwise expire during a prelitigation panel review, rather than to “toll” or stop the running of a statute of limitations which would not expire during a prelitigation panel review. Although the footnote in Jensen is dictum, it does appear to involve an interpretation which is contrary to Plaintiff’s tolling argument.

In this case, the sixty-day extension under § 78-14-12(3)(a) was irrelevant, because Plaintiff still had more than eleven months left to file the second complaint. Consequently, the Court is not persuaded by Plaintiff’s argument.

Dated this 4th day of May, 2004.


G. RAND BEACHAM, JUDGE

CLERK OF DISTRICT COURT
SALT LAKE COUNTY

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 5 day of May, 2004, I provided true and correct copies of the foregoing MEMORANDUM DECISION to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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DEPUTY CLERK OF COURT