1982

Diana Behrens v. Raleigh Hills Hospital, Inc. : Appellants' Reply to Brief of Respondent

Utah Supreme Court

James B. Hawkes; Bob W. Warnick; Attorneys for Appellant;
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,

Appellants,

v.

RALEIGH HILLS HOSPITAL, INC.

Respondent.

Case No. 18093

APPELLANTS' REPLY TO RESPONDENT'S BRIEF

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

JAMES E. HAWKES
BOB W. WARNICK
301 Gump & Ayers Bldg.
2120 South 1300 East
Salt Lake City, Utah 84106
486-3751

Attorneys for Appellants

ROBERT F. ORTON
T. RICHARD DAVIS
68 South Main, Fifth Floor
Salt Lake City, Utah 84101
521-3800

Attorneys for Respondent.

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DIANA BEHRENS, individually and as Guardian ad Litem of NATHAN ALAN BEHRENS,	)	
Appellants,	)	Case No. 18093
v.	)	
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RALEIGH HILLS HOSPITAL, INC., Respondent.	)	

BACKGROUND

The Utah Supreme Court granted appellants' Petition for Review after the District Court refused to allow them to amend their complaint to include punitive damages. The amendment was requested after appellants' $100,000 jury verdict was set aside by the trial judge because of errors in the instructions. Rule 15 of the Utah Rules of Civil Procedure allows that leave to amend a party's pleading shall be freely given when justice so requires. Appellants ask only to be allowed to prove their punitive claim at trial. Respondent will not be prejudiced in any way in that appellants' claim for punitive damages is based upon the same facts, the same parties, the same incident, the same evidence, the same testimony, and the same documents. Respondents' brief adds nothing new or different to the argument than has already been brought before the court in respondent's Motion for Summary Disposition. Appellants respond with essentially their reply to respondent's first brief.

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AURTHORITIES CITED

STATUTES

ARGUMENT

POINT I.

APPELLANTS' MOTION WAS PROPERLY BEFORE THE COURT.

Appellants brought their motion pursuant to a notice of hearing on appellants' motion to amend complaint, and memorandum of support and authorities.

Said motion was noticed up on the court's calendar. At the hearing of the motion, attorneys for appellants were there, respondent's counsel was there, and court called it, the court heard argument, the court made its order and the respondent even prepared the order which was entitled "Order Denying Plaintiffs' Motion to Amend Complaint." Said Order stated:

> "Plaintiff's motion to amend her complaint to assert a claim for punitive damages came on regularly for hearing before the Honorable G. Hal Taylor, one of the judges of the above entitled court at Court's Building in Salt Lake City, Utah, on the 6th day of October, 1981, at 2:00 P.M., plaintiff being present in court and represented by her attorney James E. Hawkes; and defendant being present in court and represented by its attorney, Robert F. Orton, of the firm of Marsden, Orton and Liljenquist; and the court having reviewed the pleadings and papers on file, having heard argument of cousel, having been fully advised in the premises and good cause appearing ... ." [Emphasis added]

The order went on to deny appellants' right to amend their complaint. Reviewing the file, appellants cannot find a pleading solely entitled "Motion," but respondent's Order determined that appellants' motion came on regularly.

Appellants have not filed an amended complaint since appellants do not have any right to file an amended complaint until the court so orders and then only to the extent as ordered

by the court. Appellants' Memorandum of Support gave respondent ample opportunity ot understand what appellants desired in their amended complaint.

POINT II.

APPELLANTS' PROPOSED AMENDED COMPLAINT IS NOT UNTIMELY AND WILL NOT ASSERT A NEW CAUSE OF ACTION.

A. The statute of limitations of an action against a health care provider (UCA 78-14-4) states:

> "No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence."

Four years has not run since the death of appellants' father/husband. The only question is whether two years have run since appellants knew or should have known of their claim for punitive damages. The requirement, as stated in Foil v. Ballinger, 601 P2d 144 (1979), is,

> "The discover of the injury means discovery of the injury and the negligence which resulted in the injury." [Emphasis added]

At the time the original complaint was filed, the appellants had no knowledge of the degree of respondent's negligence. A major factor discovered within the last two years for which punitive damages are sought is respondent's actual conduct in relationship to the promises made by their advertising and their expensive charges. The fact is that respondent's conduct was not known at that time, and was only ascertained as discovery progressed and as other facts which have come to the attention

of the general public were learned about their practices. Such knowledge was obtained during the last two years. Now appellants can indeed bring their claim for punitive damages.

B. In Peterson v. Union Pacific Railroad Co., 79 U 213, 8 P2d 627 (1932), at 220, the court states:

> "Where the amendment merely expands or amplifies what is alleges in the original complaint, even though imperfectly, in support of the cause of action, it is properly allows."

Later on Peterson, supra, at 221 stated:

> "In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured as to the manner of the defendant's breach of duty, 49 C.J. 517: Sargeant v. Union Fuel Co., supra; Fort Worth Belt R. Co. v. Jones, Tex. Civ. App. (182 SW 1184)."

POINT III.

A LETTER OF INTENT FILED BY APPELLANTS DOES NOT BAR APPELLANTS' REQUEST TO AMEND.

Appellants' original punitive damage claim falls within their notice of intent to commence action as required by UCA 78-14-8. The difficulty with this statute is that it presupposes that all plaintiffs have the same knowledge when they commence a malpractice action as they will have by the day before trial. Medical malpractice is very complex. It takes years of discovery. Experts must be sought for comprehension and preparation. Except in the most simple cases, plaintiffs cannot be expected to have the knowledge of whether a punitive claim should or should not be made. If the statute is to require the inclusion of all claims, whether known or unknown, then many health care providers will have totally erroneous claims

made against them because plaintiffs will have no choice but to include such claims prior to discovery. The statute's purpose is to protect doctors from having their reputations maligned by malpractice actions and induce out-of-court settlement. The above mentioned result is contrary to the legislative intent.

Respondent has made several motions regarding appellants' letter of intent. As stated previously, appellants' punitive claims relate solely to the degree of respondent's negligence. If Appellants' letter of intent fulfills the statutory requirements to allow them to bring their claim of negligence, then any claims of punitive negligence have the same identical basis. The degree of respondent's negligence was uniquely within its knowledge since the beginning of the action.

In order to crystalize the court's attention on the more important issues of this appeal, appellants have served a new letter of intent to commence an action upon respondent which includes a claim for punitive damages demand, thus motting this issue.

In Yates v. Vernal Family Health Center, (1980) 617 P2d 352, the court found that any technical difficulties in the letter of intent could be remedied simply be serving another letter of intent commencing the action.

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POINT IV.

UTAH'S WRONGFUL DEATH STATUES DOES NOT PRECLUDE RECOVERY OF PUNITIVE DAMAGES.

The Utah Wrongful Death Statute, UCA 78-11-7, states:

> "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."

Appellants grant the stubbornnes of the court without the state to accept punitive damages in a wrongful death action. However, the question has not been decided by Utah law. In Morrison v. Perry, 140 P2d 722, 104 U 151 (1943), the court discussed the statute in relation to compensatory damages and provided a definition of compensatory damages. Defendants are not sought to be punished by compensatory damages. They were simply to compensate the plaintiff for his loss. Appellants entirely agree with this definition but it is a definition of compensatory damages and not punitive damages. The question remains, what damages in a wrongful death action are "just?" This question must be answered for the first time by the Utah Supreme Court.

Punitive damages measure a degree of wrong and are not a cause of action. In Powers v. Taylor, 14 U2d 152, 379 P2d 380 (1963), the court discussed punitive damages:

> "Whether such damages are allowable is not dependent upon the classification of the wrognful act, nor upon the nature of the injury but upon the manner and intent with which it is done. If the wrongful act by which one injures another is done willfully and maliciously, our law allows imposition of punitive damages as punishment to defendant for such conduct, and as a warning to him and others against it."

Punitive damages are allowed in any cause of action if the degree of wrong rises to the level of willful and malicious. Whether punitive damages are allowed in a wrongful death action should be no different. In Terry v. Zions Co-operative Mercantile Institution, 605 P2d 314 (1979), the court found:

> "The purpose of a punitive or exemplary damage award is not to compensate the party harmed but rather to punish the wrongdoer, to deter him from similar acts in the future, and to provide fair warning to others similarly situated that such conduct is not tolerated."

Thus, punitive damages are not a private right but a public right. It is the social policy that certain conduct will not be accepted in the community. If the conduct is of such a nature that punitive damages are demanded had the victim lived, then how does the social policy differ if the same conduct leads to the victim's death? This gives credence to the ironic comment heard by lawyers from other lawyers and laymen that if you are going to commit a wrongful act, it is better to kill your victim than to maim.

DATED June 30, 1982.

Respectfully submitted,

James E. Hawkes

JAMES E. HAWKES

MAILING CERTIFICATE

I certify I mailed two copies of the foregoing to Robert F. Orton and T. Richard Davis, attorneys for respondent, 68 South Main, Fifth Floor, Salt Lake City, Utah 84101, June 30, 1982.