1983

Michael Patrick Payne, By And Through His Guardian Ad Litem, John Michael Payne, John Michael Payne And Stephanie Payne v. Garth G. Myers, M.D.; Joseph P. Kesler, M. D.; The State of Utah And Handicapped Children's Service; and the Division of Health of The State of Utah : Brief of Respondent Joseph P. Kesler, M. D.

IN THE SUPREME COURT

OF THE

STATE OF UTAH

MICHAEL PATRICK PAYNE, by and through his Guardian ad Litem, John Michael Payne; JOHN MICHAEL PAYNE; and STEPHANIE PAYNE,	)	
Plaintiffs-Appellants,	)	
vs.	)	Case No. 19218
GARTH G. MYERS, M. D.; JOSEPH P. KESLER, M. D.; THE STATE OF UTAH AND HANDICAPPED CHILDREN'S SERVICE; and THE DIVISION OF HEALTH OF THE STATE OF UTAH,	)	
Defendants-Respondents.	)	

BRIEF OF RESPONDENT JOSEPH P. KESLER, M. D.

APPEAL FROM A JUDGMENT OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSON, DISTRICT JUDGE

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BRIEF OF RESPONDENT JOSEPH P. KESLER, M. D.

Respondent Joseph P. Kesler, M. D., by and through his counsel of record, respectfully submits this brief pursuant to Rule 75, Utah Rules of Civil Procedure.

NATURE OF THE CASE

This is a medical malpractice action seeking damages for "wrongful life" and "wrongful birth" against two physicians and their state employer.[1]

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, Honorable Timothy R. Hanson presiding, entered summary judgment dismissing all claims against this respondent pursuant to § 63-30-4, Utah Code Annotated (Supp. 1981)[2] (R. 669, 720).

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[1] A "wrongful life" claim is brought on behalf of a severely defective infant against a physician for the physician's negligent failure to inform the child's parents of the potential disabilities of the child, thereby preventing a choice to avoid the child's birth. Cohen, Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life," 4 Am. J. L. & Med. 211 (1979); Brown, Wrongful Life: A Misconceived Tort, 4 Health Care L. Dig. (BNA) No. 8, at 5, 10, at n. 1 (Dec. 1982). A "wrongful birth" claim is brought by the parents of a severely defective infant for the cost of raising the child and compensation for the emotional injury of bearing an unexpectedly handicapped child. Brown, Id. at 10; and see, for example, Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980). Unlike the "prenatal-tort" action, in neither wrongful life nor wrongful birth actions is it contended that the negligent treatment caused the infant's abnormalities. Note, Wrongful Life--Impaired Infant's Cause of Action Recognized: Curlender v. Bio-Science Laboratories, 1980 BYU L. Rev. 676, at 1.

[2] All statutory citations are to the Utah Code Annotated unless otherwise indicated.

RELIEF SOUGHT ON APPEAL

This respondent seeks affirmance of the lower court's order.

STATEMENT OF FACTS

Pelizaeus-Merzbacher syndrome is a rare, genetically-transmitted and progressively-degenerative neurological disorder characterized by widespread demyelination of the brain sheath causing severe motor disorders and, eventually, death.[3]

Michael P. Payne, born to appellants on January 27, 1979, is afflicted with Pelizaeus-Merzbacher syndrome, as is his older brother, Matthew.[4] Shortly after his birth on September 2, 1975, Matthew exhibited signs of an unknown neurological disorder. From November 1976 through the fall of 1977, Matthew

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[3] The syndrome is thought to be carried as an X-linked recessive, that is, the mother carries the faulty chromosome. Menkes, Textbook of Child Neurology, 133-134 (2d. ed. 1980). A male child born to a carrier mother is exposed to a fifty percent risk of being afflicted. McKhann, Birth Defects Compendium 861 (D. Bergsma 2d. ed. 1979).

[4] "Facts" unsupported by the record appear throughout appellant's brief and, in particular, in their "Statement of Facts." This respondent, therefore, restates the facts which appear as a matter of record, or which appear in the pleadings and are taken as true for the purpose of this appeal. See Reliable Furniture Co. v. Fidelity and Guaranty Ins. Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135 (1963); Flick v. Van Tassell, 547 P.2d 204, 205 (Utah 1976).

was examined and treated at the Handicapped Children's Servi... an agency of the Utah State Department of Health, by respondents Joseph P. Kesler, M. D., a pediatrician, and Garth G. Myers, M. D., a pediatric neurologist (R. 2-4, 182-188).

It is alleged that Dr. Kesler and Dr. Myers negligently failed to diagnose Matthew's impairment as being of genetic origin and negligently advised appellants that they could have another child without fear of the affliction recurring (R. 5). Relying upon that alleged negligent advice, appellants conceived and bore their second child, Michael (R. 5).

This action was filed on behalf of Michael Payne seeking damages for "wrongful life" and by his parents seeking damages for "wrongful birth" (R. 9). On respondents' motion the lower court entered summary judgment against appellants on the basis that § 63-30-4 precluded any personal liability of Respondents Kesler and Myers for acts of simple negligence arising out of the performance of their official duties (R. 665, 720). This appeal followed.

ARGUMENT

No claim of gross negligence, fraud, or malice is asserted against this respondent (R. 6-7). It is undisputed that, at all times relevant to this action, he was an employee

of a governmental entity, the Handicapped Children's Service, and that all alleged negligent acts alleged on his part occurred during the performance of his official duties (R. 3, 183).

Section 63-30-4, as amended effective March 30, 1978, provided:

> Act provisions not construed as admission or denial of liability--Effect of waiver of immunity--Exclusive remedy--Joinder of employee--Limitations on personal liability. Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.
>
> The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.
>
> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the perfor-

> mance of the employee's duties within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice[5] (emphasis added).

On its face, § 63-30-4 bars this action. Appellants, however, contend that the statute is (1) inapplicable because they acquired vested rights before the effective date of the amendment, (2) was unreasonably interpreted by the lower court to bar personal liability for the individual respondents, or (3) is unconstitutional. Each of these contentions is addressed in its turn.

I. APPELLANTS ACQUIRED NO VESTED RIGHTS UNTIL AFTER THE 1978 AMENDMENT TO § 63-30-4 BECAME EFFECTIVE.

This respondent has no quarrel with appellants' point that a statute cannot be retroactively applied to eliminate vested rights. Silver King Coal Mines v. Ind. Comm., 2 Utah 2d 1, 5, 268 P.2d 689, 692 (1954); Spanish Fork West Field Irrigation Co. v. Dist. Court of Salt Lake County, 99 Utah 544, 104 P.2d 353, 360 (1940); 2 Sutherland, Statutes & Statutory Construction § 41.06 (C. D. Sands 4th ed. 1973).

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[5] Section 63-30-4 was amended in 1983 to remove the reference to "gross negligence." 1983 Utah Laws ch. 129 § 3.

sue, rather, is whether appellants acquired any vested rights before the effective date of the amendment to the statute.

Appellants propose that they acquired vested rights in the fall of 1977, on the date of the alleged negligent acts by the individual respondents or, at the latest, upon the removal of Mrs. Payne's IUD on February 14, 1978.

A. The four-year statute of repose of § 78-14-4 vested no rights in appellants.

Section 78-14-4, in pertinent part, provides:

> No malpractice action against the 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, ommission or neglect. . . .

Appellants contend that this four-year statute of repose "recognized the operative effect of the doctors' negligence" and indicated a legislative determination that a medical malpractice cause of action accrues upon the date of the negligent act [Appellants' Brief at 18]. Thus, they contend, this claim vested (that is, accrued) in the fall of 1977, the date of the alleged negligent acts.

The four-year period is a statute of repose in that it cuts off a right of action after the passage of a certain period

of time without regard to whether the action has "accrued" or not. A statute of limitations, on the other hand, procedurally limits the time in which an action, having accrued, can be brought. See Turner, The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability, 46 J. Air L. & Com. 449, 476 (1981); Restatement (Second) of Torts § 899 comment d (1982).

The four-year period, as a statute of repose, is irrelevant to the accrual or vesting of the cause of action.

B. The expense of removal of the IUD did not vest rights in appellants.

Alternatively, appellants contend that the financial obligations incurred by them for the removal of Mrs. Payne's IUD on February 14, 1978, in reliance on the respondents' alleged negligent advice[6], constituted an "injury" and gave them vested rights in the wrongful birth action.[7]

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[6] The record does not support appellants' contention that they removed the IUD in reliance upon respondents' representations or that they incurred expenses for that removal.

[7] There seems to be no question but that the wrongful birth action on behalf of the infant plaintiff did not vest until her conception since no "injury" could have been incurred by her until after that date.

Rights do not become vested until a legal remedy upon them may be pursued. Stucki v. Loveland, 495 P.2d 571, 573 (Idaho 1972); Mid-Continent Casualty Co. v. T & H Supply Co., 490 P.2d 1358, 1361 (Okla. 1971). In a negligence action, vesting occurs, at the earliest, upon breach of a recognized duty and resulting injury. Stromquist v. Cokayne, 646 P.2d 746, 747 (Utah 1982); Ind. Comm. v. Wasatch Grading Co., 80 Utah 223, 235, 14 P.2d 988, 992 (1932). The essential question, therefore, is at what point appellants could have brought an action against respondents.

It is undisputed that Mrs. Payne could not have been pregnant with Michael until after May 2, 1978, her last menstrual period before his birth (R. 690). Since Pelizaeus-Merzbacher syndrome occurs almost exclusively in males, and males born of carrier mothers have, at most, a one in two chance of being affected by the syndrome, the likelihood was that appellants' second child would be born unaffected. Notwithstanding the alleged negligent advice, had an unaffected child been born to appellants on January 27, 1979, they would have had no right to recover for the expense of the IUD removal, since the recovery of that expense was contingent upon the conception of an affected male child. Rights are not vested if they are subject to contingen-

cies. State v. The Estes Corp., 558 P.2d 714, 716 (A... 1976).

C. Rights are not vested in a medical malprac... action until discovery of the injury.

A medical malpractice cause of action accrues f... purposes of the statute of limitations upon discovery of t... "injury." § 78-14-4; Foil v. Ballinger, 601 P.2d 144, 148 (Ut... 1979); and see Christiansen v. Rees, 20 Utah 2d 199, 201, 4... P.2d 435, 436 (1969). Accrual for the purposes of a limitatio... period is the same as accrual for any other purpose. O'Hair ... Kounalis, 23 Utah 2d 355, 356, 463 P.2d 799, 800 (1970); Tolm... v. K-Mart Enterprises of Utah, Inc., 560 P.2d 1127, 1128 (Uta... 1977); Ash v. State, 572 P.2d 1374, 1379 (Utah 1977). In Foi... v. Ballinger, supra, this Court cited with approval the case ... Berry v. Branner, 421 P.2d 966, 998 (Or. 1966):

> To say that a cause of action accrues when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. . . .
> 601 P.2d at 149.

Accord, Layton v. Allen, 246 A.2d 794, 798 (De... 1968):

> Upon the basis of reason and justice, we hold that when an inherently unknowable

> injury . . . has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and harmful effect thereof develops gradually over a period of time, the injury is "sustained" when the harmful effect first manifests itself and becomes physically ascertainable.

The 1983 amendment to the Governmental Immunity Act recognized this proposition. Section 63-30-11(1) now provides: "A claim is deemed to arise when the statute of limitations that would apply if the claim were against a private person commences to run."

In this action, the statute of limitations could have begun to run, at the earliest, sometime in early 1979, following the birth of Michael Payne and the recognition of his illness. The 1983 amendment recognized, perhaps, the potential for confusion inherent in having one date serve as "accrual" for Governmental Immunity Act purposes and another serve as "accrual" for limitations purposes. For example, an action could be barred (at least as to the governmental entity) under the one-year notice provisions of § 63-30-11 before discovery was made and the applicable statute of limitations began to run.

The amendment to § 63-30-11 is not expressly retroactive. However, the obvious manifestation of legistative intent reflected in this amendment should not be ignored. Frank v. State, 613 P.2d 517, 519 (Utah 1980) (holding that a later

amendment of the Governmental Immunity Act should not, as a matter of judicial policy, be disregarded in an attempt to discern legislative intent in an earlier-enacted provision. The intent of the Legislature is that the definition of "accrual" should be consistent for all purposes. It follows that appellants' cause of action did not arise and their rights did not vest until the birth of Michael Payne, nearly a year after the effective date of the amendment to § 63-30-4.

II. THERE IS ONLY ONE POSSIBLE "INTERPRETATION" OF § 63-30-4 AND IT BARS THIS ACTION.

Appellants contend that § 63-30-4 cannot "reasonably be interpreted to bar personal liability of governmental employees for acts of simple negligence. Such an "interpretation," they assert, is inherently inconsistent with the Indemnification of Public Officers Act, § 63-48-1, et seq.[8] and violates "public policy" [Appellant's Brief at 26-33].

Section 63-48-4(3) provided that:

> No public entity is obligated to pay any judgment based upon a claim against an officer or employee if it is established

[8] Repealed as of July 1, 1983.

> that the officer of employee acted or failed to act due to gross negligence, fraud, or malice.

Appellants argue that this statute is inconsistent with § 63-30-4, since there could never be a situation when the duty to indemnify would arise. That is, the Governmental Immunity Act bars actions arising out of an employee's simple negligence, while the Indemnification Act only allows indemnification for judgments premised upon simple negligence. Thus, they argue, § 63-30-4 should be "interpreted" to be consistent with § 63-48-3 to allow suits for simple negligence against governmental employees.

The interpretation of a statute to seek consistency with another statute on the same subject matter is permissible only when the first statute permits of interpretation. Where the meaning of the first statute is clear on its face, no interpretation or construction is permitted. Sutherland, supra, at §§ 46.01-46.05. "[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the court is to enforce it according to its terms." Caminetti v. United States, 242 U. S. 470, 485 (1917). Other statutes may not be consulted as an aid to interpretation when no interpretation is necessary, that is, when the meaning of the statute is

clear and unambiguous. Allen v. Grand Cent. Aircraft Co., U. S. 535, 541 (1954); United States v. Williams, 644 F.2d 699 (8th Cir. 1981); Sutherland, supra, at §§ 51.01-51.

Section 63-30-4 is clear on its face. This Court recently held that it means what it says. Madsen v. Borthick 658 P.2d 627, 633 (Utah 1983).[9] It bars personal liability governmental employees for acts of simple negligence. Id. has no other conceivable meaning.[10]

III. SECTION 63-30-4 IS CONSTITUTIONAL.

A. The statute does not deprive appellants access to the courts or of a property right with due process of law.

Appellants contend that § 63-30-4 denies them access to courts guaranteed by Article I, § 11 of the Ut Constitution[11] since it precludes any action against a gover

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[9] Appellants' assertion that Madsen speaks of the issue co in dicta because it dealt with an "official" not an "employe is wrong. § 63-30-2(3) defines "employee" to include "officia

[10] Somewhat similar provisions to those found in the repeal Indemnification of Public Officers Act are now found at § 63- 36 through 38. However, no equivalent provision to the repea § 63-48-3(4) was reenacted. It is not easily decipherable fr a reading of the new "indemnity" provisions when a governmen employee is entitled to indemnification from his employe

[11] "All courts shall be open, and for every person, for injury done to him in his person, property or reputation, s have remedy by due course of law . . . ."

rental employee for simple negligence. They acknowledge, however, that this Court has previously held that deprivation of an existing common-law right does not violate Article I, § 11. Masich v. United States Smelting, Refining & Mining Co., 13 Utah 108, 191 P.2d 612 (1948) (abolishment of common-law action for negligence against an employer by the Occupational Disease Act). As the Court in Truax v. Corrigan, 257 U. S. 312 (1921) noted: "[N]o one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guarantee of due process in the Fourteenth Amendment is intended to preserve . . . ." 257 U. S. at 329, Taft, J.

See further, Ortwein v. Schwab, 410 U. S. 656 (1973) (filing fee requirement for litigant seeking increase in welfare payments); United States v. Kras, 409 U. S. 434 (1973) (statute requiring payment of court costs and fees by bankruptcy applicants); Jones v. Union Guano Co., 264 U. S. 171 (1974) (statute requiring chemical analysis of fertilizer before institution of action for damages); and Everett v. Goldman, 359 So.2d 1256, 1268 (La. 1978) (medical review panel provision).

Appellants have not been deprived of a vested right through the amendment to § 63-30-4.[12] Three cases are cited by them in support of their argument that the amendment deprives them of a property right in violation of the due process provisions of the Utah Constitution. See Spanish Fork West Field Irrigation Co. v. Dist. Court of Salt Lake County, supra; Barrick v. Dist. of Columbia, 173 A.2d 372 (D.C. 1961); and Buttrey v. Guaranteed Security Co., 78 Utah 39, 300 P. 104 (1931). However, each of these decisions involved an after-enacted statute that deprived the respective plaintiffs of a vested right. This respondent does not contend that vested rights may be impaired or destroyed by an after-enacted statute. Rather, he contends that appellants acquired no vested rights until after the amendment to § 63-30-4 became effective, and that, therefore, they were deprived of no property rights without due process of law.

B. The statute does not deny appellants equal protection of the laws.

Appellants contend that the amendment to § 63-30-4 deprives them of Equal Protection under the United States and

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[12] See Point I.

Utah Constitutions[13] because it creates an arbitrary and irrational classification between claimants injured by state-employed physicians and claimants injured by privately-employed physicians.

The Fourteenth Amendment does not deny the states the power to treat different classes of persons in different ways. Reed v. Reed, 304 U. S. 71, 76 (1971). As the court noted:

> The Equal Protection clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, that all persons similarly circumstanced shall be treated alike.

If neither a "suspect class" or a "fundamental interest" is involved, the statute must be upheld so long as it bears a rational relationship to a valid state interest. San Antonio Independent School District v. Rodriguez, 407 U. S. 1 (1973); Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah

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[13] "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws". U. S. Const. amend XIV, § I. See also, Utah Const. Article I, §§ 2 and 24.

1981); Hansen v. Public Employees Retirement System, 122 U
44, 246 P.2d 591 (1952).

Statutes are presumed to be constitutional. Cou
will not strike down a legislative act unless the interests
justice in a particular case before it require doing so becau
the act is clearly in conflict with a higher law set forth
the Constitution. Zamora v. Draper, 635 P.2d 78, 80 (Ut
1981); Pride Club v. State, 25 Utah 2d 333, 481 P.2d 6
(1971). All doubts should be resolved in favor of the constit
tionality of a statute, and no act should be declared unconsti
tution unless it is clearly and palpably so. Ellis v. Soci
Services Dept., Etc., 615 P.2d 1250, 1255 (Utah 1980); Parkins
v. Watson, 4 Utah 2d 191, 291 P.2d 400 (1955). It is appe
lants' burden to overcome that presumption.

Appellants argue that there is no rational basis fo
allowing physicians employed by a governmental entity to avo
personal liability for medical malpractice actions, sinc
private physicians have such liability, and there is no esse
tial difference between the two classifications. The issue i
better framed as whether the statutory amendment bears a rati
al relationship to a legitimate state concern. Allen v. Int
mountain Health Care, Inc., supra. An obvious and legitima
concern of the amendment is to preserve the integrity of th

Governmental Immunity Act from circumvention by claimants filing suits against individual employees. See Developments in Utah Law, 1978 Utah L. Rev. 741, 774-778. The author notes that the amendment to § 63-30-4 is a legislative response to a potential for indirect recovery from the governmental entity through the Indemnification Act:

> The amendment, thus, revitalizes the safeguards of the Immunity Act in situations where immunity has been waived, and consequently limits the application of the Indemnification Act to those suits where there has been no waiver and a common-law action againt the negligent employee provides exclusive remedy.

See Cornwall v. Larsen, 571 P.2d 925, 929 (Utah 1977) (Wilkins, J., concurring). Eliminating claims that allege simple negligence and seek personal liability against governmental employees guarantees the continued vitality of the Governmental Immunity Act. The classification, thus, rests upon a ground having a fair and substantial relationship to a legitimate object of legislation. Reed v. Reed, supra.

CONCLUSION

The 1978 amendment to § 63-30-4 did not impair any vested rights enjoyed by appellants. It can only be interpreted to bar appellants' action against the individual respondents.

As a rational attempt to insure the continued integrity of Governmental Immunity Act, the amendment is constitutional. The lower court, thus, properly entered summary judgment on appellants' claims against Dr. Kesler and Dr. Myers.

DATED this 14th day of November, 1983.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF OF RESPONDENT JOSEPH P. KESLER, M. D. was mailed this 14th day of November, 1983, by depositing the same in the U. S. Mail, postage prepaid, to:

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