1999

Robert J. Baczuk v. Salt Lake Regional Medical Center and Dr. Brian Moench : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ROBERT J. BACZUK, Plaintiff/Appellant, v. SALT LAKE REGIONAL MEDICAL CENTER and DR. BRIAN MOENCH, Defendants/Appellees.	Court of Appeals No. 990787-CA District Court No. 960904751 Argument Priority 15

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT
THE HONORABLE HOMER F. WILKINSON

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While the defendants attempt to distinguish the present case from Dalley v. Utah Valley Regional Med. Ctr., 791 P.2d 193 (Utah 1990), any such effort is doomed by the Court's express holding in that case.

> Where a plaintiff receives an injury to a healthy part of the body not involved in the operation in an operating room controlled by known defendants, *res ipsa loquitur* establishes a rebuttable inference of negligence and causation that puts the burden of going forward with the evidence upon those persons who were awake, aware, and conscious at the time of the injury, who were responsible for the plaintiff's safety at a time when he or she was not in a position to assume that responsibility. *Res ipsa loquitur* infers causation, and therefore a material issue of fact exists that must be presented to the trier of fact. If plaintiff prefers to rest upon the inference of cause established by *res ipsa loquitur*, then that is a tactical decision that should not be short-circuited by summary judgment.

791 P.2d at 200 (emphasis added).

Under the clear holding of Dalley, Mr. Baczuk has established all that he need to to require that his case be submitted to the jury. The defendants' suggestion to the contrary flies in the face of the Court's own words.

Furthermore, the assertion that *res ipsa loquitur* doesn't apply because defendants' offered affidavits giving the opinion that there was no breach of the standard of care is at odds with Dalley. The Court there said that the need for reliance on *res ipsa* could be eliminated if someone who was present during the operation comes

forward and offers "a conclusive exculpatory statement or explanation of how the injury occurred . . .". 791 P.2d at 200. That has not happened in this case. Neither of the defendants' affidavits, submitted by individuals who were not present during the operation, even opines as to the specific cause of Mr. Baczuk's injury or what the nature of his injury is. The sum of the defendants' evidence can be simply paraphrased as "these things happen".

In point of fact, had plaintiff's case not been short-circuited for want of expert testimony on the standard of care, he would have produced evidence that his injury was most likely a burn and that such a burn can only occur from being subjected to a K-pad which is functioning improperly. Dr. Saffle has rendered the opinion that Mr. Baczuk's injury was most probably a burn because it was located in the entertriginous fold of the gluteus which would be resistant to pressure sore development and because it was uniformly partial thickness in nature, whereas pressure sores are almost always full thickness.

Further evidence would have demonstrated that only temperatures over 110° F. will cause skin burns and that K-pads operating properly will not achieve this temperature, suggesting that Mr. Baczuk was exposed to a malfunctioning instrumentality under the control of the hospital.

Even if it is assumed the injury was a pressure necrosis, evidence Mr. Baczuk was denied the opportunity to present, would establish that the K-pad manufacturer expressly warns health care providers that when using the pad,

temperature and skin condition should be monitored every 20 minutes and additional surveillance is required if the pad is used under pressure (from the body) to prevent ischemic, which is the cause of pressure necrosis.

Accordingly, whichever form of injury Mr. Baczuk suffered, it was caused by the defendants' conduct. As his injury is of the type the Supreme Court has held to raise an inference of negligence and causation, his case should have been allowed to proceed to trial where that inference could have been bolstered by the additional evidence referred to above. This evidence could also be considered by the jury in evaluating the defendants' claim that "these things happen" in the absence of negligence. In that regard, the jury will be able to evaluate Dr. Saffle's opinion, relied on by defendants, in light of the fact that it was rendered after Dr. Moench wrote to him threatening legal action for his expression of a prior opinion.

Despite the defendants' suggestion to the contrary, King v. Searle Pharmaceuticals, Inc., 832 P.2d 858 (Utah 1992), in no way undercuts the holding in Dalley. In King, the Court simply held that where a plaintiff sues two different basis for the liability of each, the doctrine of *res ipsa loquitur* will not shift the burden of production to the defendants on the causation question because the defendants were not jointly responsible for the "exclusive management or control of all possible causation factors . . .". 832 P.2d at 866. That is simply not the case in this action. In addition, defendants' attempted reliance on Hunt v. Hurst, 785 P.2d 414 (Utah 1990) is misplaced. In that case, the Court held that the plaintiff had failed to show that his

injuries were of a type generally only suffered as a result of negligence, therefore failing to meet the proof required to establish the first element of *res ipsa loquitur*. However, later that same year, the Court clearly articulated one type of injury which definitively does satisfy the first element of *res ipsa loquitur*: [w]here a plaintiff receives an injury to a healthy part of the body not involved in the operation [while] in an operating room . . .". Dalley at 200.

As it is undisputed that Mr. Baczuk suffered such an injury, that is the end of the inquiry regarding the first element of *res ipsa*. While the defendants (and their witnesses) may disagree with the propriety of the Supreme Court's holding on this point, such disagreement is of no moment. Our Supreme Court has simply rejected the notion that health care providers can avoid having their negligence determined by a jury in those cases where a patient goes into surgery for a problem with one part of his body and comes out with a permanent injury to another.

When it is remembered that the requirements for expert testimony in medical malpractice cases was born of court's concerns that the practice of medicine often involves complex scientific issues beyond the experiences of lay jurors, it can be seen why no such testimony is necessary in this case. Mr. Baczuk was either burned unintentionally or suffered significant death of tissue from loss of its blood supply by being placed on a device for nine hours, a device from which such loss of blood flow is a known consequence about which its manufacturer expressly warns. A jury can fairly decide this matter without knowing how to practice medicine, and the defendants can

offer their evidence as to why they believe either or both of these results are not indicative of negligence. Under the law of this State as articulated by our Supreme Court, Mr. Baczuk is entitled to have the jury decide the issues in this case, and the defendants will have every opportunity to try to convince them that "these things happen" even in the absence of neglect. But when what happens is an injury to the patient at a location remote from the site of his surgery, that is all he need establish to place the issue of negligence into the hands of the jury. Though the health care defendants might believe more should be required, the law does not.

CONCLUSION

The Utah Supreme Court has clearly held that a patient who demonstrates that he suffered an injury to one part of his body while undergoing an operation upon another can rely upon the doctrine of *res ipsa loquitur* to permit his claim to be submitted to the trier of fact. The ruling of the court below in this matter to the contrary should be reversed, and the matter remanded for a jury trial on the merits.

DATED this 19th day of April, 2000.

PRINCE, YEATES & GELDZAHLER

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CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of April, 2000, I caused the original and seven (7) copies of the foregoing REPLY BRIEF OF APPELLANT to be filed with the Clerk of the Court of the Utah Court of Appeals, and two (2) true and correct copies to be mailed, first-class postage prepaid thereon, to the following:

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