IN THE UTAH COURT OF APPEALS

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Rick Baldassin and Cindy Baldassin, Plaintiffs and Appellants, v. Jan S. Freeman, M.D.; and Jan S. Freeman, M.D., P.C., Defendants and Appellees.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080390-CA F I L E D (April 23, 2009) 2009 UT App 109

Second District, Layton Department, 060604224
The Honorable Thomas L. Kay

Attorneys: Jeffrey R. Oritt and Bradley M. Strassberg, Salt Lake City; and Kay Burningham, Park City, for Appellants
Curtis J. Drake, Scott A. DuBois, and Troy L. Booher, Salt Lake City, for Appellees

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Before Judges Thorne, Davis, and McHugh.

DAVIS, Judge:

This appeal arises from a medical malpractice claim commenced by Rick and Cindy Baldassin (collectively the Baldassins) against Jan S. Freeman, M.D., P.C., (collectively Freeman) more than one year past the expiration of the applicable statute of limitations. The question presented is whether the district court erred in granting summary judgment in favor of Freeman. We conclude that it did not and, accordingly, affirm.

In May 2003, Freeman performed hernia repair surgery on Mr. Baldassin. During the procedure, Freeman accidentally "nicked" Mr. Baldassin's colon, causing extensive complications that resulted in a lengthy hospital stay and additional surgeries. Sometime between May 22 and May 28, 2003, Freeman and Mr. Baldassin had a conversation wherein Freeman offered to pay Mr. Baldassin's medical bills resulting from the surgical complications.

In an attempt to coordinate payment of Mr. Baldassin's expenses, Freeman referred the Baldassins to Mike Imbler, his medical malpractice insurance adjustor at Utah Medical Insurance Association (UMIA). Accordingly, between May 2003 and February 2005, the Baldassins submitted two sets of bills, expenses, and evidence of lost wages to Imbler; UMIA subsequently paid the expenses to the Baldassins and the other entities owed. In December 2005, the Baldassins submitted another set of bills, expenses, and evidence of lost wages to Imbler. After some discussion among the Baldassins, Imbler, and Freeman, this time the second set of expenses was not paid.

The Baldassins filed a medical malpractice lawsuit in November 2006, more than three years after the date of the original hernia repair surgery. Freeman subsequently filed a motion for summary judgment, asserting as a defense the applicable statute of limitations, see Utah Code Ann. § 78B-3-404 (2008) ("A malpractice action against a health care provider shall be commenced within two years after the . . . patient discovers . . . the injury.").[1] As required by rule 7(c)(3)(A) of the Utah Rules of Civil Procedure, Freeman included a statement of undisputed material facts in his memorandum in support of the motion for summary judgment. See Utah R. Civ. P. 7(c)(3)(A). The Baldassins' memorandum in opposition to the motion for summary judgment did not directly controvert Freeman's statement of facts as required by rule 7, see id. R. 7(c)(3)(B). Rather, the Baldassins included nine pages of additional material facts as allowed by rule 7, see id. The district court deemed Freeman's statement of facts admitted and granted summary judgment in his favor. The Baldassins now appeal.

The Baldassins assert two points of error in the district court's decision. First, they contend that the district court erred, as a matter of law, by giving more weight to Freeman's version of the facts and by failing to adequately consider their additional statements of fact. See generally Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995) ("On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist."). Second, the Baldassins assert that the district court erred in granting summary judgment because a

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[1]The original motion and memorandum in support of summary judgment cited the prior version of the medical malpractice statute of limitations provision, see Utah Code Ann. § 78-14-4 (2002). In 2008, that provision was renumbered as section 78B-3-404 and is, for our purposes, substantively the same as the prior version. See Utah Code Ann. § 78B-3-404 (2008) (amendment notes). Accordingly, for the reader's convenience, we refer to the current version of the statute.

genuine issue of material fact exists with respect to whether Freeman's and Imbler's actions or statements induced the Baldassins to commence their lawsuit after the statute of limitations had expired. Each of the Baldassins' arguments will be addressed in turn.

Regarding the first issue, we conclude that the trial court did not abuse its discretion in admitting, as uncontroverted, Freeman's statement of facts. See generally Bluffdale City v. Smith, 2007 UT App 25, ¶ 5, 156 P.3d 175 (noting that a trial court's application of rule 7 of the Utah Rules of Civil Procedure is reviewed for an abuse of discretion). Indeed, rule 7(c)(3)(A) clearly provides that "[e]ach fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." Utah R. Civ. P. 7(c)(3)(A) (emphasis added). Moreover, rule 7(c)(3)(B) further provides, in pertinent part:

> A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials.

Id. R. 7(c)(3)(B) (emphasis added).

The plain language of rule 7 is unambiguous: a party opposing a motion for summary judgment must provide a "verbatim restatement" of each fact that they claim is in dispute, along with a citation to the relevant documents explaining why the fact is controverted. Id. The Baldassins simply failed to comply with these requirements.[2] Because the Baldassins failed to

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[2]As previously noted, it is true that the Baldassins included a statement of additional facts in their memorandum in opposition to summary judgment, in accordance with rule 7(c)(3)(B), see Utah R. Civ. P. 7(c)(3)(B). We note, however, that the plain language of rule 7(c)(3)(B) provides that the opposition memorandum must contain a "verbatim restatement of each of the moving party's facts that is controverted," but the rule is permissive as to whether the memorandum may present additional facts in dispute. Id. We agree with Freeman that the reason rule 7 allows the nonmoving party to provide additional (continued...)

controvert Freeman's statement of undisputed facts, we conclude that the trial court did not abuse its discretion in admitting them for the purpose of summary judgment.

Regarding the second issue, this court normally grants "broadened discretion to the trial court on the issue of equitable estoppel." Trolley Square Assocs. v. Nielson, 886 P.2d 61, 65 (Utah Ct. App. 1994). However, where, as here, the issue of equitable estoppel is resolved on a motion for summary judgment, we review the "ultimate grant or denial of summary judgment for correctness, and view[] the facts and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party." RJW Media, Inc. v. CIT Group/Consumer Fin., Inc., 2008 UT App 476, ¶ 14, 202 P.d 291 (internal quotation marks omitted).

In determining whether equitable estoppel should apply to prevent a party from asserting a statute of limitations defense, courts employ a three-part analytical framework. First, there must be "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted." Travelers Ins. Co. v. Kearl, 896 P.2d 644, 647 (Utah Ct. App. 1995) (emphasis added) (internal quotation marks omitted). Second, there must be "reasonable action or inaction by the other party, taken on the basis of the first party's statement, admission, act, or failure to act." Id. (internal quotation marks omitted). Finally, there must be "injury to the second party that would result from allowing the first party to contradict or repudiate the statement, admission, act, or failure to act." Id. The Baldassins contend that the trial court erred in concluding that they could not establish the first two elements of equitable estoppel.[3] For the following reasons, we again disagree.

As to the first element--whether there was a statement or action inconsistent with a claim later asserted--the uncontroverted evidence demonstrates the following: (1) at some point after the surgery, Freeman told Mr. Baldassin that he had inadvertently "nicked" his colon and subsequently requested that Mr. Baldassin collect his related medical bills so that Freeman could "take care of them"; (2) over the course of the next two years, two sets of medical bills, expenses, and lost wages were

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[2](...continued)
facts is for situations where a moving party's memorandum may not set forth facts that can be controverted, but the nonmoving party nonetheless has a valid defense to summary judgment.

[3]The parties do not dispute the existence of the third element of the equitable estoppel test. Accordingly, we do not address it.

indeed paid by UMIA; (3) Freeman "frequently" told the Baldassins, "You need to sue me"; and (4) when Mrs. Baldassin told Freeman that others had advised her and Mr. Baldassin to sue him, he responded, "You're right."[4] We conclude that none of these acts is inconsistent with Freeman asserting the statute of limitations defense; rather, repeatedly telling the Baldassins that they should sue him is consistent with his later assertion of a statute of limitations defense. Accordingly, we conclude that the district court did not err in determining that the first element of estoppel had not been established.

Regarding the second element, that is, whether there was "reasonable . . . inaction . . . taken on the basis of [Freeman's or Imbler's] statement, admission, act, or failure to act," see id., the Baldassins claim that their additional statement of facts creates a disputed issue of material fact that precludes summary judgment.[5] The uncontroverted evidence, however, demonstrates that (1) Freeman never agreed to pay a specific sum of money or to make payments for a specific period of time; (2) Mr. Baldassin had no agreement with either Freeman or Imbler that he would be paid in exchange for a promise not to sue; and (3) Mrs. Baldassin said that she did not think it was appropriate

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[4]Not only did the Baldassins fail to controvert this statement of fact in their reply memorandum as required by rule 7, see Utah R. Civ. P. 7(c)(3)(B), but trial counsel admitted during oral argument before the district court that the Baldassins stated that Freeman told them to file a lawsuit.

[5]Specifically, the Baldassins contend that a disputed issue of material fact exists regarding whether Imbler discussed the applicable statute of limitations during their initial meeting. Imbler testified that the discussion did occur, while Mr. Baldassin claims it did not. Although this does present a disputed fact, we conclude that it makes little, if any, difference to the outcome of this case. Under rule 56 of the Utah Rules of Civil Procedure, summary judgment is appropriate only when "there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c) (emphasis added). Whether Imbler discussed the relevant statute of limitations with the Baldassins is not a material fact in the context of this case. Freeman repeatedly told the Baldassins to sue him, and Mrs. Baldassin testified that they did not sue him because they believed it would be detrimental to their high-end piano business to sue a doctor. These two uncontroverted facts alone defeat the second element of equitable estoppel. Accordingly, although there may be a factual dispute about whether a statute of limitations conversation with Imbler occurred, it is ultimately immaterial to the resolution of this case.

to sue Freeman because it "would not be good for [the Baldassins' high-end piano] business." Accordingly, the undisputed evidence shows that there was no agreement to pay a certain amount of money for a specific length of time and that the Baldassins' reluctance to sue was based on their belief that suing a doctor would have a negative effect on their business affairs, not in reliance on the statements and actions of Freeman and Imbler. The district court, therefore, was correct in concluding that the second element of equitable estoppel had not been established.

We conclude that the district court did not misapply rule 7(c)(3) of the Utah Rules of Civil Procedure and did not abuse its discretion in admitting Freeman's uncontroverted statement of facts. Furthermore, the Baldassins' additional facts proffered under rule 7 did not create a disputed issue of material fact on whether reasonable reliance precluded summary judgment. Accordingly, we affirm.

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James Z. Davis, Judge

I CONCUR:

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Carolyn B. McHugh, Judge

THORNE, Judge (concurring and dissenting):

"Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Fericks v. Lucy Ann Soffe Trust, 2004 UT 85, ¶ 10, 100 P.3d 1200; see also Utah R. Civ. P. 56(c). Here, even in light of the district court's acceptance of Dr. Freeman's statement of undisputed facts,[1] genuine issues of

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[1]I do concur with the majority opinion's conclusion that the district court acted within its discretion in deeming Dr. Freeman's statement of undisputed facts admitted pursuant to rule 7 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 7(c)(3). But, for that very reason, I dispute the majority opinion's footnote five, which treats Imbler's discussion of the (continued...)

material fact remain as to whether Dr. Freeman should be equitably estopped from relying on a statute of limitations defense. Accordingly, I respectfully dissent from the portion of the majority opinion affirming summary judgment in favor of Dr. Freeman.

If we accept, for purposes of this analysis, that the Baldassins may invoke estoppel only upon meeting the three-part test enunciated in Travelers Insurance Co. v. Kearl, 896 P.2d 644 (Utah Ct. App. 1995), I believe that the factual admissions and assertions presented to the district court in the parties' summary judgment pleadings raise reasonable factual inferences that (1) Dr. Freeman and his insurer engaged in a course of words and conduct inconsistent with a later invocation of a limitations defense, (2) the Baldassins reasonably relied on that course of words and conduct to delay filing their lawsuit, and (3) the Baldassins suffered injury as a result. These reasonable inferences, if believed by the jury, would satisfy the Kearl test. See generally id. at 647.

Additionally, there are other cases that appear to apply a less formal, inducement-based analysis to the question at hand. See, e.g., Lund v. Hall, 938 P.2d 285, 287-88 (Utah 1997) (examining question of estoppel of statute of limitations defense in terms of whether "the trier of fact could reasonably conclude that the conduct of the adjuster was such as to induce plaintiff to delay filing her action" (internal quotation marks and citation omitted)); Rice v. Granite Sch. Dist., 23 Utah 2d 22, 456 P.2d 159, 162-63 (1969) ("Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." (internal quotation marks and citation omitted)); Dansie v. Anderson Lumber Co., 878 P.2d 1155, 1160 (Utah Ct. App. 1994) ("If the actions of a defendant, its agents, or its privies induced delay in commencing an action, the court will not allow any of them to assert such delay as a defense."). Under any of these cases, I believe that it is clear

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[1](...continued)
statute of limitations with the Baldassins as a disputed fact. To the contrary, the Baldassins admitted that this discussion took place when they failed to properly contradict Dr. Freeman's assertion of its occurrence in his statement of undisputed facts. See id.

The rest of the Baldassins' additional factual allegations, so long as they do not directly contradict the facts asserted in Dr. Freeman's statement of undisputed facts, were appropriately before the district court under rule 7 and should have been considered in the summary judgment analysis. To the extent that the district court's order or the majority opinion suggests otherwise, I disagree.

that the Baldassins should have been allowed to present their estoppel-by-inducement argument to the jury.

The allegedly negligent surgery occurred in May 2003. Dr. Freeman told the Baldassins shortly after surgery that he would take care of the Baldassins' bills resulting from the surgery (the resultant bills). Dr. Freeman told the Baldassins to collect the resultant bills and submit them to Imbler, a representative of his malpractice insurer. The Baldassins did so on two occasions, once in August 2004 and once in February 2005. Dr. Freeman's insurer paid over $100,000 in medical bills, expenses, and lost wages claims submitted by the Baldassins. In light of these payments and Mr. Baldassin's conclusion that Dr. Freeman had admitted liability to him and had arranged to pay the resultant bills, Mr. Baldassin could have reasonably concluded that it was unnecessary to file suit. After all, he was at the time not seeking "pain and suffering" general damages but simply payment of the resultant bills.

The Baldassins submitted a third set of resultant bills in December 2005, after the running of the limitations period. Payment of these bills was denied in February 2006. The Baldassins then filed a statutory notice of intent to sue in May 2006 and initiated this lawsuit in November 2006.

Drawing reasonable inferences from these facts at summary judgment in favor of the Baldassins, as is required, see, e.g., Sohm v. Dixie Eye Ctr., 2007 UT App 235, ¶ 13, 166 P.3d 614, cert. denied, 182 P.3d 910 (Utah 2007), a reasonable fact-finder could conclude that Dr. Freeman and his insurer had not acted wrongfully but had acted inconsistently with a later assertion of a statute of limitations defense and that the Baldassins reasonably relied on those actions to their detriment. Specifically, Dr. Freeman and his insurer's course of conduct could be reasonably interpreted as a representation that no lawsuit would be necessary to obtain payment of Mr. Baldassin's resultant bills. Viewed in this light, Dr. Freeman's suggestion that a lawsuit by the Baldassins was an option might reasonably be interpreted as a suggestion to sue if the voluntary compensation efforts were unsatisfactory or if the Baldassins sought damages in excess of payment of the resultant bills. The Baldassins did not become aware that no further compensation would be voluntarily forthcoming until February 2006, and then promptly initiated litigation.

I disagree with the majority's conclusion that either Dr. Freeman's repeated suggestions that the Baldassins sue or Mrs. Baldassin's September 2003 statement that they could not sue a doctor because it would be bad for business is fatal to the assertion of an equitable estoppel claim. As to the suggestions to sue, the Baldassins are not arguing that Dr. Freeman had

concealed a potential cause of action. Rather, the argument is that Dr. Freeman had represented that a lawsuit would not be necessary for the Baldassins to obtain payment of the resultant bills. In this context, Dr. Freeman's repeated assertions to "sue me" can reasonably be interpreted as "sue me--if you want more than payment of the resultant bills, otherwise it will not be necessary."[2] And Mrs. Baldassin's September 2003 statement, made while under the impression that compensation for the medical bills would be voluntarily forthcoming, at most raises a factual question as to whether it was advisable to seek more than simple payment of the resultant bills.

Whether the Baldassins reasonably failed to act by May 2005, some twenty months later, should be a question for the fact-finder. A jury could believe that the Baldassins ultimately chose not to sue because they were satisfied with the payment process for the resultant bills and were not seeking additional compensation. Or the jury could find that they refrained in reliance on Dr. Freeman's implied promise to voluntarily pay the resultant bills. Thus, these questions were inappropriate for resolution at the summary judgment stage.

In conclusion, I believe that the district court properly deemed Dr. Freeman's statement of undisputed facts admitted under rule 7, but should have denied Dr. Freeman's motion for summary judgment and submitted the question of equitable estoppel to the jury. Accordingly, I concur in part and dissent in part from the majority opinion.

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William A. Thorne Jr.,
Associate Presiding Judge

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[2]An alternative way of characterizing the discussions between Dr. Freeman and the Baldassins is as something akin to an accord and satisfaction. Under this characterization, the Baldassins agreed to forgo damages in excess of the resultant bills in exchange for Dr. Freeman agreeing to pay those bills without suit. Looking at the exchange in this way, the Baldassins' cause of action would not have accrued until 2006, when Dr. Freeman failed to pay resultant bills presented by the Baldassins. Of course, under such a characterization, the Baldassins could also be said to have waived damages in excess of the payment of the resultant bills.