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Jeannette U. Swan v. Dr. Robert H. Lamb And Dr. Dennis D. Thoen : Brief of Appellant In Opposition To Respondents' Joint Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JEANNETTE U. SWAN, :
Plaintiff and :
Appellant, :

vs. :

Case No. 14823

DR. ROBERT H. LAMB and :
DR. DENNIS D. THOEN, :

Defendants and :
Respondents. :

BRIEF FOR APPELLANT IN OPPOSITION
TO RESPONDENTS' JOINT PETITION FOR REHEARING

Appeal from a Judgment of the Third District Court
Salt Lake County, Honorable Bryant M. Croft

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CASES CITED

- Boykin v. Alabama, 395 U.S. 238 (1969).
- Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976).
- Cascade Security Bank v. Butler, 88 Wash.2d 77, 567 P.2d 631 (1977)
- In re Bye, 12 Cal.3d 96, 115 Cal.Rptr. 382, 524 P.2d 854 (1974).
- In re Tahl, 1 Cal.3d 122, 81 Cal.Rptr, 577, 460 P.2d 449 (1969)
- Moore v. State, 553 P.2d 8 (Alaska 1976)
- Rolley v. Merle Norman Cosmetics, Inc., 129 C.A.2d 844 282 P.2d 991 (1955)
- Rubalcava v. Gissman, 14 Utah 2d 344, 384 P.2d 389 (1963)
- Russell v. Blackwell, 53 Haw. 274, 492 P.2d 953 (1953)
- Stanton v. Stanton, 564 P.2d 303 (1977) reh. 567 P.2d 625 (1977)
- State v. Kelbach, 569 P.2d 1100 (Utah 1977)
- State v. Stenrud, 113 Ariz. 327, 553 P.2d 1201 (1976)
- State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972)
- Swan v. Lamb, No. 14823 (Utah, filed August 16, 1978)
- Wood v. Morris, 87 Wash.2d 501, 554 P.2d 1032 (1976)

OTHER AUTHORITIES CITED

20 <u>Am.Jur.2d</u> Courts (1965)	4
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IN THE SUPREME COURT
OF THE STATE OF UTAH

JEANNETTE U. SWAN

Plaintiff and
Appellant,

Case No. 14823

vs.

DR. ROBERT H. LAMB and
DR. DENNIS DR. THOEN,

Defendants and
Respondents.

APPELLANT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

NATURE OF THE PETITION FOR REHEARING

Respondents have petitioned this Court for a rehearing on the question of whether the appellate decision against them should have been given retroactive application.

DISPOSITION OF THE APPEAL

This Court ruled that an otherwise qualified neurosurgeon from Los Angeles need not have had personal medical contact or experience in Utah in order to testify as an expert on the standard of care applicable to respondent physicians in performing a myelogram and a spinal decompression laminectomy.

RESULT SOUGHT ON REHEARING

Appellant asks the Court to deny respondents' petition, or, if the petition is granted, to rule that the Court's previous decision to grant retroactive effect to its holding was correct.

STATEMENT OF FACTS

Since the only issue to be decided, in the event respondents' petition is granted, is whether the prior holding of this Court giving retroactive application to its decision was correct, the relevant facts are limited. Basically they are that respondents were, at the time of the surgery which was performed upon Mrs. Swan, board certified specialists in their respective fields who considered themselves bound to follow national rather than local standards of skill and care in treating their patients. (Tr. day 2 at 2; day 3 at 5 and 657; see also Original Brief for Appellant at 44-45.) The record contains no evidence that respondents relied upon any prior decisions of this Court in treating or agreeing to treat Mrs. Swan. Furthermore, it contains no evidence that retroactive application of the Court's decision will place a burden upon the administration of justice.

Finally, an additional fact having a bearing on whether respondents' petition should be granted at all is that at no time prior to their filing of this petition for rehearing did either of them raise to this Court the issue of whether a decision, if adverse to them, should be applied prospectively only.

POINT I

ON A PETITION FOR REHEARING, RESPONDENTS CANNOT RAISE FOR THE FIRST TIME, AND ALLEGE AS ERROR, POINTS WHICH THEY FAILED TO ADDRESS AT ANY PREVIOUS TIME IN THE APPELLATE PROCESS.

Drs. Lamb and Thoen, the respondents and petitioners in this matter, requested a rehearing "solely as to the issue of whether this Court's decision should be applied retroactively or prospectively." Petition & Brief for Respondents at 2. At no time prior to the submission of their joint brief did either of the respondents suggest that the decision of this Court, if adverse to them, should be given only prospective application. Upon submission of their petition and brief, respondents, for the first time, claimed that the Court erred in applying its decision retroactively.

In the recently published Appellate Advocacy Handbook for the Utah Supreme Court, which was distributed by the Utah State Bar, it is stated that "The points relied on [in a petition for rehearing] must have been raised previously." Id. at 25. Several Utah cases are cited in support of said statement. See Id. at 25, n. 2. Any other policy would tend to encourage parties to take a piecemeal approach to their appeals and would defeat the efforts of the judiciary to deliver opinions with finality. Cf. Rolley v. Merle Norman Cosmetics, Inc., 129 C.A.2d 844, 282 P.2d 991 (1955.).

Since respondents' petition for rehearing is based solely on assertions of error involving an issue which neither of them saw fit to raise heretofore, they are precluded from raising the issue now. Their petition should be denied.

POINT II

RESPONDENTS DO NOT QUALIFY FOR AN EXCEPTION TO THE GENERAL RULE THAT AN OVERRULING DECISION WILL BE GIVEN RETROACTIVE APPLICATION.

The general rule in Utah, as well as in other jurisdictions, is that overruling decisions will be given retroactive as well as prospective application. State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002, 1003 (1972); Annot. 10 A.L.R.3d 1271 (1966); 20 Am.Jur.2d Courts §233 (1965).

In certain instances, exceptions to the general rule of retroactivity have been granted where necessary (1) to prevent an unfair cancellation of vested rights or invalidation of justified reliance interests, especially in contract or property matters; or (2) to avoid the imposition of onerous and substantial burdens on the administration of justice, especially in criminal matters. See 10 A.L.R., supra at 1378. Utah uses similar guidelines in determining whether an overruling decision should have retroactive effect.

In State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, supra, this Court declared that the rules governing whether an overruling decision would be given only prospective application were

based upon the proposition that where persons had entered into contracts and other business relationships based upon justifiable reliance on the prior decisions of courts, those persons would be substantially harmed if retroactive effect were given to overruling decisions. An additional factor was that retroactive operation might greatly burden the administration of justice. (Emphasis added.) Id., 493 P.2d at 1003.

In order for the decision in the present case to be declared prospective only, the record must show the existence of contracts or business relationships between Mrs. Swan and her doctors which were based upon the doctors' justifiable reliance interests in prior medical malpractice decisions of this Court, or must show that retroactive application will impose some great burden on the administration of justice.

A. Existence of Justifiable Contractual Reliance Interests

An example of the type of justifiable contractual reliance interests that are contemplated by the exception to the general rule of retroactivity, is found Cascade Security Bank v. Butler, 88 Wash.2d 77, 567 P.2d 631 (1977). (Dictum from the Cascade case was cited by respondents in their brief at page 8.)

The defendant in Cascade bought a parcel of real estate on a contract. Several years later, while defendant still owned the property, plaintiff obtained judgment against him on an unrelated matter. At the time of the entry of judgment, the law of the State of Washington provided that judgment liens did not attach to real estate contracts. Several days after entry of the judgment against him, defendant assigned his interests in the real estate contract to a third party who, in reliance on the judgment lien law, apparently took no special precautions to search out judgments against his assignor. Some months later, the third party in turn assigned his interests in the contract to a fourth party who also apparently relied on existing law concerning the inapplicability of judgment liens to real estate contracts. One year after the assignments, plaintiff attempted to execute its judgment on the real estate contract which was now in the possession of the fourth party.

The Washington Supreme Court overruled its prior decisions, on which the third and fourth party relied, and held that judgment liens did attach to real estate contracts. However, because of the obvious reliance interests of both third and fourth parties and because of the fact that a retroactive application of its overruling decision would unjustly work a forfeiture of the fourth party's property rights which he in good faith believed were inviolate, the court made its decision prospective only. Cascade, supra, 567 P.2d at 635. (For a similar discussion of reliance interests

involving statutory construction and the advisability of invalidating business arrangements which were made in good faith, see Moore v. State, 553 P.2d 8, 28 (Alaska 1976).)

The present case clearly does not involve a contract or business relationship such as was involved in Cascade Security Bank v. Butler, supra or such as was contemplated by State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, supra. There is no showing that either Mrs. Swan or her doctors ever understood or agreed that the level of medical care which she was to receive would be inferior to that available in other cities, due to the prior decisions of the Utah Supreme Court. Furthermore, there is no showing that respondent doctors were even aware of the prior rulings of this Court.

Even if Drs. Lamb and Thoen had been aware of this Court's medical malpractice decisions, there is no showing that they relied upon them in determining what methods and procedures they would employ to treat Mrs. Swan. On the contrary, the evidence showed that respondents were specialists in their fields who considered themselves to be governed by standards of medical care that they admitted were uniform throughout the country and not unique to Utah or to Salt Lake City. (Tr. day 2 at 2; day 3 at 5, 67; see also Original Brief for Appellant at 44-45.) In no sense can respondents now claim properly to have relied on the "strict locality rule" in their practices.

Furthermore, if respondents had relied on the "strict locality rule" to shield them from liability for employing

inferior treatment methods and procedures, such reliance would not have been justified. Drs. Lamb and Thoen were both board certified specialists in their respective fields, practicing medicine in an area noted for its fine hospitals, outstanding libraries, fully equipped laboratory facilities and readily available advanced medical equipment. Under such circumstances they had an obligation to do more than just get by. It would be unjustifiable for respondents to assume, on the basis of what they claim is a 100 year-old legal doctrine, that they did not have to employ the same level of skill and care as that practiced by their similarly situated professional colleagues in other cities.

Respondents ask this Court to believe that a retroactive application of its decision will cause them and all Utah physicians "great hardship and injustice," and will further subject them and others to "much greater liability." Such an argument is deceptive and untrue. It erroneously presupposes that all or nearly all Utah physicians have been and are practicing medicine in accordance with lower standards of skill and care than their counterparts in Los Angeles and elsewhere. The fact is, as noted by Justice Ellett in his majority opinion, that "Our quality of care in Utah rates with the best in the nation." Swan v. Lamb, No. 14823 (Utah, filed Aug. 16, 1978) at 113. The decision of this Court does not raise the level of existing standards of practice. Rather, it legally recognizes and adopts the standards that have existed

in the medical profession since long before Mrs. Swan underwent surgery in 1973.

Utah doctors are not threatened by the prospect of being measured by standards which they have not only met but exceeded for decades. The contention that the retroactive application of the Court's decision in the present case would cause widespread hardship and injustice is untenable.

B. Existence of Substantial Burden on the Administration of Justice.

There is no record of any facts which would tend to show that the retroactive application of the Court's decision in the present case would generate any kind of burden, let alone a substantial or great one, upon the administration of justice. Such burdensome situations usually are found only where the retroactive application of a decision would result in needless reopening of cases which have long since been finalized and laid to rest. Several examples appear in the cases cited but not elaborated upon in respondents' brief. Most of these involve matters of criminal procedure.

Characteristic of such cases is Russell v. Blackwell, 53 Haw. 274, 492 P.2d 953 (1953), cited in Petition & Brief for Respondents at 4. There, the defendant was convicted of murder and robbery on the basis of guilty pleas which he entered through his attorney in 1965. He was sentenced to life in prison. In 1969 the United States Supreme Court ruled, in an unrelated case, that a guilty plea in a criminal case was invalid unless the record of its entry affirmatively disclosed

that it had been entered voluntarily and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969). After Boykin, the defendant in Russell commenced a habeas corpus proceeding seeking to withdraw his earlier guilty plea on the basis of the Boykin decision. The Hawaii Supreme Court reasoned that if it granted retroactive application to Boykin, it would impose an intolerable burden on the administration of justice by subjecting to challenge the conviction of every person whose guilty plea was ever accepted by a court. It therefore adopted the position of the California Supreme Court as stated in In re Tahl, 1 Cal.3d 122, 81 Cal.Rptr. 577, 460 P.2d 449 (1969).

"To invalidate all such prior guilty pleas years and decades after their acceptance would have a dolorous effect upon the administration of justice. In light of these combined legal and pragmatic factors, we believe Boykin v. Alabama and the procedures adopted therein must be given prospective application only "
Russell, 492 P.2d at 956.

Concerns similar to those expressed in Russell, supra, over the viability of the criminal justice system in the event of retroactive application of overruling decisions, also influenced the outcomes in several of the other cases cited but not elaborated upon by respondents. State v. Stenrud, 113 Ariz. 327, 553 P.2d 1201 (1976), cited in Petition & Brief for Respondents at 4, involved a habeas corpus challenge to the propriety of the method by which a guilty plea was entered in a narcotics case. The basis of the writ was Boykin-like

overruling decision. See also Wood v. Morris, 87 Wash.2d 501, 554 P.2d 1032 (1976), (a manslaughter case), and In re Bye, 12 Cal.3d 96, 115 Cal.Rptr. 382, 524 P.2d 854 (1974), (a narcotics addiction case), both cited in Petition & Brief for Respondents at 4.

The decision in the present case has none of the characteristics that would cause its retroactive application to create a burden upon the administration of justice. There are no criminal issues involved. No writs of habeas corpus will flood the courts. Medical malpractice cases which have gone to final conclusions will not be reopened. It is doubtful whether any of them could be reopened on the basis of the single issue decided by this Court anyway. As was stated in State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972):

The record in this case would not support a decision limiting the effect of the prior decision to future application. There is no showing that any considerable number of persons or corporations would be affected by letting the decisions apply retrospectively. There is no showing that injustice would result or that administration of justice would in any way be affected. Id. at 1003.

There is, therefore, no reason to alter the retroactive application of the Court's decision.

POINT III

THE RETROACTIVE APPLICATION OF THE COURT'S DECISION IN THE PRESENT CASE ACCORDS WITH, RATHER THAN CONTRADICTS, THE DECISIONAL LAW OF THE STATE OF UTAH.

Respondents argue in Point II of their brief that a retroactive application of the decision rendered in the present case would be contrary to the principles announced in previous cases. A close examination of the "previous cases" to which respondents refer shows their facts to be so different from those of the present case as to make them inapposite.

The inference that the holding in Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976), evidences this Court's refusal to apply its decisions retroactively, is incorrect. Brunyer was not an overruling decision. It was a statutory construction decision. It involved the dismissal of a third-party complaint which sought contribution from a joint tortfeasor. The dismissal was granted. This Court affirmed the dismissal and held that the third party plaintiff could not sue for contribution since the statute which created the right of contribution among joint tortfeasors was "by its terms" not retroactive to the time the tort was committed. This explanation appears in the omitted portion of the quote which respondents cited in their brief:

The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose, and the statute not being retroactive by its terms did not create a right on behalf of third-party plaintiffs. (Emphasis added.) Id. at 522; cf. Petition & Brief for Respondents at 10.

Rubalcava v. Gissman, 14 Utah 2d 344, 384 P.2d 389 (1963), like Brunyer, supra, also involved questions of statutory construction. In Rubalcava, a wife who was riding in a car driven by her intoxicated husband when it collided with a train, sued her husband's estate for her injuries. The issue arose as to whether the statute which permitted intramarital contract and property actions also permitted intramarital tort actions. The Utah Supreme Court analyzed the statute and, in an opinion authored by Justice Crockett, concluded that it did not. The Court declined to revise and change the unambiguous work of the legislature. Obviously no questions concerning the retroactive or prospective application of the holding were raised or decided since no new rights were created and no old rights were extinguished.

State v. Kelbach, 569 P.2d 1100 (Utah 1977), involved issues of statutory construction which had a direct bearing on whether two convicted criminals would live or die. The state in Kelbach sought to appeal what it claimed were errors in the trial court's imposition of sentences of life imprisonment instead of death. The issue on appeal was whether the statute which authorized state appeals of criminal decisions was broad enough to permit the state to appeal a

criminal sentence. Upon analysis of the statutes and the cases which had construed them, the Court held against the State. Once again no issues of retroactive or prospective application of the ruling were raised or decided due to the fact that nothing had been overruled.

The three foregoing cases dealt with vastly different issues from those presented in the present case. Each of them involved rulings on statutes which had been authored by the legislature. Each also involved interpretations of legislative intents and purposes. Because the cases also each involved issues on which the legislature had made findings and conclusions, the Court was obliged to give a certain deference to such findings and conclusions irrespective of its disagreement or agreement with them. None of the cases contained holdings which overruled existing law, therefore, none of them involved more than peripheral considerations of such things as the reliance interests of the litigants, or the burdens on the administration of justice, which are pivotal in deciding issues of retroactive versus prospective application. For these and other reasons, the dicta of the foregoing cases do not govern the outcome of the present case.

Stanton v. Stanton, 564 P.2d 303 (1977), reh. 567 P.2d 625 (1977), was an action by a divorced wife to compel her ex-husband to continue to make child support payments for a daughter who, according to statute, had attained her majority,

(then age 18). The wife argued that since males did not, under the statute, attain their majority until age 21, the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States required that females be treated the same. After a series of appeals and remands involving both the State and Federal Supreme Courts as well as the trial court, it was ultimately held that for purposes of the Stanton case, both males and females attained their majority at age 18. The Stanton decision was, by its terms, made prospective only.

The reasons for the Stanton opinion are similar to those involved in the habeas corpus cases cited infra at 8-10. In child support matters, as in criminal imprisonment matters, the Court retains a type of continuing jurisdiction. If the Stanton decision had been made retroactive, it is conceivable that a flood of petitions would have been filed requesting alteration or amendment of hundreds, perhaps thousands, of divorce decrees involving child support payments to males between the ages of 18 and 21. A substantial burden on the administration of justice would thereby have been created.

Furthermore, the terms of child support agreements which were incorporated into divorce decrees were often reached by parties in reliance on the statute of majority which treated males and females differently. To nullify the justifiable contractual expectations and plans of such parties by a retroactive change of the law would have been unfair. See

concurring opinion of Justice Crockett, Stanton, 564 P.2d at 305.

As was pointed out infra at 4-10, the present case involves no justifiable contractual reliance interests and no potential great burdens on the administration of justice. Courts maintain no continuing jurisdiction over concluded medical malpractice cases. There is no reason to limit the application of the decision in Swan v. Lamb.

The last of the Utah Supreme Court decisions cited by respondents in their second argument actually supports the position of Mrs. Swan. See State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972). In the State Farm case, plaintiff insurer paid the medical bills of its insured who had been involved in an auto accident with defendant's insured in 1966. Despite receiving a notice of subrogation from plaintiff, defendant proceeded to reimburse the injured party for his medical expenses. Plaintiff sued, claiming that a 1969 overruling decision of this Court required defendant to pay such sums to it because of the subrogation notice. Defendant argued that the 1969 overruling decision, was not retroactive and that the law prior to the overruling decision, which permitted its actions, should have been applied. The trial court ruled that the holding was retroactive. This Court affirmed. It recognized the general rule that overruling decisions were ordinarily retroactive unless they would improperly frustrate justifiable contractual

reliance interests or would greatly burden the administration of justice. Id. at 1003. The Court held that since the record in the case showed that no considerable number of persons or corporations would be affected and that no injustice or great burden on the administration of justice would occur, its 1969 decision was to be applied retroactively. Id. See infra at 5 and 10.

CONCLUSION


Respondents should not be granted a "rehearing" on an issue which they never raised in briefs or arguments and which was never "heard" by this Court. Such a practice constitutes a piecemeal approach to the appellate process which is not permitted.

The general rule that overruling decisions are to be given retroactive effect was correctly applied in this case. The conditions under which exceptions to such a rule are occasionally granted were not met by respondents. Drs. Lamb and Thoen showed neither the existence of justifiable contractual reliance interests in the prior decisions of this Court, nor the imposition of great burdens on the administration of justice that were requisites to the granting of a prospective-only decision.

There is no inconsistency between the Court's decision in this case and the decisions which it has rendered in other cases. The retroactive application which it has granted its decision causes no severe hardship or injustice and

imposes no intolerable burdens. Its prior ruling should stand.

RESPECTFULLY SUBMITTED this 19th day of October, 1978.


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AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Geniel Johnson, being first duly sworn, says: That she is employed by the law firm of Hansen & Orton, Attorneys for Plaintiff and Appellant, that she served the attached Appellant's Brief in Opposition to Petition for Rehearing upon Defendants and Respondents by placing a true and correct copy thereof in an envelope addressed to the following:

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and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 20th day of October, 1978.

Geniel Johnson

SUBSCRIBED AND SWORN to before me this 20th day of October, 1978.

Martha J. Brinkerhoff
NOTARY PUBLIC

MY COMMISSION EXPIRES:

RESIDING AT:

Salt Lake County, Utah

