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Kathryn Sohm v. Dixie Eye Center. Ronald L. Snow, M.D. and Jeffrey R. Ricks. O.D. : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KATHRYN SOHM, Plaintiff-Appellant, vs. DIXIE EYE CENTER, RONALD L. SNOW, M.D. and JEFFREY R. RICKS, O.D., Defendant-Appellees.	)	REPLY BRIEF OF APPELLANT Case No.: 20060274 CA

APPEAL FROM A FINAL ORDER OF THE FIFTH DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH.
THE HONORABLE RAND L. BEACHUM, PRESIDING

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III. INTRODUCTION

Plaintiff and Appellant Kathryn Sohm ("Plaintiff") submits this brief in reply to Dixie Eye Center, Ronald L. Snow, M.D., and Jeffrey R. Ricks, O.D. ("Defendants") Appellees' brief. Defendants' arguments should be rejected, and the summary judgment dismissing Plaintiff's claims reversed, because the trial court based its decision on an unraised and unbriefed issue which no party had the opportunity to address. As all briefing below was regarding the issue of causation, and the trial court explicitly accepted Plaintiff's position with regard to that issue but nevertheless granted summary judgment to Defendants on the distinct and separate issue of damages, it's decision was in error. Therefore, Plaintiff is entitled to relief from the trial court's adverse decision and its Order granting summary judgment in favor of Defendants must be reversed.

IV. ARGUMENT

A. The Trial Court Erred When it Granted Summary Judgment on the Issue of Damages.

In their Motion for Summary Judgment below, Defendants' argument was clearly articulated. There, they asserted that Plaintiff had failed to prove that the cause of Plaintiff's injuries could be attributed to Defendants. Specifically, Defendants argued that "Plaintiff's medical expert... does not and cannot establish the element of causation and was unable to state, within a reasonable degree of medical probability, what level of vision plaintiff would have had if Defendants had given the care he believes should have been given." (R.157) Throughout their motion, Defendants continued to argue that

causation could not be proven by Plaintiff, through arguments proffering that a jury would be left to speculate on the issue, that there was no "basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that Plaintiff suffered injury and damage and that it was **proximately caused** by the negligence of the Defendant," and that Plaintiff had no expert testimony to "**causally link**" Plaintiff's vision loss to Defendant (R. 169-170) emphasis added.

In response to Defendants' motion, Plaintiff limited her arguments to the issue of causation, as it was the sole matter raised by Defendants. Defendants' Reply Memorandum was also confined to the question of whether Plaintiff had sufficiently established that Defendants' actions were the proximate cause of her injuries. As such, **all** briefing before the trial court was exclusively related to the issue of causation, and it was the only question before it for determination.

Inconsistent with the briefing, however, the trial court granted summary judgment to Defendant based on Plaintiff's lack of proof of damages, a totally separate issue. Although the court specifically recognized the distinction between the elements of causation and damages in proving a negligence claim, it's opinion openly stated that, "most of the parties' effort is spent on the proximate cause issue, **but I find the damages issue to be dispositive.**"[1] Ruling on Defendants' Motion for Summary Judgment, pages

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[1] Both parties also acknowledge the distinct elements of a negligence claim, and separate causation and damages into two different issues. Defendants cite *Dalley v. Utah Valley Regional Medical Center*, 791 P.2d 193, 195 (Utah 1990) in listing the necessary elements, to include: "(3) that the injury was proximately caused by the Defendant's negligence, and (4) that damages

1-2. Moreover, the court plainly asserted that, with regard to causation, Plaintiff had met her burden to overcome summary judgment, holding that there was **"a sufficient issue regarding proximate cause to prevent summary judgment."** Id. at page 2. Thus, Defendant's summary judgment motion was granted on the unbriefed and unraised issue of damages, while causation was the only issue the parties addressed.

Plaintiff did not have the opportunity to present her case on the issue of damages, and is now entitled to that privilege. Rule 56(c) of the Utah Rules of Civil Procedure governs the determination of motions for summary judgment and provides (in part):

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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. U.R.C.P. 56(c).

Courts in other jurisdictions have analyzed identical provisions to mandate that "a party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." and that "the purpose of the rule [56(c)] is to ensure that a party opposing a motion for summary judgment has a meaningful opportunity to respond to the motion." *Short v. Celestino*, 1996 WL 339925, 3 (Ohio App. 6 Dist.), quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988). To this end, courts have vehemently held that, **"it follows that**

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occurred as a result of Defendant's breach of duty." (R. 168) Likewise, Plaintiff quotes *Steffensen v. Smith's Management Corporation*, 820 P.2d 482 (Utah App. 1991) in saying that a Plaintiff must prove both "that the breach of the duty was the proximate cause of Plaintiff's injury; and that there was in fact injury." (R. 348)

a trial court may not grant a summary judgment based upon an issue that was not raised by either party." *Id.*, emphasis added. Utah courts have also followed this reasoning, providing that "although Rule 56(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried." *Farr v. Brinkerhoff*, 829 P.2d 117, 119 (Utah App. 1992).

In this case, Defendants specifically delineated the issue at bar for the trial court, limiting it to whether Plaintiff could prove proximate cause. Plaintiff responded accordingly in addressing that issue alone. She should not now be prejudiced by the trial court's decision to grant summary judgment on a totally separate element of negligence, which was never raised by either party, and which she never had a meaningful opportunity to address.

1. Plaintiff is Entitled to Respond to the Newly Raised Issue of Damages on Appeal.

Appellate courts generally do not consider an issue raised for the first time on appeal. "In order to preserve an issue for appeal, it must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority." *State v. Kassuhn*, 2005 WL 552835 (Utah App.2005). However, there are also well-established exceptions that the Utah Court of Appeals has recognized to allow a "new" issue to be set forth for the first time on appeal. *Utah Medical Products, Inc. v. Searcy*, 958 P.2d 228, 234 (Utah 1998). Specifically, an appellate court may address a

new issue if: (1) the trial court committed "plain error," or if (2) there are exceptional circumstances present. *State v. Archambeau*, 820 P.2d 920, 922 (Utah App. 1991). As both scenarios are applicable here, Plaintiff should be allowed to respond to the damages issue here.

Under the first exception, Utah courts have held that for an error to be plain, it must be clear to the appellate court from an examination of the record (i.e. "it should have been obvious to the trial court that it was committing error"), and that the error be harmful. *Id.* As noted above, in the case at bar, the issue of damages was never raised by either party. The trial court took it upon itself to rule on a completely separate and unbriefed issue. The trial court record, and especially the court's opinion, leaves little doubt as to this fact, and, as the authority above dictates, is an improper and obvious error. The trial court's ruling on an unraised issue is extremely harmful to Plaintiff. She was unable to address the court's (**not** the Defendants') position, and now must rely on appeal as her only recourse. The court's actions effectively terminated Plaintiff's case, and has prejudiced her in an egregious manner.

The trial court's actions also allow Plaintiff to address the issue of damages pursuant to the second exception. The court in *Archambeau* articulates this provision by calling it a "catch-all device" requiring "'exceptional' or 'unusual'" circumstances. *Id.* at 922-923. "It is a safety device to make certain that manifest injustice does not result from the failure to consider an issue on appeal. Both the Utah Supreme Court and the Court of

Appeals have often acknowledged this exception." *Id.* Here, Plaintiff was unaware that damages were at issue in her case and in Defendants' summary judgment motion. Nevertheless, the court granted the motion on those grounds, while specifically stating that Plaintiff had met her burden on causation. The fact that the trial court deviated from the issue at hand and ruled on a completely separate issue constitutes exceptional and unusual circumstances that permit Plaintiff to address the new issue on appeal.

B. The Authority Upon Which Defendants Rely is Inapplicable to the Issue Before This Court and Provides no Basis for the Court to Rule in Defendants' Favor.

In their appellate brief, Defendants continue to refuse to acknowledge the trial court's actual holding, which, again, states that Plaintiff **has** met her burden with regard to causation. Instead, Defendants re-argue the causation issue, asserting that "because Plaintiff could not establish a causal link between Defendants' care and her vision loss and because any jury award in this medical malpractice action would necessarily be based on speculation, the District Court properly granted summary judgment to Defendants." R. Defendants rely on several cases standing for this premise (none of which were addressed in the court below). Defendants cite *Anderson v. Nixon*, 139 P.2d 216, 220 (Utah 1943) which addresses the issue of proximate cause ("in this case there was no evidence that anything Dr. Nixon did or failed to do after osteomyelitis developed caused the end result. In the absence of such expert testimony, there is nothing upon which a jury can base its finding on the proximate cause of the injury") (Brief of Appellee, page 21), *Talbot v. Dr.*

W.H. Groves' Latter-Day Saints Hospital, Inc., 440 P.2d 872, 873 (Utah 1968), which also is an opinion on the issue of causation ("the Utah Supreme Court determined a medical malpractice Plaintiff failed to meet his burden under the doctrine of res ipsa loquitur because he could not establish the cause of his injury and he left open the possibility of non-negligent causes") (Brief of Appellee, page 23), and *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993), ("the affidavit of [Plaintiff's expert] is devoid of any statement of proximate cause and in no way counters or contradicts the opinion of [Defendant's expert] that an earlier diagnosis of [Plaintiff's injury] would not have permitted earlier treatment or surgery for that condition.") (Brief of Appellee, page 25).

Because these (and the rest of Defendants' cases), are irrelevant to this appeal, this Court should decline to consider them. Instead, the Court should examine only those issues left open by the trial court through its opinion. Plaintiff is appealing from a judgment against her based on the lack of proof of damages, and Defendants' rehashing of the causation argument is not proper or necessary, particularly in light of the trial court's specific finding that material issues of fact precluded the entry of summary judgment on the issue of causation.

C. The *Tingey* case is Properly Before This Court.

Defendants assert that *Tingey v. Christensen*, 987 P.2d 588 (Utah 1999), should not be considered by the Court, maintaining that "Plaintiff has waived the right to argue that *Tingey v. Christensen* [citation omitted] applies to this case by failing to raise this

argument below." FN 11, p. 30. However, the *Tingey* case was asserted on appeal in support of the issue of damages, which, as has been established, was not at bar in the court below. Plaintiff cites *Tingey* only for the proposition that if a jury is unable to apportion damages between preexisting conditions and the defendant's negligence, the tortfeasor is liable for the entire amount. *Tingey* does not speak to causation in any manner. Thus, pursuant to the authority above, and because this is Plaintiff's first and only opportunity to address the damages issue, she should be allowed to utilize supplemental evidence to rebut the trial court's ruling which has taken her by surprise and prejudiced her case.

1. The Facts and Rules of Law Set Forth in *Tingey* Are Dispositive of the Issue on Appeal and Must be Considered by the Court.

Defendants also attempt to distinguish the facts of *Tingey* from the instant case. Defendants specifically offer that, unlike the situation here where Plaintiff suffers from an ongoing condition, the *Tingey* plaintiff had only a preexisting injury, and that somehow this difference is fatal to Plaintiff's case. However, Defendants' reading of *Tingey* is inaccurate. There, the Plaintiff also suffered from an ongoing condition-chronic back pain. *Tingey,* 987 P.2d at 589. The court explained her health in the following manner:

> Tingey was already in great pain before the 1993 accident. She had previously been injured in several accidents: a February 1989 accident left short-lived injuries, and an October 1990 accident caused severe neck and shoulder pain, as well as headaches. She was also injured in two falls: one in 1991 and a second in 1992. Twenty-five days before the 1993 accident, at the University

> of Utah Hospital Pain Clinic, she indicated pain in her head, neck, shoulders, upper and lower back, arms, hands, and thigh. Tingey described her pain then as splitting, agonizing, pounding, torturing, **constant**, killing, and excruciating.

Id. Therefore, the preexisting condition from which the plaintiff in *Tingey* suffered should be characterized as more of an ongoing ailment akin to Plaintiff's in the instant matter, than as one distinct previous injury.

Defendants attempt to further distinguish *Tingey* from the case at hand by linking it to causation once again, although its facts center on the issue of damages. For example, Defendants quote a *Tingey* provision which provides that "once the fact of damage is established, 'a defendant should not escape liability because the amount of damage cannot be proven with precision.'" *Tingey*, 987 P.2d at 588. However, Defendants then go on to assert that, because here, Plaintiff has not proven a causal relationship, she also cannot prove damages. As previously mentioned, the trial court has already ruled that Plaintiff has proved causation, and causation is **not** the issue on appeal. As such, Defendants' argument on this point is moot and should not be considered.

Defendants' final argument with regard to the *Tingey* case is also faulty. Defendants provide that *Tingey*, an automobile action, should not be applied to medical malpractice cases such as the one at bar. However, Defendants cite no authority for this proposition, simply saying that "well-established Utah law" supports their position. In reality, the *Tingey* view of apportionment of damages was created by

Utah courts based on several legal principles, none of which are limited to a particular type of negligence action. *Tingey*, 978 P.2d at 592. The first of these principles is that a "tortfeasor takes a tort victim as he or she finds the victim." The second is that "a tortfeasor should bear the burden of uncertainty in the amount of a tort victim's damages." In stating this legal theory, the *Tingey* court cites to *Atkin Wright & Miles v. Mountain States Tel. And Tel. Co.*, 709 P.2d 330,336 (Utah 1985), which is a breach of contract/negligent interference with business relationships case. The *Tingey* court also cites a breach of lease agreement case (*Winsness v. M.J. Conoco Distributing, Inc.*, 593 P.2d 1303, 1306 (Utah 1979) in demonstrating the final legal principle on which they base their view of apportionment of damages, the fact that a defendant should not escape liability because the amount of damage cannot be proved with precision. *Tingey*, 978 P.2d at 592. Thus, it is clear that the court designed the *Tingey* standard for application to multiple types of negligence claims, and that it is not solely for use in automobile accident cases.

Additionally, the *Tingey* proposition that a medical malpractice defendant is liable for the entire amount of damages when a jury is unable to apportion them between the defendants' negligence and a preexisting condition has been adopted in other jurisdictions. For example, New Jersey courts have maintained that, **especially in medical malpractice actions**, the burden of proof should be shifted to defendants to apportion a plaintiff's injuries based on preexisting conditions. *Tisdale v. Fields*,

443 A.2d 211, (N.J. Super 1982). In so doing, the *Tisdale* court directly contradicts Defendants' policy position in holding that, "We think medical malpractice cases can be distinguished on the relatively light burden a treating physician is forced to shoulder when required to apportion his patient's damage claims. The nature and extent of a patient's condition as well as his prognosis are peculiarly within the ken of the physician." *Tisdale*, 443 A.2d at 355. The *Tisdale* court also offered that "in the usual malpractice case a physician is in a much better position with respect to the proofs to express an opinion on causal relationship, and it is not an undue burden to ask a doctor to negate the claim that the aggravation was due to his tortious acts." *Id.* Based upon the foregoing, it is clear that *Tingey* is applicable within the context of medical malpractice claims in general and to the issue on appeal in particular and should be considered by the Court. Finally, in light of the holding in *Tingey*, the trial court's entry of summary judgment in this case was inappropriate and should be reversed.

V. CONCLUSION

The trial court's dismissal of Plaintiff's claim was based on an issue which was never before the court. Neither Plaintiff nor Defendant had an opportunity to address it in their briefing. The trial court's decision was therefore erroneous, against case law, and prejudicial to Plaintiff. This being the case, Plaintiff should now be able to present her case on the issue that the court found to be dispositive, and the district

court's decision should be reversed.

Although it is the element of damages which is at issue on appeal, Defendants continue to direct this court's attention to arguments pertaining to the issue of causation, which issue has already been clearly and specifically determined by the trial court in Plaintiff's favor. Defendants did not file a cross appeal on the causation issue. Accordingly, they should not be allowed to reargue the causation issue before this court. Defendants cite case after case in support of their motion for summary judgment on the issue of causation, but completely ignore the issue that is actually before this Court. Defendants also attempt to prevent Plaintiff from relying on *Tingey v. Christensen*, supra, because it was not raised in the court below. Again, Defendants fail to recognize that the issue before the trial court is totally distinct from that which is now on appeal.

At a minimum, it is clear that there are issues of material fact that preclude the entry of summary judgment in Defendants' favor in this matter. Accordingly, Plaintiff respectfully requests that the trial court's decision be reversed.

Dated this 5th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2007, two true and correct copies of the foregoing Reply Brief were served upon the following by the method indicated below:

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