1988

Duane Quistberg v. Gerald N. Goodman : Reply to Brief in Opposition

Utah Supreme Court

David Slagle; Attorneys for Defendants.
Samuel King; Attorney for Plaintiff.

IN THE SUPREME COURT OF THE STATE OF UTAH

DUANE QUISTBERG, Plaintiff/Appellant/ Petitioner, vs. GERALD N. GOODMAN and BRYNER CLINIC, a Utah Corporation, Defendants and Respondents, and GARY RANSOM, Defendants/Respondents.	PETITIONER'S REPLY Supreme Court No. 880472 Court of Appeals No. 890270-CA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SAMUEL KING
Attorney for Plaintiff/Appellant
2120 South 1300 East, Suite 301
Salt Lake City, UT 84106
486-3751

DAVID SLAGLE
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Gerald N. Goodman
and Bryner Clinic, Defendants/ Respondents
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111
521-9000

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PETITIONER'S REPLY

Defendants' Brief in Opposition has restructured the issues.

This Reply is submitted so that the real issues remain defined.

The interesting case involves when and to what degree general principles of law should be modified for philosophic consistency and for individual justice. This is such a case, yet defendant submits only general law or avoids issues altogether.

On first reading, the Brief in Opposition is powerful and persuasive. Its adjectives are beautifully chosen. Petitioner asks it be reread with the following questions in mind.

FIRST. EXCEPTIONS. The question is, how detailed need Exceptions be when no notice will be taken of them by the trial court nor remedy made as it has already instructed the jury and the judge has retired to chambers? (Petition, Point IV).

The Brief in Opposition does not refute these facts, yet it reads as if the judge was in fact present so that he would have notice of the Exceptions (Brief in Opposition, P.15: "Objections [sic] must be sufficiently specific to give the trial court notice of the claimed error.")

The Brief in Opposition also states, "This issue was fully and completely dealt with by the Utah Court of Appeals." (Brief in Opposition, P.15.) How did that court deal with the issue "fully and completely" when there is no word in that decision

concerning the judge's absence? Respondent's brief is the answer.

In its Brief in the Court of Appeals, at pages 25-26, defendant wrote in a similar vein--that the Exceptions did not give the judge adequate notice, omitting the vital fact that the trial was over except for the verdict. This led the Court of Appeals to its mistake of fact as to the judge's absence, or it would surely have dealt with that inescapable preliminary issue before it dealt with the Exceptions themselves.

Why in the Utah Supreme Court has defendant written its brief to again give the impression that the judge was present?

Resolution of the issues of whether a judge should formally hear formal Exceptions before it instructs a jury, rather than just the ragged debate of instructions in chambers, and what detail need the Exceptions have when given after the jury is instructed and the judge gone, is important to Utah law.

SECOND. COACHING. Defendant admitted his attorney told him the answers during his deposition. (Petition, Appendix G, P.5, L4; P6, L.2-12.) This raises the questions squarely, as stated in the Petition (Point I), is such conduct justifiable and, if not, what sanctions are proper? Defendant's Brief in Opposition submits no law to justify defendant's counsel's conduct nor to explore the sanctions. Utah has no case in point.

Respondent has submitted a version of what occurred at the doctor's deposition that makes the doctor and his counsel blameless. (Brief in Opposition, Pp. 11-12.) This version does

not accord with Respondent's Brief in the Court of Appeals (at Pp. 25-26), nor with the deposition transcript. (Petition, Appendix G, P.4, L.7- P. 6, L.12.)

Why does Respondent do this? The answer is in the context of the deposition.

The deposition tactics are clear enough. The doctor denied authorizing refills, so he was taken through a foundation to rebut that answer--the pharmacist had testified he received authorization for each refill and had a precise, dated, record of his requests. The doctor didn't enter refills on his patient's charts, couldn't even remember who the patient was having not seen him in four years; however, based on his chart he was prepared to authorize refills. With that deposition testimony in place, plaintiff's counsel needed only two more questions: (1) "You would have authorized refills if requested?" and, (2) "You can't swear under oath that the pharmacist lied when he testified he called for refill authorization, in truth you can only say you don't remember?"

With those two answers, the doctor could no longer categorically deny he authorized a single refill. Instead, he could only confess that due to his inadequate charting,he didn't know. That ends the doctor's defense. His counsel took him from the room at question one.

Respondent says plaintiff should have filed a pre-trial motion for redress. (Brief in Opposition, P.14.) His counsel gave it serious thought, but without case law and sanctions to

guide the trial court, that would have been fruitless. As this case shows, such case law is sorely needed. If the aggrieved party has an immediate remedy at the trial level, witness coaching will be less common, and honest answers more common.

THIRD. PRIVILEGE. The question is, may an attorney claim privilege as to what he says to his client, when what he has done is substitute his testimony for his clients as to a pending question? Petitioner submitted cases in point (Petition, Point II). Respondent cited only cases as to the general rule of attorney-client confidentiality. The issue is whether this case merits an exception to the general rule. The Brief in Opposition is entirely silent as to this real issue.

FOURTH. DOCTOR'S DUTY. What is the law in Utah as to the duty of a doctor to protect his patient from addicting? The Petition addresses this (Point III--doctor's duties, Point IV--Instructions on doctor's and patient's rights and duties).

Defendant's brief is silent.

The testimony at trial, based on an exhaustive State of Utah study, was that Utah's largest group of drug addicts is addicted to prescription drugs. (T.324, L.19-25.) There are more of these addicts, according to the study, than street drug addicts. If one considers how many street drug addicts we have, the study's findings, which were conceded at trial, are appalling. This means a tremendous amount of human harm to addicts and their families while the addict is being supplied by his doctor.

Due to the tremendous social consequences of such addictions, and this being a case of first impression in Utah, it is submitted that it is of great importance that the Utah Supreme Court write an opinion for the guidance of doctors, their counsel and the courts concerning the doctor's duties. This would put Utah in line with the other jurisdictions that have considered the matter. (Petition, P. 14.)

On pages 8-10 of Respondent's Brief in Opposition, it is argued that the Petition does not state "special or important reasons" for granting Certiorari. On the contrary. It is precisely that measure of "... judicial discretion..." to which the plaintiff's Petition is addressed. (Rule 43, Rules of the Utah Supreme Court.)

What is involved here is an extraordinary public policy consideration which conceivably outweighs all other concerns in this matter and places the full impact of Rule 43 behind the plaintiff's Petition. To what extent does the court impose accountability upon a licensed medical practitioner to meet the duties of his profession? In this regard, the plaintiff has cited the statutes and the dispositive case law on the subject clearly and directly on point with respect to the physician's duty. (Petition, Pp. 13, 14, 17.)

DATED August 16, 1990.

Respectfully submitted,

SAMUEL KING

MAILING CERTIFICATE

I certify that I mailed four copies of the foregoing Reply Brief to David Slagle, SNOW, CHRISTENSEN & MARTINEAU, attorneys for Gerald N. Goodman and Bryner Clinic, defendants/respondents, P. O. Box 45000, Salt Lake City, Utah 84145, U. S. mail, postage prepaid, August 16, 1990.

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SAMUEL KING

WP:Quist.Mail