1975

Betty J. Nelson v. Perry A. Peterson, M.D., And Valley West Hospital Development Corperation : Brief of Respondent Perry A. Peterson

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTY J. NELSON,
Plaintiff and Appellant,

vs.

PERRY A. PETERSON, M.D. and VALLEY WEST HOSPITAL DEVELOPMENT CORPORATION, a Utah corporation, dba VALLEY WEST HOSPITAL,
Defendants and Respondents.

Case No. 13803

BRIEF OF RESPONDENT
PERRY A. PETERSON, M.D.

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Bryant H. Croft, District Judge

JOHN H. SNOW
Worsley, Snow & Christensen
700 Continental Bank Building
Salt Lake City, Utah 84101
Attorney for Defendant and Respondent
Perry A. Peterson, M.D.

RAY R. CHRISTENSEN
Christensen, Gardiner, Jensen & Evans
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Defendant and Respondent
Valley West Hospital Development Corporation, dba Valley West Hospital

HANSEN & ORTON
Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

RAYMOND A. HINTZE
Suite #273, Cottonwood Mall
4835 Highland Drive
Salt Lake City, Utah 84117
Attorneys for Plaintiff and Appellant

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Case No. 13803

BRIEF OF RESPONDENT

PERRY A. PETERSON, M.D.

NATURE OF THE CASE

This is a medical malpractice action alleging damages for pain and mental suffering of the appellant as a result of a stillbirth.

DISPOSITION IN THE LOWER COURT

A jury returned a unanimous verdict of no cause of action against the appellant and in favor of both respondents.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment below.

STATEMENT OF FACTS

Appellant's Statement of Facts violates the rule that the evidence should be viewed "in the light most favorable" to the parties who won the verdict of the jury. *Rivas v. Pacific Finance Co.*, 16 Utah 2d 183, 397 P.2d 990 (1964); *Paull v. Zions First National Bank*, 18 Utah 2d 183, 417 P.2d 759 (1966). The facts will therefore be restated and the parties will be designated by name or as they appeared in the trial court.

The plaintiff engaged the services of Dr. Peterson in January, 1971, soon after she became pregnant and continued under his care throughout the term of her pregnancy. (R. 334.) The plaintiff was then 42 and had previously given birth to seven children. (R. 335, 357.) On September 2, 1971, the plaintiff went to Dr. Peterson's office for a routine examination. Dr. Peterson examined her shortly before 4:00 p.m. and, although she was not having contractions, he observed that the cervix was thinned out and was beginning to dilate, indicating that labor might be imminent. (R. 251.) At the time of the examination, the doctor also observed that the membranes were bulging, but the bag of waters had not ruptured. (R. 274.) Since the plaintiff was several days overdue, the doctor elected to send her to the hospital to induce labor that evening. (R. 247, 274.) Dr. Peterson advised the plaintiff to go directly to the hospital, but agreed that she could stop by her home

where she had asked to do so. (R. 274, 339.) The doctor then notified the hospital that she was to be admitted for labor induction and informed the nurse that the plaintiff's membranes were bulging, but had not ruptured. (R. 274.)

The plaintiff arrived at the hospital at approximately 4:40 p.m. where she was promptly admitted and put to bed. (R. 339, 326.) She informed the supervising nurse that she had not felt any contractions or pain and did not express any complaints to the hospital staff. (R. 356-357, 328.) In accordance with Dr. Peterson's standard admission orders, the nurses administered an enema and recorded the fetal heart tones. (R. 265, 326.) Thereafter, the plaintiff remained in her room until approximately 6:30 p.m., during which time she did not experience any pain or contractions. (R. 356-357.) During this period, the nurses were assisting in a complicated delivery, but were available if plaintiff had needed help. There was a call button at her bedside and her sister was with her but neither called for assistance. (R. 407, 357.)

At approximately 6:30 p.m., the nurses delivered the infusion equipment to the plaintiff's room and began preparations for administration of labor-inducing medication. (R. 409.) The nurses had some difficulty regulating the infusion pump, but no medication was delivered until the machine was operating properly. (R. 412-413.) Two or three minutes later, Dr. Peterson arrived at the plaintiff's room and, after adjust-

ing the infusion pump to deliver the medication to the plaintiff, he immediately examined her just as she was experiencing her first contraction. (R. 413, 259-260.)

Dr. Peterson's internal examination revealed that the umbilical cord was looped and was protruding into the plaintiff's vagina. (R. 260.) The doctor immediately pushed the baby's head upward in the birth canal and held it there to release pressure from the cord to allow resumption of circulation and administered oxygen to the plaintiff. (R. 262.) Despite these resuscitation efforts, which continued for 10 to 15 minutes, no resumption of fetal life was detected. (R. 263.) The labor induction was then resumed and the stillborn child was delivered approximately two hours later. (R. 263-264.)

Dr. John W. Harris, a qualified Salt Lake City obstetrician was produced by plaintiff as an expert witness and he testified that in the Salt Lake City hospitals with which he was familiar, when a maternity patient was admitted to the hospital, the standard practice required an abdominal and vaginal examination of the patient and the nurses should inquire if the patient's water had broken and they should listen to, and record, the fetal heart tones. He further testified on direct examination that a vaginal examination should "be done by some personnel" if induction of labor was to be commenced by the use of an infusion machine. (R. 295, 297, 300, 318.) On cross-examination, Dr. Harris conceded that the requirement of an abdominal examination would be met by either finger palpitation or by listening with a stethoscope (R. 306) and it was

membranes had not ruptured, there would be no need for a vaginal examination where, as in the present case, the patient came to the hospital immediately after a good examination by the doctor in his office. (R. 308.) A vaginal examination by the nurse might, or might not, determine if the membranes had ruptured because this is often a difficult determination, even for an obstetrician. (R. 309.)

Dr. Harris further admitted on cross-examination that the requirement of a vaginal examination before the machine induction of labor began would be satisfied if the doctor performed such an examination at about the time the machine was started (R. 311, 312) and the evidence is undisputed that Dr. Peterson performed such an examination at that time. The nurses had had difficulty in getting the machine to operate and when Dr. Peterson arrived, the patient was not getting any medication and he turned the "stop cock" to direct the flow of medication into the patient. He then made a good examination as soon as he could don the necessary sterile gloves. (R. 286, 287.)

Dr. Harris' testimony, as it remained after cross-examination, was in substantial accord with that of Dr. Peterson, the only other medical expert who testified. Neither witness could state when the umbilical cord was pinched but pressure from the head of the fetus on the cord could have caused the death of the fetus even though the prolapsed cord protruded into the birth canal. (R. 277, 310, 311.)

Dr. Harris agreed that it was a proper exercise judgment by Dr. Peterson to send the patient to the hospital for later induction of labor in view of his findings in the office examination and that to send her that time evidenced a proper concern for the safety of the patient. He further agreed that under the standard of practice, an obstetrician sending a patient to the hospital under such circumstances had the right to expect a call from the hospital, after the patient's arrival, if there was any development or progress in the patient's condition. (R. 304, 305.)

Since the effect of the medical testimony was that Dr. Peterson properly exercised his judgment in sending the patient to the hospital for later induction of labor and since it was undisputed he had received no information indicating any adverse development in the patient's condition and since the umbilical cord was found to be prolapsed and lifeless upon his arrival and it was not then possible to avert the death of the fetus, there remained no basis for the jury to find that he had been negligent or that his conduct had proximately caused the damage of which plaintiff complained and thus the unanimous verdict of no cause of action against Dr. Peterson was fully supported by the record in this case.

Prior to the reception of evidence, counsel for plaintiff submitted and argued a motion *in limine* in an attempt to prevent the jury from learning the circumstances under which the pregnancy began, the fact of its illegitimacy and the fact that plaintiff was divorced and on welfare. (R. 200-206.) However, during cross-

examination by counsel for the hospital, Dr. Peterson was asked to explain why his initial office record concerning the plaintiff listed her name as Billie Jean but that later entries showed the name "Betty Nelson." Dr. Peterson replied that during the pregnancy, the plaintiff was required to give proper identification to the welfare department and as a result he then learned her name was Betty Nelson and that the pregnancy was illegitimate. (R. 268.)

Plaintiff's attorney made an immediate motion for a mistrial which was extensively argued, during which it was pointed out to the Court that plaintiff, in her complaint against Dr. Peterson, claimed damages for mental distress and anguish, embarrassment and humiliation and that the fact of illegitimacy would be a relevant and material factor in the jury's evaluation of whether the plaintiff had in fact sustained such damages. The Court agreed and denied the motion for mistrial, stating that plaintiff "is here claiming great mental anguish because of the loss of the child. I think the fact that it was an illegitmate child might very well have a bearing upon that very thing" (R. 268-273.)

Defendants' motions for a directed verdict after plaintiff rested (R. 372-390) and at the conclusion of all the evidence (R. 437-438) were taken under advisement by the Court. (R. 437, 438.) The jury returned a unanimous verdict for both defendants. (R. 18, 456, 457.) Plaintiff's motion for judgment notwithstanding the verdict and her alternative motion for a new trial were denied (R. 9, 10) and this appeal followed. (R. 5.)

ARGUMENT

POINT I

THE VERDICT IS CLEARLY SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED.

In a malpractice case of this kind, plaintiff has the burden of establishing, by expert medical testimony, not only the standard of care, but the claimed deviation from that standard. *Dickinson v. Mason*, 18 Utah 2d 383, 432 P.2d 663 (1967); *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P.2d 1108 (1956); *Anderson v. Nixon*, 104 Utah 262, 139 P.2d 216 (1943). Similar principles apply to the proximate causation of the injuries alleged. Expert testimony must be produced to show that the injuries were probably caused by the physician's deviation from the standard of care. Without such evidence, there is nothing upon which a jury can base its findings on causation. Mere neglect or lack of skill is not enough. *Huggins v. Hicken*, 6 Utah 2d 223, 310 P.2d 523 (1957); *Forrest v. Eason*, 123 Utah 610, 261 P.2d 178 (1953); *Anderson v. Nixon*, *supra*.

When these principles are applied to the facts of this case, it is apparent that the jury's verdict was compelled by the plaintiff's failure to establish the basic elements of proof required in this kind of case. These principles have been uniformly applied by this Court in medical malpractice cases for more than 40 years, but plaintiff's brief does not contain a single citation of authority, either from Utah or elsewhere, on the subject of medical malpractice and the proof required to establish it.

To support her claim of negligence against Dr. Peterson, plaintiff relies solely upon testimony given by Dr. Harris (plaintiff's brief P. 5, 6) but examination reveals plaintiff's reliance is misplaced when Dr. Harris' testimony is considered in its entirety. It is fundamental that "testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination. A particular part of his testimony may not be singled out through the exclusion of other parts of equal importance bearing on the subject." *Alvarado v. Tucker*, 2 Utah 2d 16 268 P.2d 986 (1954).

While Dr. Harris testified that a patient should be given an abdominal or vaginal examination upon admission to the hospital, he agreed on cross-examination that this would not be necessary if the patient had been examined by her physician immediately prior to coming to the hospital and her amniotic membrane had not ruptured. (R. 308.) It was undisputed that Dr. Peterson had examined the patient just before admission and that the membrane was then intact. (R. 245.)

Further, Dr. Harris testified on direct examination that a vaginal examination should be performed prior to machine induction of labor (R. 300) but he admitted upon cross-examination that this requirement was satisfied by the examination Dr. Peterson performed immediately after turning the stop cock to permit the drip from the machine to begin labor induction. (R. 311, 312.)

Finally, cross-examination of Dr. Harris revealed that Dr. Peterson had properly used his medical judgment and his concern for the patient when he sent her to the hospital and under the applicable standard of practice prevailing in the community of obstetricians Dr. Peterson had the right to expect a call from the hospital, after the patient's admission, if there was any development or progress in the patient's condition. It is undisputed that no such call was ever made to Dr. Peterson. (R. 258, 304, 305.)

While it is thus apparent that the claim of negligence evaporated under the cross-examination of plaintiff's expert there is even greater weakness in her claim of causation. Plaintiff apparently concedes this weakness because the only portion of her brief relating to negligence and causation contains not one word of contention that anything Dr. Peterson did, or failed to do, was the proximate cause of the death of the fetus.

The only mention of proximate cause is found on page 6 of plaintiff's brief wherein this highly significant statement may be found:

> Furthermore, it is also evident as a reasonable medical probability, that the cause of death of the fetus could have been avoided *had the hospital made its required examinations and followed procedures which were within the standard of care required by hospitals in the community.* (Emphasis supplied)

Plaintiff's brief does not mention, nor does the evidence suggest, any action Dr. Peterson could have taken

avoid the death of the fetus and even the claim of causation as against the hospital was found to be without solid foundation when Dr. Harris admitted that it is purely speculative whether the fetus would have survived even if the prolapsed umbilical cord had been promptly discovered. (R. 312, 313, 314, 315.)

Plaintiff's failure to produce evidence of proximate causation as against Dr. Peterson is fatal to her claim against him. This Court succinctly stated the rule in *Hanlon v. Hicken*, *supra*, as follows:

> As a general rule in a malpractice action, expert testimony must be produced to show that the injuries alleged were probably caused by the lack of due care of defendant. In the absence of such evidence, there is nothing upon which a jury can base its finding on the proximate cause of the injury. The evidence must be substantial and must, in cases of this complex type, have foundation in expert medical testimony.

The verdict in this case demonstrates the jury's conclusion that negligence, or causation or both had not been proved and under familiar principles of review, the verdict should be upheld by this Court.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RECEIVING EVIDENCE OF ILLEGITIMACY AND IN ITS DENIAL OF A MISTRIAL.

Plaintiff's motion *in limine* sought to prevent disclosure to the jury that plaintiff was on welfare, that her pregnancy was illegitimate and that it resulted from

a one-night encounter with a man whose identity was known to the plaintiff. In granting the motion, in part the Court commented that an inquiry as to the identity of the father of the child "is not material or relevant here" and then the Court continued "I would suggest counsel that you not dwell upon that and not talk to the jury about the fact that the child was born out of wedlock." (R. 204.)

In cross-examination by counsel for the defendant hospital, Dr. Peterson was asked the name plaintiff gave when she first came to him as a patient and since the record contained a later entry with a different name he was asked when the second name was first given to him and in his response to that series of questions, he inadvertently disclosed the fact that plaintiff was on welfare and that the pregnancy was illegitimate.

Plaintiff's counsel made an immediate motion for a mistrial and extensive argument followed. When it was pointed out to the Court that plaintiff's complaint sought damages for mental distress, mental anguish, embarrassment, humiliation and nervousness, it became apparent to the Court that the jury should be told the truth of the matter and if they were permitted to consider the case upon the assumption that this was a normal and legitimate pregnancy, any verdict would be based upon a completely false premise. The Court further agreed that the defendants would be prejudiced if the truth were withheld from the jury and since plaintiff was claiming mental anguish, the Court decided that

the fact that the pregnancy was illegitimate "might very well have a bearing upon that very thing." The motion for mistrial was therefore denied. (R. 271, 272, 273.)

Plaintiff has cited no authority in support of her claim that the reception of such evidence and the denial of the mistrial constituted an abuse of discretion which would justify reversal of this judgment.

Rule 45, Rules of Evidence, bestows wide discretion on the trial court in its rulings upon evidence and Utah case law makes it clear that in a review of a trial court's refusal to grant a mistrial, plaintiff has the burden of persuading this Court that the trial court was "plainly wrong." *Burton v. Zions Cooperative Mercantile Institution*, 122 Utah 360, 249 P.2d 514 (1952).

Plaintiff has presented no facts, no legal authority or argument to satisfy that burden and since the trial court carefully weighed the conflicting contentions of the parties and concluded that no prejudice would result, plaintiff has failed to carry the burden of persuasion in this Court and the trial court should be affirmed in its rulings.

POINT III

THE COURT DID NOT ERR IN RULING THAT DAMAGES MAY NOT BE RECOVERED FOR WRONGFUL DEATH OF AN UNBORN FETUS.

Since the jury determined the issues of liability against the plaintiff and in favor of the defendants the court's decision that damages are not recoverable for

the death of the unborn fetus is moot and need not be considered on this appeal. Nevertheless, should the Court set the jury's verdict aside, the plaintiff's claim for wrongful death of the unborn fetus should not be allowed.

In *Webb v. Snow*, 102 Utah 435, 132 P.2d 114 (1942) the Court previously considered and rejected the right to recover for the wrongful death of an unborn child. In *Webb*, the plaintiff brought an action for assault and battery alleging that she suffered a miscarriage as a result of the injuries inflicted upon her. The Court stated:

> While injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings experienced by a woman who has a miscarriage by reason of the injuries caused by the wrongful acts of others, *damages are not awarded for "loss of the unborn child" itself.* 132 P.2d at 119. (Emphasis supplied)

The view adopted in *Webb* is wholly justified in light of legislative intent expressed in the wrongful death statutes and remains consistent with economic as well as legal, realities.

Utah Code Ann. §78-11-6 (1953) provides that a father, or in the case of his death or desertion of the family, the mother may maintain an action for the death of a "minor child." Since an action for wrongful death did not exist at common law, any right to such action must exist, if at all, only in accordance with the statute under which recovery is sought. *Webb v. Denver R.G.W. Ry. Co.*, 7 Utah 17, 24 P. 616 (1890).

In *Norman v. Murphy*, 124 C.A. 2d 95, 268 P.2d 75 (1954), the California court considered a statute substantially indistinguishable from Utah's and held that the legislature did not intend to include unborn children in the definition of "minor persons" within the meaning of the California wrongful death statute. In the absence of an unequivocal mandate from the legislature, the Court refused to indulge in legal fiction and speculation concerning the claimed loss.

Similarly, the Utah legislature could easily have created a separate and distinct right to recover for the wrongful death of an unborn child, but it has not done so. Since the decision of this Court in *Webb v. Snow*, *supra*, it has been the law of this jurisdiction that no separate and distinct action exists for the wrongful death of an unborn child. The legislature, in more than 30 years since the decision, has not chosen to alter the statute and its acquiescence should be viewed as support for the Court's present position.

The refusal to create a right of recovery for the death of an unborn child is also consistent with economic realities. This Court has consistently held that wrongful death actions are created to compensate survivors rather than to punish the tortfeasor. Consequently, damages for wrongful death are allowed only for "the deprivation of some service, attention or care that has in it the element of pecuniary value." *Burbidge v. Utah Light & Traction Co.*, 57 Utah 566, 196 P. 556 (1921). In the case of prenatal death there is no competent means of measuring any pecuniary value of the child to the parents.

Ever since 1884, when our legislature adopted the statute permitting an action for the wrongful death of a minor child, this Court has repeatedly held that damages for such a death are to based upon a "pecuniary loss" and that damages for mental suffering and anguish resulting from the death are not recoverable. Counsel for plaintiff presumptively was aware of this statutory and decisional law and thus it is significant to note that in the complaint which began this action there are no allegations suggesting any of the elements of damage which our Court has recognized as being part of a pecuniary loss. (R. 192.) Instead, the complaint alleges the plaintiff "suffered the death of a viable fetus, suffered great pain and mental distress, now suffers and will continue to suffer great mental anguish, embarrassment, humiliation, nervousness, nervous weakness, headaches and insomnia and will continue to be unable to normally perform her household duties."

Thus it is apparent that when plaintiff began this action, she was not seeking the damages which are recoverable for wrongful death of a minor child and even in her statement of facts in her brief in this Court plaintiff's claim of her damage is limited to the following statement:

> As a result of the death of the fetus, plaintiff has suffered extreme and prolonged emotional distress. (Brief P. 3.)

These elements of sorrow and anguish do not furnish any basis for a damage recovery in a wrongful death action as has been held by this Court at [illegible]

since 1890 when the Court, in *Webb v. Denver & R.G.W. Ry Co., supra* reversed a trial court which had permitted a jury to consider mental suffering and sorrow as an element of damage in a wrongful death case. In its reversal, this Court said

> We think the mental suffering of the heir, on account of the death of a deceased relative, too remote and sentimental to be a proper element of damage under the statute . . .

The speculative nature of damages inherent in an action for wrongful death of a fetus has been a principal factor in the wise decision of many other courts throughout the country disallowing such a right of action. In *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425, 15 A.L.R. 3d 983 (1966), the Court stated:

> It is virtually impossible to predict whether an unborn child, but for its death, would have been capable of giving pecuniary benefit to anyone. None of the usual indicia such as mental and physical capabilities, personality traits, aptitudes and training of the wrongfully killed infant are present. While it is true that the social position of the parents may constitute a slight unit of measure, the probable future earnings of a stillborn foetus are patently a matter of sheer speculation. An objection, in the same vein, specifically applicable to the wrongful death action is that it can hardly be seriously contended that the death of a foetus represents any real pecuniary loss to the parents. There may have been a time when the average child went to work as soon as he was able. That day has passed. Today, the rearing of a child typically constitutes a great pecuniary liability for the parents. 15 A.L.R. 3d at 988.

In short, the Court concluded that there can be no evidence from which to infer pecuniary loss to the surviving beneficiaries. The Court stated:

> *Our Death Act was not intended to grant damages against a tortfeasor merely to punish him.* We therefore hold that under our death act there can be no right of recovery for the wrongful death of an unborn child. *Id.* (Emphasis supplied)

The traditional rule recognized in this state and numerous other jurisdictions throughout the country is thus, entirely rational and supportive of sound judicial policy. The Court should not permit juries to award damages that are contrary to economic and social realities and supported only by rank speculation.

In summary, this Court should refuse to recognize a separate and distinct cause of action for the wrongful death of an unborn child. The legislature has not created such an action and to do so judicially would give rise to unprecedented speculation in the computation of damage awards. Consequently, the Court should affirm the ruling of the trial court.

CONCLUSION

The jury's verdict exonerating Dr. Peterson of liability for the loss of the plaintiff's child is clearly supported by and, indeed, compelled by the evidence at trial.

The plaintiff was afforded a full and fair opportunity to present her case to the jury and she has here shown no error was committed that could reasonably suggest a different result if the case were retried. Plaintiff has failed to overcome the presumption of validity of the judgment and this Court should affirm that judgment.

Respectfully submitted,

WORSLEY, SNOW &
CHRISTENSEN

John H. Snow

Attorney for Defendant and Respondent
Perry A. Peterson, M.D.

700 Continental Bank Building
Salt Lake City, Utah 84101