

1979

## Zeblen v. White, et al. v. Intermountain Health Care, Inc : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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ZEBLEN V. WHITE, et al.,	)	
	)	
Plaintiffs-	)	
Appellants,	)	
	)	
vs.	)	Case No. 16266
	)	
INTERMOUNTAIN HEALTH	)	
CARE, INC., et al.,	)	
	)	
Defendants-	)	
Respondents.	)	

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REPLY BRIEF OF APPELLANTS

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Appeal from Judgment of the Third Judicial District  
Court of Salt Lake County, State of Utah

Honorable Bryant H. Croft, Judge

---

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REPLY BRIEF OF APPELLANTS

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The Plaintiff-Appellant, Zeblen V. White, an incompetent, respectfully submits the following Reply Brief in response to the Brief of Respondent, Peter S. Quintero, filed on the 20th day of June, 1979, and the Brief of Respondent, Intermountain Health Care, Inc., filed on the 13th day of August, 1979.

ARGUMENT

POINT I

RETROACTIVE APPLICATION OF THE 1979 AMENDMENTS TO THE HEALTH CARE ACT DOES NOT DEPRIVE RESPONDENTS OF ANY CONSTITUTIONALLY PROTECTED "VESTED RIGHT".

The Court is referred to the Reply Brief of Amicus Curiae Larry Cleghorn in Case No. 16329, which case has been consolidated herewith for hearing, pages 1 through 5. To avoid undue repetition, the arguments contained in that brief are incorporated herein by reference.

## POINT II

THE PASSAGE OF THE AMENDMENT TO §78-14-8 AS ENACTED BY THE LEGISLATURE IN 1979 DOES NOT VIOLATE ARTICLE VI, §22 OF THE CONSTITUTION OF UTAH.

Article VI, §22 of the Constitution of Utah provides in pertinent part:

. . . No bill shall be passed containing more than one subject, which shall be clearly expressed in its title.

Respondent cites a portion of the opinion in State v. Kallas, 97 Utah 492, 94 P.2d 414 (1939), as providing that the purpose of the above constitutional requirement is to lead to "an inquiry into the body of the act to ascertain changes proposed in the original and existing law." In so doing, Respondent conveniently ignored the paragraph immediately preceeding the one which he cites. This paragraph provides as follows:

The title of an act amendatory of a law, in force and effect at the time of the enactment of the amendatory act, giving the number of the section of the original law designated to be amended, is sufficient notice to the legislature and to the public as reasonably to lead to an inquiry into the body of the bill to ascertain what changes are proposed in the original or existing law, or that could have been included in the original and existing law may be included in any subsequent act amendatory other than existing law. (Emphasis added.) State v. Kallas, supra.

The title of House Bill 164, the bill setting forth the amendment to the Health Care Act, reads as follows:

AN ACT AMENDING §§78-14-4 and 78-14-8, UTAH CODE ANNOTATED, 1953, AS ENACTED BY CHAPTER 23, LAWS OF UTAH, 1976;  
RELATING TO HEALTH CARE MALPRACTICE: PROVIDING THAT THE

LEGAL DISABILITY OF AN INDIVIDUAL SHALL NOT ACT TO EXTEND THE STATUTE OF LIMITATIONS SET FORTH IN THAT SECTION; PROVIDING THAT NOTICES OF INTENT TO BRING MALPRACTICE ACTIONS BE SIGNED BY THE PLAINTIFF OR HIS ATTORNEY; PROVIDING THAT THE NOTICE MAY BE SERVED BY CERTIFIED MAIL; AND EXTENDING THE TIME FOR COMMENCEMENT OF ACTIONS WHERE THE NOTICE IS SERVED LESS THAN 90 DAYS PRIOR TO THE EXPIRATION OF A STATUTE OF LIMITATIONS.

This clearly sets forth the "number of the section" designated to be amended. It is, therefore, sufficient notice to the legislature and to the public as "reasonably to lead to an inquiry into the body to ascertain what changes are proposed."

Further, in State v. Edwards, 34 Utah 13, 95 P. 367 (1908), the Court stated that if "by any reasonable construction, the title of the act can be made to conform to the constitutional requirement, it is the duty of the Courts to adopt this construction rather than another (if the title be open to more than one construction) which will defeat the act."

It is, therefore, clear that Respondents' argument that this last portion of §78-14-8, as amended, is unconstitutional as a violation of Article VI, §22 of the Constitution of Utah is entirely without merit.

### POINT III

AS THE 1979 AMENDMENTS AFFECT ONLY MATTERS OF PROCEDURE, THEY ARE APPLICABLE TO MATTERS PENDING ON APPEAL.

Respondent-Quintero's Point IV, pages 14 through 16, and Point V, pages 19 through 21, are contradictory on this point. On page 15 he cites a New York case for the principle that procedure must be governed by the law regulating it at the time the



question of procedure arises. On page 20 he cites the well established Utah law that all pending actions will be governed by amendments to remedial or procedural statutes. Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909) and Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948).

He thus argues that §78-14-8 should be applied retrospectively but that the 1979 amendments thereto should be applied prospectively, if at all. This is obviously incorrect. The original act expressly provides that only the provisions relating to the statute of limitations (those provisions contained in §78-14-4) are to be applied retroactively. The 1979 amendments reaffirm and clarify this statement which is contained in §78-14-11 of the original act. The amendments merely clear the ambiguities that, with all due respect, have been placed on the language of the act by judicial interpretation.

Respondents also argue that "if §78-14-11 intended that only §78-14-4 was to be applied retroactively, then §78-14-11 would thereby be rendered superfluous and redundant." This is clearly not the case.

Appellant acknowledges that a fundamental rule of statutory construction requires us to assume that all the words in a statute have been included for a purpose. See Horman v. Liquor Control Commission, 21 Utah 2d 294, 445 P.2d 4 (1968) and 73 Am. Jur. 2d, Statutes, §250.

The phrase in §78-14-11, "with the exception of the provisio

relating to the limitation on the time for commencing an action," is essential for the clarity of that section and to avoid the conflict that would otherwise arise between it and §78-14-4. If the phrase set forth in quotation marks above were not included in §78-14-11, that section would read as follows, "The provisions of this act shall not apply to injuries, death or services rendered which occurred prior the effective date of this act." §78-14-4 (2) would read in pertinent part, "The provisions of this section . . . shall apply retroactively . . . ." There would thus be a conflict between these sections. To avoid this conflict and for clarity, the legislature apparently included the phrase, "with the exception of the provisions relating to the limitation on the time for commencing an action" in §78-14-11. This phrase clearly refers to §78-14-4 which contains the "provisions relating to the limitations on the time for commencing an action."

§78-14-11 is clearly neither superfluous nor redundant. It is necessary to avoid an otherwise obvious conflict and to clarify the legislature's intent. The legislature has simply had to correct the judiciary's erroneous interpretation by adopting the 1979 amendments which remove all doubt as to this question.

#### POINT IV

§78-12-36, U.C.A., 1953, AS AMENDED, IS APPLICABLE TO THE CASE AT BAR.

Appellant has been legally incompetent since the initial occurrence of Defendants-Respondents' acts giving rise to this

action. It is not determinative that actions were filed in the Appellant's name prior to the official appointment of a guardian for him. A person under a disability may institute a suit during the period of his disability. 51 Am. Jur. 2d, Limitation of Actions §181, Page 749.

Furthermore, §78-14-4(2) by its terms, allows a claimant to file any time after the effective date of the act (April 1, 1976), to the extent there is an unelapsed portion of time as "allowed under the former law." This point is fully discussed in Point V of Appellant's brief. In summary of that point, Plaintiff was under a legal disability and under former law, this tolled the running of the statute of limitations. Therefore, no time had elapsed against the Appellant as per the "former law" as of April 1, 1976.

Also, in the very least, the time of the Appellant's incompetency is a question of fact and he is entitled to a factual determination of this issue by a trier of fact. A legal disability may rest upon an incompetent person even though the question of his competency has never been the subject of judicial inquiry. Brown v. Smith, 119 Colo. 469, 205 P.2d 239 (1949), Lentis v. Davidson, 60 Kan. 339, 56 P. 745 (1899).

#### CONCLUSION

Respondents are not the possessors of any constitutionally protected "vested right" herein. As the case is pending on appeal, any legislative amendment affecting remedial or procedural matters

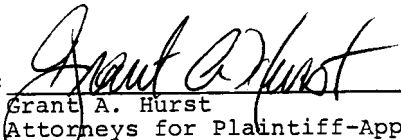
relevant hereto is applicable. Further, the title to H. B. 164 gives adequate notice to satisfy the requirements of Article VI, §22 of the Utah Constitution. Finally, Appellant's filing of actions prior to the time of setting forth his incompetency and having a guardian appointed for him does not affect the fact that he has been legally incompetent from the date the underlying cause of action accrued. In the very least, he is entitled to an evidentiary hearing on this question.

It is clear, therefore, that the 1979 statutory amendments are determinative of this matter. The case should be remanded for trial on the merits.

Respectfully submitted this 5<sup>th</sup> day of September, 1979.

MARSDEN, ORTON & LILJENQUIST

By:

  
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CERTIFICATE OF DELIVERY

Delivered a copy of the foregoing REPLY BRIEF OF PLAINTIFF APPELLANT ZEBLEN V. WHITE, et al., to Dan S. Bushnell and Larry R. White, Kirton, McConkie, Boyer & Boyle, 330 South Third East, Salt Lake City, Utah 84111, and to R. M. Child, Bayle, Child & Ritchie, 1105 Continental Bank Building, Salt Lake City, Utah 84101, this 6<sup>th</sup> day of September, 1979.

