

1993

L. Diane Turner v. Craig H. McQueen, M.D., and Utah Orthopaedic Associates and Sports Medicine Clinic: Brief of Appellee

Utah Court of Appeals

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J. Ray Barrios, Jr., P.C.

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BRIEF

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DOCKET NO. 930187CA

IN THE UTAH COURT OF APPEALS

L. DIANE TURNER,

Plaintiff/Appellant,

Case No. 930187-CA

vs.

Argument Priority 15

CRAIG H. McQUEEN, M.D., and
UTAH ORTHOPAEDIC ASSOCIATES &
SPORTS MEDICINE CLINIC

Defendants/
Appellees.

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court of
Salt Lake County, The Honorable Leslie Lewis, District Judge

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1 OF APPEALS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3(2)(k) (Supp. 1992), pursuant to an order of the Utah Supreme Court dated March 25, 1993 which poured the case over to this Court.

STATEMENT OF ISSUES PRESENTED

1. Was the trial court correct in denying Plaintiff's Motion for Extension of Time to Designate Expert and Motion for a Continuance of Trial as not timely or well-taken when the motion was filed six weeks after the cutoff time for Plaintiff's designation of experts and the Plaintiff had ample time and forewarning that she was required to produce expert testimony regarding the standard of care--a prima facie element of her case in chief?

2. Was the trial court correct in granting Defendants' motion for Summary Judgment when Plaintiff failed to provide expert testimony regarding standard of care, thus leaving no genuine issue of material fact?

STANDARD OF APPELLATE REVIEW

1. The decision of a trial court to deny a continuance should not be reversed unless it is shown that there was an abuse of discretion. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). This Court should affirm unless it is found that the

trial court "has abused that discretion by acting unreasonably." Hill v. Dickerson, 839 P.2d 309, 311 (Utah App. 1992).

2. A motion for summary judgment should be granted only if the pleadings, depositions, admissions and affidavits 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. Hunt v. Hurst, 785 P.2d 414, 415 (Utah 1990). This Court must examine the evidence in a light most favorable to the party opposing the motion. Id.

DISPOSITIVE STATUTES AND RULES

"Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown...." Utah R. Civ. P. 40(b) (1993).

Utah Rule of Civil Procedure 56 controls the granting of a motion for summary judgment.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below.

This is a medical malpractice case commenced on June 19, 1991 by Plaintiff/Appellant L. Diane Turner (Plaintiff). (R. 2-11.) Thereafter, Defendants/Appellees Craig H. McQueen, M.D. and Utah Orthopaedic Associates & Sports Medicine Clinic (Defendants), filed an answer and discovery ensued. (R. 12-16)

A scheduling conference was held on July 20, 1992, wherein the parties agreed to the following dates: (a) Plaintiff's witnesses (expert and otherwise) to be designated on July 31, 1992; (b) Defendants' witnesses (expert and otherwise) to be designated on August 10, 1992; (c) Discovery cut-off October 9, 1992; and (d) four-day jury trial set for November 30, 1992. (R. 34-35.)

On July 31, 1992, Plaintiff designated Dr. Robert Horne as the only medical expert witness prepared to testify on her behalf. (R. 38, 157.) On August 7, 1992, defendants designated their experts and other medical witnesses. (R. 39-41.)

On September 11, 1992, Defendants moved for Summary Judgment on the grounds Plaintiff failed to produce competent expert testimony necessary to prevail on her medical malpractice claim. (R. 47-49.) On September 21, 1992, Plaintiff filed a Motion in Opposition to Defendant's Motion for Summary Judgment and moved for an extension of time in which to designate an expert witness. (R. 81-102.) Defendants filed a Reply Memorandum in support of their Motion for Summary Judgment on September 23, 1992. (R. 103-111.) On November 2, 1992, Plaintiff filed a Motion for Continuance of the Trial. (R. 140-143.)

On November 20, 1992, the trial court denied the Plaintiff's Motion for an Extension of Time to Designate an Expert Witness, and granted the Defendants' Motion for Summary Judgment, thereby

dismissing the Plaintiff's complaint with prejudice. (R. 152-154, 155-160.)

B. Statement of Facts.

1. On June 19, 1989, L. Diane Turner (Plaintiff) underwent arthroscopic knee surgery performed by Dr. Craig McQueen. (R. 6, 156.) After subsequent treatment by Dr. McQueen, Plaintiff sought treatment from Dr. Robert Horne.

2. On July 12, 1989, Dr. Horne saw Plaintiff and became her treating physician. (R. 8.)

3. Plaintiff brought suit against Defendants and discovery commenced. (R. 2-11.)

4. Plaintiff's Complaint alleged that Defendants owed her a duty to treat and care for her in a manner that was consistent with the standards of the medical community in which they practiced and that Defendants failed in that duty. (R. 4, 159.)

5. As part of her prima facie case, Plaintiff was required to provide an expert witness who could testify regarding Defendants' alleged malpractice.

6. A scheduling conference was held and it was agreed that Plaintiff's witnesses (expert and otherwise) were to be designated on July 31, 1992. (R. 34-35.) Trial was set for November 30, 1992. (R. 34.) On July 31, 1992, Plaintiff designated Dr. Robert Horne as her sole expert witness. (R. 38, 88, 157).

7. In late August 1992, Defendants made preparations to take the deposition of Dr. Horne. On August 31, 1992, Defendants were told by Dr. Horne that this was the first he had heard of being involved in a law suit, that he had never agreed to testify as an expert witness in this case, that he would not agree to do so now, and that the prior care given by Dr. McQueen was both necessary and appropriate. (R. 148-150, 157-159.)

8. An affidavit was obtained from Dr. Horne by Defendants and Dr. Horne alerted Plaintiff's attorney of his opinion via fax on September 11, 1992. (R. 90-91, 148-150.)

9. On September 11, 1992, Defendants moved for summary judgment on the grounds Plaintiff failed to produce competent expert testimony necessary to prevail on her medical malpractice claim. (R. 47-49.) Defendants' Motion for Summary Judgment was supported by Affidavits from both Dr. Horne and Dr. Sherman Coleman. (R. 57-59, 60-62, 157.)

SUMMARY OF ARGUMENT

I. Plaintiff is improperly attempting to appeal the trial court's adverse ruling on her Motions for an Extension of Time to Designate an Expert Witness and for Continuance of Trial. Denial of these motions is not a final judgment.

II. The trial court did not abuse its discretion in denying Plaintiff's Motions for an Extension of Time to Designate an Expert Witness and Continuance of Trial. Plaintiff had ample opportunity to find and prepare an expert witness for her case.

Plaintiff had nearly three years from the time she first gave notice to the Defendants of a law suit until the date set for Plaintiff to designate her expert witnesses. Plaintiff further knew that expert testimony was required to meet a prima facie element of her case and yet designated her only expert witness without asking him his opinion of Defendants' treatment or whether he would testify as her expert. When Plaintiff was notified that her expert was not willing to testify she still made no effort to find another until ten days later when she requested an extension. Finally, three weeks after she was notified that Dr. Horne would not testify, Plaintiff moved for a continuance of the trial.

III. Plaintiff failed to provide an expert witness to testify that an injury occurred as a result of a departure from the applicable standard of medical care. Expert testimony is necessary to establish a prima facie case. Because of this failure, Plaintiff has no testimony to contradict the testimony of Defendants' experts as to the care provided. There is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

ARGUMENT

POINT I

PLAINTIFF/APPELLANT IS IMPROPERLY ATTEMPTING
TO APPEAL A TRIAL COURT DECISION THAT IS NOT
A FINAL JUDGMENT.

Plaintiff has stated the following as her issue for review
in this appeal:

Whether or not the trial court judge abused her
discretion in ruling that Dr. Robert Horne, M.D. had
never agreed to act as Plaintiff's expert, and since
Dr. Horne, M.D., for the first time on September 11,
1992 indicated to Plaintiff that he would not act as
such expert, the trial court abused her [sic]
discretion in not granting Plaintiff's motion for a
continuance of her trial, and an extension of time in
which to designate a replacement expert.

(Plaintiff's Brief, p. 1-2.)

Plaintiff has not appealed from the trial court's entry of
Summary Judgment--only from the denial of her Motion for an
Extension of Time to Designate an Expert Witness and Motion for
Continuance of Trial. Neither of these judgments ended the
controversy between the parties nor finally disposed of the
subject-matter of the litigation on the merits of the case.

Denial of these motions is not a final judgment and the
appeal should be dismissed. Cf. A.J. Mackay Co. v. Okland Const.
Co., 817 P.2d 323, 325 (Utah 1991); Salt Lake City Corp. v.
Layton, 600 P.2d 538, 539-60 (Utah 1979); Kennedy v. New Era
Indus., Inc., 600 P.2d 534, 535-37 (Utah 1979).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DENYING PLAINTIFF'S MOTIONS FOR AN
EXTENSION OF TIME TO DESIGNATE AN EXPERT AND
FOR A CONTINUANCE OF THE TRIAL.

Plaintiff asks this court to find that the trial court abused its discretion in denying her motions to extend the time to designate an expert witness and continue the trial. In so doing, the Plaintiff argues that she was surprised by Dr. Robert Horne's refusal to testify for her at trial and that as a result the trial court should have granted her a continuance of the trial scheduled for November 30, 1992 and extend the time during which the plaintiff could designate an expert to replace Dr. Horne.

Plaintiff spends some time listing facts which she presumes the trial court relied on in making its determination. However, the issue here is not what facts the trial court did or should have relied on, but whether its conclusion of denying the motion based on its findings was an abuse of discretion. In considering Plaintiff's motion, the trial court found:

There is no evidence that the plaintiff or her attorney confirmed that Dr. Horne would act as her expert witness, testifying that the standard of care was not met by the defendant Dr. McQueen. The evidence indicates that Dr. Horne first learned that he had been appointed in this role when the defendants' attorneys called him to schedule his deposition.

(R. 158). The trial court further found:

The irrefuted evidence indicates Dr. Horne objected to being designated as an expert witness and claimed he was not critical of the care rendered. Further, there

is no evidence before the Court that Dr. Horne had changed his mind or his position with regard to this question; he had simply never been asked to be plaintiff's expert witness.

(R. 158).

The trial court found that the Plaintiff had ample opportunity to find and prepare an expert witness. (R. 159). Plaintiff had nearly three years from the time she first gave notice to the Defendants of a law suit until the date set for Plaintiff to designate her expert witnesses. (R. 156-57). In January, 1992, plaintiff testified that Dr. Horne had never voiced any criticism of the treatment she received by Dr. McQueen. (R. 108-110). When she designated Dr. Horne as an expert, neither she, nor her attorney had contacted Dr. Horne or asked him if he would act as her expert.

Furthermore, Plaintiff took no immediate action when she was alerted, on September 11, 1992, that Dr. Horne would not act as an expert witness in this case. Plaintiff did not file her motion for an extension until September 21, 1992, and did not ask for a continuance until November 2, 1992. (R. 92-102, 140-143). She had still not designated an expert as of November 20, 1992, when the various motions were argued.

This was not a case of surprise. Ample time had been afforded since the commencement of the action in 1989 to utilize discovery procedures. See Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990) (holding that denial of a motion for a continuance is proper when the plaintiff was allowed ample time after the commencement

of a law suit to utilize discovery procedures). Plaintiff could have easily prevented the "surprise event" by simply asking Dr. Horne if he would act as an expert before he was listed as her sole expert witness. The trial court was correct in denying the motion for a continuance.

Plaintiff refers to a number of cases which she states are instructive to the issue at hand. The most instructive of these cases is Hill v. Dickerson, 839 P.2d 309 (Utah App. 1992). Hill involves a claim for dental malpractice arising in 1986, and filed in 1990. Despite court ordered deadlines, the plaintiff failed to timely produce competent medical expert testimony in favor of her negligence theories. The trial court denied the plaintiff's motion for a continuance and dismissed the complaint with prejudice. The Court of Appeals affirmed and held:

The purpose of the Utah Rules of Civil Procedure is to effect total fairness for all parties in a suit. To allow one party to have continuance after continuance to the prejudice of the other party would be patently unfair. This is especially true when such continuances are being granted for the plaintiff, who triggers the time constraints of litigation by bringing the suit in the first place. It is equally unfair to allow a party to name new witnesses several days before trial. Allowing a party to do so at the last minute not only prejudices the other party by foreclosing adequate opportunity to depose said witnesses and find opposing witnesses to respond to the new testimony, but also encourages parties to do so as a trial strategy.

Id. at 312. In reaching this conclusion, the Court of Appeals recognized that it was not error for a trial court to dismiss a plaintiff's case with prejudice due to their abuse of the opportunity to be heard through dilatory conduct. Id.

In the present case, Plaintiff had ample time in which to find an expert witness who would be willing to testify on behalf of the plaintiff. Plaintiff knew that the testimony of an expert witness was necessary to establish the prima facie elements of her malpractice suit and that this testimony was critical.

The following finding of the Trial Court should be sustained:

Plaintiff's Motion for an Extension of Time to Designate an Expert is untimely and is not well-taken in that the Motion was filed a full six weeks after the cut-off time for plaintiff's designation of experts. The Motion for an Extension is not supported by the facts or by case law. Plaintiff triggered the time constraints by filing her Notice to Commence a Medical Malpractice Claim against defendants. She had ample time and ample forewarning that she was required to produce expert testimony regarding the standard of care, a prima facie element of her case in chief. The Court finds and hereby holds that defendants should not be required to bear the burden of plaintiff's laxity, and finds no basis for a continuance.

(R. 159.).

POINT III

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHEN PLAINTIFF FAILED TO PROVIDE AN EXPERT WITNESS TO TESTIFY THAT AN INJURY OCCURRED AS A RESULT OF A DEPARTURE FROM THE APPLICABLE STANDARD OF MEDICAL CARE.

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, a motion for summary judgment should be granted only if the pleadings, depositions, admissions and affidavits 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. Hunt v. Hurst, 785 P.2d 414, 415 (Utah 1990). Consideration of a motion for summary

judgment requires this Court to examine the evidence in a light most favorable to the party opposing the motion. Id.

In evaluating whether a genuine issue of material fact exists for purposes of summary judgment, the reviewing court must consider the standard of proof at trial on each element of the plaintiff's claim. Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah App. 1987). A plaintiff who alleges a claim for medical malpractice does not establish a prima facie case until he or she can show, by competent evidence: (1) the standard of care required of the defendant as a practicing orthopedic surgeon in the community; (2) the defendant's departure from the required standard of care; and (3) that such departure was the proximate cause of injury to the plaintiff. Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980).

The required showing must be made by competent expert testimony. Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987). It is not sufficient to merely show that an adverse result occurred: an orthopedic surgeon, like any health care provider, is not an insurer or guarantor of results and no presumption of negligence may be inferred from the mere fact of an adverse outcome.

The rationale for requiring expert testimony is clear. The issues presented by medical malpractice cases generally involve medical questions and medical judgments beyond the knowledge of

laymen. Kim v. Anderson, 610 P.2d 1270, 1271 (Utah 1980).

Without the assistance of expert medical testimony, the finder of fact is left to impermissibly base its verdict upon speculation and conjecture as to what standard of care was required of the defendant orthopedic surgeon and whether it was met. Anderson v. Nixon, 104 Utah 2d 262, 129 P.2d 220 (1943); Hoopilaiana v. Intermountain Health Care, Inc., 740 P.2d 270 (Utah App. 1987).

Plaintiff failed to provide the trial court with any expert testimony controverting that provided by the Defendants. Without such evidence, the court held:

The defendants' Motion for Summary Judgment is granted. The Court finds there are no material issues of fact precluding Summary Judgment as a matter of law. The law requires plaintiff to establish a violation of the medical standard of care by expert testimony and the plaintiff's designated expert, Dr. Horne, indicates he will not testify as to such a violation. Therefore, plaintiff cannot meet its burden of proof.

(R. 153).

In this case, Summary Judgment is proper. The trial court did not abuse its discretion in denying Plaintiff's motions for an extension of time and continuance of the trial. Plaintiff has not provided an expert witness required to meet her prima facie case. Defendants have provided affidavits from expert witnesses supporting their defense. As a result, no genuine issue of material fact exists and Defendants are entitled to judgement as a matter of law.

Finally, Utah courts have consistently concluded that requests to continue summary judgment to allow further discovery

are properly denied. For example, in Jones v. Bountiful City Corp., 834 P.2d 556 (Utah App. 1992), the Utah Appellate Court found that the trial court did not err in denying the motion for additional time for discovery after considering: (1) whether the reason articulated for additional discovery was adequate or was merely a "fishing expedition;" (2) whether the plaintiff had sufficient time to conduct discovery; and (3) whether the non-moving party had been afforded an appropriate time to respond to the Motion for Summary Judgment. Here, Plaintiff seeks additional time simply to fish for an expert witness she has heretofore failed to do. As discussed earlier, Plaintiff has had ample time to conduct this discovery. Additionally, Plaintiff has been afforded the appropriate time to respond to the Motion for Summary Judgment.

Because the Utah Rules of Civil Procedure are intended to "secure the just, speedy and inexpensive determination of every action," the trial court's order granting Defendant's Motion for Summary Judgment should be affirmed. Utah R. Civ. P. 1 (1993).

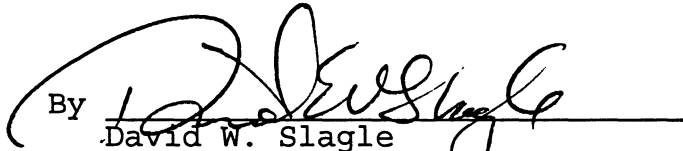
CONCLUSION

Plaintiff, in appealing from the trial court's denial of her Motion for Extension of Time to Designate Expert and Motion for Continuance of Trial, is apparently attempting to appeal from a trial court decision that is not a final judgment. As a result, this Court should dismiss Plaintiff's appeal. In the event this Court does not dismiss this appeal, it should affirm the trial

court's ruling. The trial court did not abuse its discretion in denying Plaintiff's motions when Plaintiff had ample time to designate an expert witness willing to testify as to a prima facie element of her case, and failed to do so. Defendants should not bear the burden of Plaintiff's laxity.

DATED this 2nd day of June, 1993.

SNOW, CHRISTENSEN & MARTINEAU

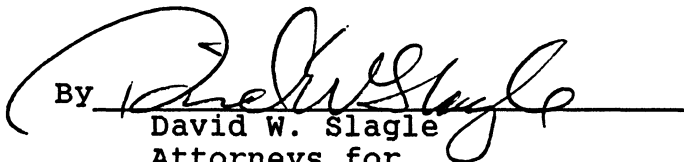
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellees were mailed, first class, postage prepaid, on the 2 day of June, 1993 to:

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