1982

Diana Behrens v. Raleigh Hills Hospital, Inc. : Brief of Respondent

Utah Supreme Court

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Robert F. Orton; Attorney for Respondent;

IN THE SUPREME COURT
OF THE STATE OF UTAH

DIANA BEHRENS, individually and as Guardian ad Litem of NATHAN ALAN BEHRENS,	:	
Appellant,	:	Case No. 18093
vs.	:	
RALEIGH HILLS HOSPITAL, INC.,	:	
Respondent.	:	

BRIEF OF RESPONDENT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE G. HAL TAYLOR

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I. NATURE OF THE CASE

This is an interlocutory appeal from the denial of Appellant's Motion to Amend her Complaint to include a claim for punitive damages in this wrongful death medical malpractice action.

II. DISPOSITION IN LOWER COURT

The Third Judicial District Court denied Appellant's Motion to Amend her Complaint.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the Order of the District Court enabling the parties to pursue the resolution

of the issues framed in the pleadings on file in said lower court.

IV. STATEMENT OF FACTS

Because of the inclusion in Appellant's Brief of several material misstatements and numerous points of argument irrelevant to this appeal, and pursuant to the Order of this Court dated April 5, 1982, declaring the issues raised here to be only of law, Respondent submits the following Statement of Facts:

On the 16th day of July, 1978, Robert Alan Behrens suffered self-inflicted injuries while a self-admitted patient at Respondent's hospital. From these injuries he died on or about the 20th day of July, 1978 (R. 35, 36). On the 13th day of July, 1979, Appellant served upon Respondent a Notice of Intention to Bring Action for Malpractice relating to the death of Mr. Behrens (R. 4).

On or about the 11th day of October, 1979, Appellant filed a civil action under Utah's Wrongful Death Statute, against Respondent, claiming the death of Robert Alan Behrens was the proximate result of the negligence of Respondent, and seeking compensatory damages only (R. 2-5). The Complaint commencing said action was amended by an Order of the district court to conform with the Notice of Intention required by Utah Code Ann. § 78-14-8 (1953, as amended) (R. 25-30).

On or about the 22nd day of September, 1981, Appellant filed a "Notice of hearing on Plaintiff's Motion to Amend Complaint" and a "Memorandum of Points and Authorities" and served copies thereof upon Respondent's counsel (R. 454-456, 458). Appellant did not, however, file or serve any motion, nor was a motion stated in the Notice of Hearing. On the 6th day of October, 1981, a hearing on the unstated motion was held before the Honorable G. Hal Taylor, Third Judicial District Court Judge. On the 13th day of October, 1981, Judge Taylor issued an Order Denying Plaintiff's Motion to Amend Complaint (R. 468-469). Appellant's Petition to Grant an [Interlocutory] Appeal was granted by this Court on the 1st day of December, 1981 (R. 474).

V. ARGUMENT

A. APPELLANT'S MOTION TO AMEND COMPLAINT WAS NOT PROPERLY BEFORE THE DISTRICT COURT.

Rule 7(b)(1) of the Utah Rules of Civil Procedure provides:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Appellant neglected to file with the court or serve upon Respondent a Motion to Amend in writing stating "with particularity the grounds therefor." She failed to

otherwise fulfill this requirement by stating her Motion or offer the grounds therefore in her Notice of Hearing. Moreover, she failed to file, for perusal by the Court and Respondent's counsel, a copy of the proposed Amended Complaint. Failing to properly make her motion, Appellant was correctly denied her request to amend her Complaint.

B. APPELLANT'S PROPOSED AMENDED COMPLAINT WOULD IMPROPERLY AND UNTIMELY ASSERT A NEW CAUSE OF ACTION.

On or about the 11th day of October, 1979, Appellant filed a Complaint, seeking compensatory damages for alleged negligent conduct of Respondent resulting in the "wrongful death" of Robert Alan Behrens. Said Complaint was later amended pursuant to Respondent's Motion to Strike, but there was never a claim for punitive damages until Appellant filed the above-described Notice of Hearing. By her unstated Motion to Amend the Complaint, Appellant seeks to add a second cause of action for punitive damages by reason of an alleged "intentional disregard" by Respondent for the safety of its patients (R. 454).

1. An Amendment to a Complaint May Not Allege a New or Different Cause of Action.

Rule 15(a) of the Utah Rules of Civil Procedure provides that a party may amend his pleading by leave of court "when justice so requires." This has been interpreted by this Court to allow amendments to complaints which do not constitute new or different causes of action.

Crane v. Crane, 102 Utah 411, 131 P.2d 1022, 1023 (1942); Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 484, 135 P.2d 919, 923 (1943).

> [T]he test is not whether under technical rules of pleading a new cause of action is introduced, but rather the test is whether a "wholly different cause of action" or "legal obligation" is introduced, that is, an amendment will be allowed if a change is not made in the liability sought to be enforced against the defendant.

Wells v. Wells, 2 Utah 2d 241, 172 P.2d 167, 170 (1954).

The anticipated Amended Complaint will set forth two "wholly different" causes of action: one for negligent conduct and one for an intentional tort. Only the new second cause will support Appellant's proposed prayer for punitive damages substantially changing Respondent's potential liability. Notwithstanding Appellant's contentions that the Amended Complaint will be based on "the same parties, the same incident, the same evidence, the same testimony, and the same documents" (R. 454-455), it is incontrovertable that a new and distinct cause of action is being raised thereby.

2. Any New Cause of Action Asserted by Appellant is Barred by the Statute of Limitations.

An action for damages resulting from a wrongful death of another person must be commenced within two years following said death. Utah Code Ann. § 78-12-28 (1953, as

amended). The time for raising a new cause of action from the alleged "wrongful death" of Robert Alan Behrens, therefore, expired on the 20th day of July, 1980; 14 months prior to Appellant's filing of the Notice of Hearing concerning her proposed Amended Complaint.

Unlike an amplifying amended complaint, an amendment which sets up a new cause of action, different and distinct from the original complaint, does not relate back to the commencement of action and the statute of limitations therefore may run against it to the time of filing. Peterson v. Union Pacific R.R., 79 Utah 213, 8 P.2d 627, 630 (1932). Inasmuch as Appellant attempts to set forth a new and different cause of action by amendment to her Complaint, such amendment should not be allowed as it would be contrary to recognized rules of practice and procedure in Utah and barred by the statute of limitations.

C. APPELLANT MAY NOT INCLUDE IN HER COMPLAINT ALLEGATIONS AND CLAIMS THAT ARE NOT SPECIFICALLY INCLUDED IN HER NOTICE TO COMMENCE MALPRACTICE ACTION.

After stating that a Notice of Intent to Commence Action is a prerequisite to the initiation of a medical malpractice action, Utah Code Ann. §78-14-8 (1953, as amended) provides: "Such notice shall include . . . specific allegations of misconduct on the part of the prospective Defendant, the nature of the alleged injuries and other damages sustained."

The Legislative Findings and Declarations of said Utah Health Care Malpractice Act specifically state that the purpose of the Act is "to provide other procedural changes to expedite early evaluation and settlement of claims." Utah Code Ann. § 78-14-2 (1953, as amended)(Emphasis added). Such early evaluation and settlement of claims can be accomplished only if the required Notice is timely given in strict compliance with requirements set forth in Section 78-14-8. Such notice would serve no purpose if the specific allegations of misconduct upon which the Plaintiff intends to rely are not set forth therein. It would be an anomaly to allow a prospective Plaintiff to set forth one or two specific allegations of misconduct in his Notice and subsequently come in with additional specific allegations of misconduct in his Complaint. This would thwart the express purpose of having the Plaintiff submit a Notice of Intent.

On July 13, 1979, a Notice of Intention to Bring an Action was served on Henry Blakley, Administrator of Respondent's Hospital. The fourth paragraph thereof sets forth the specific allegations of misconduct upon which the Appellant relies.

> The specific allegations of misconduct are that Mr. Behrens was allowed to obtain the instrument which caused his death contrary to the reasonable medical practices of health care by professionals attending a patient in Mr. Behrens' condition. Further, those in attendance knew or should have known of the dangers to Mr. Behrens by his mental

and emotional condition while in the Raleigh Hills Hospital.

(R. 4).

Appellant subsequently filed a Complaint herein, making several allegations of negligence which were not set forth in her Notice. In an Order of the district court dated the 21st day of December, 1979, said unconforming allegations were striken from the Complaint.

Appellant again seeks to Amend her Complaint by setting forth new allegations of Respondent's "intentional disregard for the safety" of its patients. There is no mention in Appellant's original Notice of any such allegations as are now sought to be added to the Complaint nor is a claim made for punitive damages.

After the district court's denial of Appellant's Motion to Amend and during the pendency of this Appeal, Appellant caused a second Notice of Intent to Commence Malpractice Action to be served upon Respondent. Apparently recognizing the insufficiency of the original Notice to support the proposed new allegations of intentional tort and prayer for punitive damages, Appellant mistakenly relied on Yates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980), hoping that the second Notice would legitimate the initiation of her new claim. Yates dealt with a defective Notice served prior to the initiation of a malpractice action, said defect being caused by technical nonconformance

with the statute. The subsequent Complaint was dismissed, not on its merits, and leave was given by this Court for the same action to be properly initiated pursuant to Utah Code Ann. § 78-12-40 (1953, as amended).

This case is distinct from Yates in several crucial ways: (1) The original Notice given here by Appellant was not defective and accordingly survives as a proper fulfillment of the required condition precedent for the pending malpractice action; (2) Appellant's original action has not been dismissed, rather the district court refused Appellant's request to add a new action; and (3) the desired change in Appellant's second Notice is substantive rather than procedural.

Inasmuch as the Appellant attempts to set forth specific allegations by amendment to her Complaint which were not set forth in her original Notice of Intent to Commence Action, such Amendment should not be allowed as it would be contrary to the law and purpose of the Utah Health Care Malpractice Act.

D. PUNITIVE DAMAGES ARE NOT RECOVERABLE IN AN ACTION BROUGHT PURSUANT TO UTAH'S WRONGFUL DEATH STATUTE.

Under the recognized "general rule," punitive damages cannot be awarded in a wrongful death action unless the governing statute expressly or by clear implication confers the right to such damages. 22 Am. Jur. 2d 704, Death, Section 136. (1965 & Supp. 1981). In the great majority of

states, the rule for damages in a wrongful death action is only to recover the pecuniary loss sustained by the survivors. Even when there are aggravating circumstances which would warrant punitive damages in another less severe injury, they are denied in a death action. Ford Motor Company v. Superior Court of the State of California 175 Cal. Rptr. 39, 41, 120 Cal. App. 3d 748 (1981); Mathies v. Kittrell, 350 P.2d 951, 953 (Okla. 1960); Burron's Estate v. Edwards, 594 P.2d 1064, 1065 (Colo. App. 1979); Johnson v. International Harvester Co., 487 F. Supp. 1176, 1177 (D.N.D. 1980); Currie v. Fitting, 373 Mich. 440, 134 N.W.2d 611 (1965); Hamrick v. Lewis, 515 F. Supp. 983, 988 (N.D. Ill. 1981); Rosenfeld v. Isaacs, 433 N.Y.S. 623, 625, 79 A.D. 2d 630 (App. Div. 1980); Rubeck v. Huffman, 54 Ohio 2d 20, 374 N.E. 2d 411 (1978); Wilson v. Whittaker, 207 Va. 1032, 154 S.E. 2d 124, 129 (1967); Greene v. Nichols, 274 N.C. 18, 161 S.E. 2d 521, 528 (1968); Wagen v. Ford Motor Company, 97 Wisc. 260, 294 N.W. 2d 437 (1980); Magee v. Rose, 405 A. 2d 143, 147 (Sup. Del. 1979); Huff v. White Motor Company, 609 F.2d 286 (7th Cir. 1979)(Indiana law); Wallace v. Ener, 521 F.2d 215, 222 (5th Cir. 1975)(Georgia law). This rule has generally been justified on the grounds that statutes authorizing actions for wrongful death, being in derogation of the common law, are to be strictly construed.

The Utah statute authorizing a civil action for the wrongful death of an adult, as set forth in Utah Code Ann. § 78-11-7 (1953, as amended), has remained an unchanged adoption of Lord Campbell's Act since 1933. This statute is not the basis for a survival action based on the decedent's transferred rights, but instead creates a new cause of action in the heirs of the decedent. Meads v. Dibblee, 10 Utah 2d 229, 350 P.2d 853, 855 (1960).

In Morrison v. Perry, 104 Utah 151, 140 P.2d 772 (1943), this Court addressed the nature of damages allowed under the Utah Wrongful Death Statute, as follows:

> The damages recoverable in an action such as this are set forth in 104-3-11. R.S.U.1933, as follows: "In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just." This is nothing more nor less than the law seeks in every case of actual or compensatory damages. Compensation for loss sustained. Under our wrongful death statute, 104-3-11, R.S.U.1933, the law does not seek to punish the wrongdoer, but simply to compensate the heirs for the loss sustained.

140 P.2d at 780 (emphasis added). The policy of this Court to limit damages allowable under this statute to "compensate survivors rather than to punish the tort feasor " was again recognized in Platis v. United States, 288 F. Supp. 254, 274 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir.1969). This joint legislative and judicial policy of permitting only compensatory damages to survivors under the Utah statute is

entirely consistent with the nature of a traditional wrongful death statute.

Appellant relies heavily on the recent Idaho case of Gavica v. Hanson, 608 P.2d 861 (Idaho, 1980) to convince this Court to abandon its precent of limiting damages under the Utah statute to those of compensatory nature. Although Gavica is similar in many respects to the present case, there are several unique policies recognized by the Idaho Court which preclude undue reliance by this Court on that opinion.

Prior Idaho Supreme Court decisions recognize a survival nature of a decedent's rights in a wrongful death action in Idaho. Doggett v. Boiler Engineering & Supply Company, 93 Idaho 888, 477 P.2d 511, 515 (1970); Helgeson v. Powel, 54 Idaho 667, 34 P.2d 957, 961 (1934). The cases from other states which the Gavica court cites for support in its reasoning all are based on statute providing for survival actions. Although the Court declared it "unnecesary to employ a survival action theory "to grant punitive damages in Gavica, its case authorities unanimously employ that theory. That court also expressly failed to find a legislative intent behind the Idaho statute to not punish the tort feasor. Gavica v. Hanson, 608 P.2d 861, 865 (Idaho, 1980). Such an intent has long been recognized in Utah.

Cases from the State of Arizona illustrate the necessary statutory language which would properly allow recovery of punitive damages. In Downs v. Sulfur Springs Valley Electric Coop., 80 Ariz. 286, 297 P.2d 339 (1956) the Arizona Court construed the State's Wrongful Death Statute as purely compensatory, disallowing any claim for punitive damages. The relevant language of that statute provided "In an action for wrongful death, the jury shall give such damages as it seems fair and just, . . . " A.R.S., § 12-613 (1950). The Arizona Legislature thereafter amended that statute to read as follows:

> In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default.

(Emphasis added) In the subsequent case of Bores v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965) the Arizona Court ruled the amended statute demonstrated the Legislative intent to allow punitive damages.

The statutes of Utah and California are very similar, both permitting the recovery of such damages "as under all the circumstances may be just." California has confronted the question of availability of punitive damages many times, but each time "[t]he California statutes and decisions . . . have been interpreted to bar the recovery of

punitive damages in a wrongful death action." Tarasoff v. Regents of University of California, 131 Cal. Rptr. 14, 551 P. 2d 334 (1976).

Utah's Wrongful Death Statute has been consistently interpreted to establish four elements of recovery. These are: (1) loss of support; (2) loss of assistance of services to family; (3) loss of probability of inheritance; and (4) loss of society, companionship, happiness of association, loss of nurturance, guidance and training. Platis v. United States, 288 F. Supp. 154 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969). Punitive damages have not been included in this compensatory-directed statute, and are not recoverable for wrongful death in Utah.

When confronted by the same issue, the New York Supreme Court, Appellate Division stated: "Plaintiff's arguments as to the desireability of allowing the recovery of punitive damages in these types of actions, however appealing in logic and justice, must be directed to the legislature." Rosenfeld v. Isaacs, 433 N.Y.S. 2d 623, 625, 79 A.D. 2d 630 (App. Div. 1980). This Court likewise must refuse to judicially amend the Utah Wrongful Death Statute which has heretofore consistently allowed recoveries of only compensatory damages.

VI. CONCLUSION

Based on the foregoing analysis, the Order of the district court denying Appellant's Motion to Amend her Complaint should be affirmed on the basis that Appellant's Motion was contrary to the laws of the State of Utah.

Respectfully submitted this 5 day of May, 1982.

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