2002

Suzanne Dowling v. Kathleen Bullen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SUZANNE DOWLING f.k.a. SUZANNE HOAGLAND, **Appellant/Respondent** **v.** **KATHLEEN BULLEN, TROLLEY CORNERS FAMILY THERAPY CLINIC, a general partnership, CANYON RIM PSYCHOTHERAPY, and John Does 1 through 20.** **Appellee/Petitioner.**	**Case No: 20021008 – SC**

BRIEF OF RESPONDENT PLAINTIFF SUZANNE DOWLING fka SUZANNE HOAGLAND

On Certiorari from an Opinion and Order Issued by the Utah Court of Appeals on November 7, 2002

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PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption

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STATEMENT OF JURISDICTION

Utah Code Annotated Sections 78-2-2(3)(a) and (5) and 78-2-2(3)(j) confer jurisdiction upon this court to hear this matter.

STANDARD OF REVIEW

This case is before the Court on Certiorari from the Opinion and Order of the Court of Appeals, which reversed the District Court's grant of Summary Judgment. This Court reviews the Appellate Court's decision for correctness and, in doing so, applies the same standard.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following sections of the Utah Health Care Malpractice Act, §78-14-1, et seq., control the outcome of this case. They are set forth in the Appendix section of the

Appellant's Brief.

Section 78-14-2

Section 78-14-3 (10)

Section 78-14-3(14) (currently numbered as 78-14-3 (15))

Section 78-14-3 (20) (currently numbered as 78-14-3 (21))

Section 78-14-3 (32) (currently numbered as 78-14-3 (32))

Section 78-14-4 (1)

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

In the latter part of 1994, Suzanne Dowling's (Dowling) daughters were taken to a Licensed Clinical Social Worker (Bullen) to receive counseling. Dowling also began a form of individual counseling along with her husband James Dowling (James) at that time. In January of 1996, James filed for a divorce from Dowling. The divorce was finalized on September 26, 1996. Upon the issuance of the Decree of Divorce, James announced his intentions to marry Bullen. At this same time Dowling became privy to information indicating that Bullen had begun an intimate relationship with James during his counseling sessions with her. This intimate relationship occurred prior to James filing for divorce.

Bullen treated James individually and apart from Dowling. In her counseling of James, which, incidentally, was to assist in the reparation of the family not its destruction, she started an intimate relationship that led to the destruction of Dowling's marriage. Dowling was not aware of Bullen's behavior until the Divorce Decree was finalized.

Dowling filed suit against Bullen within four years time of learning about Bullen's inappropriate relationship with her then husband. The Complaint was filed September 25, 2000. The Complaint alleged, among other things, alienation of affections because of Bullen's inappropriate conduct with James Hoagland. See Complaint, R. at 7 ¶¶51-57.

Once the Complaint had been filed Bullen moved for summary judgment arguing that the matter was barred by Utah Code Ann. section 78-14-4 (1996) of the Utah Health Care Malpractice Act. The District Court reviewed the undisputed facts submitted by the parties and ruled in Bullen's favor.

Dowling appealed the decision arguing that she was not subject to the two year Utah Health Care Malpractice Act's two-year statute of limitation because Bullen's behavior with James was not related to the healthcare/counseling she provided to Dowling and her daughters. 2002 UT App. 372 ¶¶ 7-10. Rather, the inappropriate behavior took place when Bullen and James Hoagland were together.

The Court of Appeals decided that, when read as a whole, the Utah Health Care Malpractice Act's two year statute of limitation did not govern Dowling's alienation of affections allegation. 2002 UT App. 372 ¶ 10. The Court of Appeals ruled that "the alleged alienation of affections, while arguably 'relating to or arising out of health care rendered' to James, (citations omitted), did not relate to or arise out of the health care rendered to Dowling." *Id.* Presumptively, the Court of Appeals ruled that Dowling's claim was to be governed by the general four-year statute of limitation found in Utah Code Ann. §78-12-25 (1996). *See generally* 2002 UT App. 372 ¶ 11; see also 2002 UT

App. 372 ¶ 11 FN. 2, the Utah Court of Appeals did not reach Dowling's claim for intentional infliction of emotional distress.[1]

Statement of the Facts

1. Suzanne Dowling was married to James Anthony Hoagland, Jr., and they resided with their two children in their marital home in Salt Lake City prior to their divorce on September 26, 1996. Complaint, R. at 3, ¶ 12.

2. Therapy was provided first to Dowling's two minor daughters and then subsequently to Dowling and James as part of family counseling, which continued until approximately June of 1996. Complaint, R. at 3, ¶¶ 14-16.

3. During January of 1996, James Hoagland filed a Petition for Divorce from Dowling and Bullen continued to counsel various members of the family. Complaint, R at 3, ¶16 and 18.

4. In February of 1996, one month after James Hoagland filed for divorce, Bullen suggested that Dowling see another counselor, specifically Susan Culbertson. Complaint, R. at 3, ¶19.

5. On or about September 26, 1996, James Hoagland was granted a divorce from Dowling. Complaint, R. at 3, ¶20.

6. During this same time period and in close proximity to the granting of the Divorce between James and Dowling, James and Bullen announced that they were dating, which ultimately ended in marriage. Complaint, R. at 4, ¶ 21.

7. Dowling subsequently learned that Bullen and James had initiated an intimate relationship prior to James filing for divorce. Complaint, R. at 4, ¶ 22.

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[1] In actuality the complaint did not assert a claim for intentional infliction of emotional distress, rather it asserted a cause of action for negligent infliction of emotional distress. Complaint, R. at 4, ¶¶ 23-30.

8 On or about September 25, 2000 Dowling filed a complaint against Bullen, Trolley Corners Family Therapy Clinic, Canyon Rim Psychotherapy and John Does 1-20. Complaint, R at 1, pg. 1.

9. Dowling sued Bullen under numerous causes of action, including but not limited to, negligent infliction of emotional distress and alienation of affection. Complaint, R. at 4 and 7, ¶ 23-30 and ¶ 51-58.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly interpreted the plain language of the Utah Health Care Malpractice Act. The language in the act when read as a whole lead the Appeals Court to correctly conclude that Ms. Dowling's alienation of affections claim fell outside the parameters of the act and that the factual record in this matter correctly and adequately shows this position.

ARGUMENT

I. The Utah Healthcare Malpractice Act does not cover Ms. Dowling's Alienation of Affections claim and therefore is not applicable in this matter.

The gravamen of this case hinges on the interpretation of the Utah Healthcare Malpractice Act (hereinafter the "Act") and whether the Act is broad enough to reach Ms. Dowling's Alienation of Affections claim. The Act has various key definitions that determine whether claims fall within its parameter. The definition section is found in 78-14-3. *Dowling v. Bullen*, 2002 UT App 372 at ¶5, ¶8, ¶958 P.3d 877 at 878. The two definitions that the Court of Appeals focused on in making their ruling were sections 78-

14-3(10) and 78-14-3(15). Code section 78-14-3(10) defines "Health Care," and code section 78-14-3(15) defines "Malpractice action against a health care provider."

In order for the Act to apply Ms. Dowling's interaction with Ms. Bullen must qualify as "health Care" as defined in the Act. The Act defines health care as:

> any *act* or *treatment performed* or *furnished*, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient *during the patient's medical care, treatment, or confinement.*

(emphasis added) Utah Code Ann. §78-14-3 (10) (2002). The Act appears to be all encompassing in that it covers "any act or treatment performed or furnished" by the health care provider. The issue, however, falls on what the legislature intended "any act or treatment" to mean. Surely the legislature would have required that the act or treatment be of the type the health care provider was trained to provide in that it relates to medical or health care. In the present matter, Ms. Bullen's actions could not have been the type that the legislature would have contemplated in its "any act or treatment" language. Ms. Bullen's behavior in starting a sexual relationship with Mr. Dowling during his therapy, thereby alienating Ms. Dowling, cannot be considered an "act or treatment" which was "performed or furnished during the patient's medical care, treatment, or confinement" because it did not relate to or arise out of medical treatment or healthcare treatment. Utah Code Ann. §78-14-3 (10) (15) (2002).

The case of *Norton v. Macfarlane*, 818 P.2d 8 (Utah1991), is illustrative of the foregoing argument. In *Norton*, Macfarlane the Defendant as a physician "developed an improper and undue influence over Sherry Norton and that he induced her by means of that influence to abandon and leave her husband, home and children." *Norton*, 818 P.2d at 9. In *Norton* the plaintiff was able to pursue his cause of action against the physician

that used his influence to induce his spouse Sherry Norton into leaving the marriage. *Id* at 15. The most significant fact is that the Act is not mentioned in the case anywhere as a defense. Presumably, because Dr. Macfarlane's actions of beginning a sexual relationship with his patient were so far removed from anything closely related to the medical profession that the Act was inapplicable.

II. The Appellate Court's Decision is Distinguishable with Jensen v. IHC Hospitals, Inc., 944 P.2d 327 (Utah 1997).

In reaching its decision the Utah Court of Appeals focused on sections 78-14-3(10) and 78-14-3(15) of the Utah Health Care Malpractice Act (hereinafter "the Act"). 2002 UT App. 372 ¶¶ 8-9. The Appellate Court noted that when these two sections of the statute were read as a whole the Act required "that the healthcare in question must have been provided to the complaining patient," and when applied to Dowling, the Appellate Court noted that she was not complaining about her healthcare nor was she the complaining patient. *Id* at ¶¶ 9-10. Petitioner claims that the Appellate Court's opinion conflicts with this Court's decision in *Jensen v. IHC Hospitals, Inc.,* 944 P.2d 327 (Utah 1997).

In *Jensen,* Shelly Hipwell (hereinafter "Hipwell"), a young pregnant mother experienced severe abdominal pains the day before she was scheduled to be induced and deliver her second child. 944 P.2d at 329. Hipwell went to the emergency room at the McKay-Dee Hospital, on December 12, 1988, after experiencing the pains and was subsequently sent home. *Id.* Hipwell returned the following day to McKay-Dee for a caesarian delivery and experienced numerous complications while delivering. *Id.*

Hipwell was transferred from McKay-Dee to the University of Utah Hospital and while there she suffered "anoxic brain damage after a resident physician punctured her

heart with a biopsy needle, leaving her in a coma, totally and permanently disabled." *Id* Hipwell eventually died three and a half years later on May 27, 1992. *Id.* No complaint was filed in the matter until July 29, 1992, some three and a half years after the alleged medical malpractice took place and three months after Hipwell's death.

This Court was presented with the issue of whether the wrongful death statute of limitations, found in Utah Code Ann. §78-12-28(2), or the Act's statute of limitations found in §78-14-4, governed the survivors' claims. This Court was faced with two statutes that purportedly covered the same subject. To resolve the dilemma this Court sought to determine legislative intent to guide it in its choice of statutes. 944 P.2d at 331. This Court in reaching its decision followed the general rules of statutory construction, which posit that "the best evidence of legislative intent is the plain language of the statute," *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 879 (Utah 1993) (citing *Jensen v. Intermountain Health Care, Inc.,* 679 P.2d 903, 906 (Utah 1984)), and that " 'a more specific statute governs instead of a more general statute.'" *De Baritault v. Salt Lake City Corp.*, 913 P.2d 743, 748 (Utah 1996) (quoting *Pan Energy v. Martin*, 813 P.2d 1142, 1145 (Utah 1991) (citations omitted).

This Court then stated that the Medical Malpractice Act's plain language "indicates a legislative intent to have the statute apply to claims" like those being brought by Hipwell. *Jensen* at 331. This Court noted that §78-14-4 of the Act provides, "No malpractice action ... may be brought unless it is commenced within two years after the plaintiff or patient discovers ... the injury." *Jensen* at 331 (quoting Utah Code Ann. 78-14-4 (1996)). Malpractice action is defined under the Act as "any action against a health care provider, whether in contract, tort, breach of warranty, *wrongful death*, or otherwise,

based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider." *Jensen* at 332 (quoting Utah Code Ann. 78-14-3(14) (1996))(emphasis added). The Act was determined to be more specific in that it specifically lists wrongful death as being subject to the Act's statute of limitations. *Jensen* at 332.

In applying *Jensen* to the Court of Appeals decision, it is very apparent that the two cases are distinguishable. First, the malpractice that occurred in *Jensen, arose out* of and was *related to* the treatment furnished by Shelly Hipwell's physician to Shelly Hipwell during her medical care. (emphasis added). These facts when juxtaposed with the decision by the Court of Appeals do not cause contradiction or conflict rather they show two completely different factual scenarios.

These factually distinct scenarios are more easily understood after having analyzed two sections of the Act. The Court of Appeals analyzed sections 78-14-3(10) and 78-14-3(15), which led it to conclude that the Act "requires that the healthcare in question must have been provided to the complaining patient." 2002 UT App. 372 at ¶ 9. In comparing *Jensen* with the Court of Appeals decision the factual distinction arises when comparison is made regarding the complaining patients. In *Jensen* the complaining patient was Ms. Hipwell, who ultimately passed away because of the malpractice committed against her. In the Court of Appeals decision James Hoagland would need to be classified, like Ms. Hipwell, as the complaining patient in order to be factually similar. However, James Hoagland is not the complaining patient and as of this date James Hoagland has yet to complain of his treatment with Bullen and presumably will never bring a claim being that they are married. The Court of Appeal's application of its

complaining patient theory to Dowling's alienation of affection claim reveals the factual distinction of the two cases. The Court of Appeals stated the following:

> Dowling's alienation of affection claim while arguably 'relating to or arising out of health care rendered to James (citations omitted), did not relate to or arise out of the health care rendered to Dowling. Dowling the patient, has not complained of "any act or treatment performed or furnished ... by [Bullen] for, to, or on behalf of [Dowling] during [Dowling's] medical care or confinement." Utah Code Ann. §78-14-3(10).

As stated, in *Jensen*, Ms. Hipwell's claim of malpractice related to and arose out of the health care rendered to her and therefore her relative's claims arose out of the same health care rendered to her. Therefore, the Court of Appeals was justified in classifying Dowling's alienation of affection claim outside the scope of the Act's two-year statute of limitations.

III. The Court of Appeals Interpreted the Utah Health Care Malpractice Act According to its Plain Meaning, Which Resulted in a Logical outcome.

The Court of Appeals followed two sections of the Utah Health Care Malpractice Act to their logical conclusion in reaching its decision. The two sections are Utah Code Ann. §78-14-3(10) and §78-14-3(15). Section 78-14-3(10) defines "health care" as:

> any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

Section 78-3-(15) defines "malpractice action" as:

> any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider.

The Court of Appeals reached the conclusion that the Utah Health Care Malpractice Act (the "Act") applies when health care is provided "for, to, or on behalf of a patient during the patient's medical care." See UT App. 372 at ¶ 9. The Appellate Court read the aforementioned section of the Act in conjunction with section 78-14-3(15), "which requires that the injuries relate to or arise out of 'health care,'" which led the Appellate Court to hold that "the Act requires that the health care in question must have been provided to the complaining patient." See UT App. 372 at ¶ 9, Utah Code Ann. §78-14-3(15).

The Court of Appeals interpretation of the Act is the logical conclusion to the plain language found therein. Derivative claims such as subrogation, indemnity and the like are not extinguished with the Court of Appeals interpretation of the Act so long as the health care out of which the derivative claim arises is "provided for, to, or on behalf of a patient *during the patient's medical care, treatment or confinement.*" UT App. 372 at ¶ 9, Utah Code Ann. §78-14-3(15) (emphasis added). Dowling's claim of alienation of affection does not relate to health care "provided for [her], to [her], or on [her] behalf *during [her] medical care treatment or confinement.*" Utah Code Ann. §78-14-3(15).(emphasis added). Furthermore, malpractice actions under the Act must "[relate] to or [arise] out of health care rendered or which should have been rendered by the health care provider." As the Court of Appeals correctly determined Dowling's claim of alienation of affection did not relate to or arise out of the health care that Bullen provided to her. UT App. 372 at ¶ 10.

The Petitioner argues that the Court of Appeals has removed the malpractice claim of breach of confidentiality. The Petitioner assumes too much; all breach of

confidentiality malpractice actions will be subject to the Act so long as the complaint or derivative action is brought by or on behalf of the "complaining patient." See UT App. 372 at ¶ 9.

The Petitioner further argues that Bullen's treatment of James was on Dowling's behalf because she was trying to help Dowling, James and the two daughters all at the same time. Once again the Petitioner assumes more than the facts have revealed. We do not know the details of Bullen's sessions with James and we cannot make the assumption that those sessions were of benefit to Dowling. Furthermore, the Act makes it clear that the health care must be "*during the patient's medical care, treatment or confinement.*" Utah Code Ann. §78-14-3(10)(emphasis added). To impute that James' counseling sessions were of benefit to Dowling and that they were "during [Dowling's] medical care, treatment, or confinement" is to use the statute in an absurd manner. Bullen counseled James individually, presumably, because of the status of James and Dowling's family those sessions were not of benefit to Dowling nor were they during Dowling's medical care.

IV. The Court of Appeals Decision is Based on Facts that are Supported by the Record.

The Court of Appeals correctly recognizes that Dowling's alienation of affection allegation did not arise out of or relate to her medical treatment nor was it provided for, to, or on her behalf. UT App. 372 at ¶ 9, Utah Code Ann. §78-14-3(15), Utah Code Ann. §78-14-3(10). In Dowling's complaint the alienation of affection claim expressly relates to Bullen's treatment of James. The allegations state "Defendant Bullen, by her actions in divulging Plaintiff's confidences, used her position of trust and influence as a licensed clinical social worker and family counselor, to poison Plaintiff's husband against

Plaintiff." Complaint, R. at 7, ¶ 53. The only time that Bullen would have been capable of alienating Dowling's affections would have been when Bullen and James were alone. The Petitioner's position that Dowling's complaint did not allege that the actions by Bullen were undertaken only during the treatment of James is erroneous based on the above argument.

CONCLUSION

The Utah Health Care Malpractice Act is not applicable to Dowling's alienation of affections claim, and therefore this Court should uphold the decision made by the Court of Appeals by holding that the general four year statute of limitations is applicable.

Dated this 27TH day of June, 2003.

WINGO RINEHART & McCONKIE

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CERTIFICATE OF MAILING

I certify that on the 27TH day of June, 2003, I caused two (2) copies of Plaintiff Dowling's Brief on Appeal to be hand delivered and mailed, first-class postage prepaid, to:

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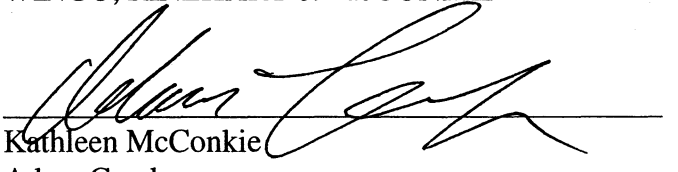

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