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 : Appellant's Reply Brief

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.	)	
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,	)	No. 19218
Defendants-Respondents.	)	

APPELLANTS' REPLY BRIEF

APPEAL FROM A SUMMARY JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
JUDGE TIMOTHY R. HANSON

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Appellants submit the following brief in reply to the briefs filed by respondants Joseph T. Kesler and Garth G. Myers. This case involves plaintiffs appeal from summary judgment entered in favor of said respondants. Appellants submit in their reply brief that respondants have shown in their briefs that there are in fact genuine issues of material fact which preclude the affirmance of the lower court's summary judgment, that respondants have raised issues that are not properly before this court on appeal, and that respondants have otherwise failed to adequately respond to the points raised in this appeal by

appellants.

ARGUMENT

POINT I.

GENUINE ISSUES OF MATERIAL FACT ARE DEMONSTRATED BY RESPONDANTS BRIEFS.

Summary judgment is only proper where there are no genuine issues of material fact. Rule 56, Utah Rules of Civil Procedure. Both respondants claim in their briefs that appellants have alleged facts on appeal that are not part of the record on appeal. For example, Respondant Myers claims that the record does not indicate specifically that Stephanie Payne's obstetrician made a charge for the medical expense of removing the IUD, and also that the record does not support the statement that the IUD was removed for the purpose of allowing Mr. and Mrs. Payne to conceive a second child. Although appellants position is that said facts are adequately of record by way of the deposition of Dr. Gibbs, including the exhibits made a part of that deposition, if those facts are not adequately of record, then there are genuine issues of material fact which have not yet been resolved in this case, precluding summary judgment.

The amount of the charge for the removal of the IUD, and the purpose for removing the IUD are material facts which must be resolved in order to make a determination as to whether appellants incurred damage prior to the effective date of Utah

Code Annotated §63-30-4, as amended. It is appellants' position that Dr. Gibbs' charges to the Payne's for removal of the IUD were charges incurred by the Payne's as a direct result of their reliance on negligent advice given them by Drs. Kesler and Myers, and that these charges constituted damages to the Paynes which were incurred prior to the effective date of U.C.A. §63-30-4, as amended.

If respondants claim that those facts are not clearly set forth at the present time in the record in the lower court, it is because the evidence has not been presented to a trier of fact and the factual issues must be determined before any decision on a motion for summary judgment can be affirmed. As indicated above, however, it is the position of appellants that the facts relating to those issues are adequately set forth in the record and there is no need for further discovery or fact finding on those issues. The deposition of Dr. Gibbs, which is a part of the record on appeal, clearly sets forth that the purpose for removing the IUD was to allow the Paynes to conceive a second child. This purpose is even implied in questions addressed to Dr. Gibbs by the attorney for appellant Kesler during the deposition of Dr. Gibbs. Dr. Gibbs testified as follows:

> Q. [By Mr. Carney] Do you have any recollection of any conversations with Mrs. Payne or her husband regarding taking the IUD out?
>
> A. As to why she was getting it out?
>
> Q. Yes.

A. Not specifically, no.

Q. Well, generally do you recall -- Obviously she wanted to get it out because she wanted to get pregnant. Do you remember any conversations about her decision to try to become pregnant again?

A. No.

****

Q. Well, she had the IUD out in February and she apparently is now using contraceptive foam?

A. I always recommend they use some contraceptive for a month after taking the IUD out.

Q. Why is that?

A. It seems as though the incidence of miscarriage or tubal pregnancy is increased in those who become pregnant immediately after an IUD. [emphasis added] [Gibbs Depo. pp. 20, 21, 22]

Respondant Kesler's attorney's own question to Dr. Gibbs assumes the fact that the IUD was removed so that Mrs. Payne could become pregnant. Moreover, it is clear from the answers given by Dr. Gibbs that he also was assuming the purpose for the removal of the IUD was to allow Mrs. Payne to become pregnant.

With respect to the question of whether the cost of removing the IUD was charged to the Paynes, Exhibit A to Dr. Gibbs' deposition included his statement for charges to the Paynes over several years time. The Paynes were billed in one lump sum for all of the Ob./Gyn. care provided by Dr. Gibbs as it related to the pregnancy which resulted in the birth of Michael Payne. That would include removal of the IUD in February, 1978.

that Dr. Gibbs made regular charges for services relating to the IUD is further evidenced by a specific entry in his billing chart to the Paynes in 1979 for insertion of the IUD. It is fair and reasonable to imply from the exhibits and the facts on record in this case that an expense was incurred by the Paynes for removal of the IUD, which otherwise would not have been incurred had the negligent advice not been given by the respondents. Appellants have already discussed, in appellants' original brief, the existence of a legal obligation to pay for the removal of the IUD at the time this service was performed, which obligation constitutes damages to them.

Thus, the facts are either adequately before the court or there are genuine issues of material fact precluding summary judgment.

POINT II.

UTAH'S MEDICAL MALPRACTICE STATUTE SETS FORTH A FOUR-YEAR STATUTE OF LIMITATIONS, NOT A STATUTE OF REPOSE.

Respondent Kesler charges that the four-year period for filing a medical malpractice claim set forth in Utah Code Annotated §78-14-4 is not a statute of limitations, but is a statute of repose, and therefore discounts appellants' argument that they obtained a right or claim as of the date that the four-year period began to run under §78-14-4. Appellants' position is that Utah's Medical Malpractice Act has two limitation periods. The first is a two-year period from the date of discovery of the injury. The second is a maximum four-year period from the date of the negligence.

In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), this court referred to the four-year period as a limitations period on at least two occasions. The court stated:

> The next question to be addressed is whether the action, which was originally filed without serving a notice of intent to sue as required by §78-14-8, could be refiled after the running of the four-year limitations period. . . .
>
> * * * *
>
> Since plaintiff did not serve a notice of intent to commence action upon defendant within the four-year statute of limitations period, it is arguable that the first action was therefore not "commenced" within the meaning of §78-12-40 and that its savings provision is not applicable. [emphasis added] [601 P.2d at 149]

It is clear from the above-quoted language in Foil, that the Utah Supreme Court considers the four-year period to be a statute of limitations and not a statute of repose as assumed by respondent Kesler. Since the four-year time period is a statute of limitations, then pursuant to Utah Code Annotated §63-30-11(1), as amended in 1983, plaintiffs' initial position is that the claim arose when that four-year statute of limitations began to run. The four-year statute of limitations began to run on the date of the negligence, which was clearly prior to the effective date of §63-30-4. Alternatively, plaintiffs take the position that a claim arose when the first medical expense or detriment occurred as a result of the negligent advice, which in this case is the time of the removal of the IUD.

Since plaintiffs had a claim in either case which had arisen prior to the effective date of §63-30-4, then to apply the

statute to this case and preclude personal liability of the individual physicians, would constitute an improper retroactive application of said statute.

POINT III.

DAMAGE WAS INCURRED BY APPELLANTS PRIOR TO THE EFFECTIVE DATE OF U.C.A. §63-30-4, AS AMENDED, AND APPELLANTS DID HAVE A CLAIM PRIOR TO SAID EFFECTIVE DATE.

Contrary to the arguments of respondents, plaintiffs did incur damages prior to the effective date of §63-30-4. As has been previously noted above, the expenses for medical care provided by Dr. Gibbs to the Paynes for removal of the IUD were incurred prior to the effective date of §63-30-4. These expenses would not have been incurred had the Paynes not relied on the advice of Drs. Kesler and Myers that it was genetically safe for them to conceive and bear a second child. The expenses are, therefore, damages incurred by Paynes giving them a cause of action prior to the effective date of §63-30-4. All other subsequent damages relate back to the same negligence and are part of the same cause of action.

POINT IV.

U.C.A. §63-30-4, AS AMENDED, IS AMBIGUOUS AND THEREFORE SUBJECT TO INTERPRETATION BY THE COURT.

Respondents argue in their briefs that §63-30-4 is clear on its face and unambiguous and therefore there need be no interpretation made of the statute by this court contrary to the

plain language of the statute. Appellants, in their initial brief in this case, have clearly pointed out that this statute is ambiguous. Section 63-30-4 is not only itself ambiguous, but it becomes even more ambiguous when read in conjunction with other provisions of Utah's Governmental Immunity Act and also when read in conjunction with the provisions of Utah's Indemnity Act, which was in force at all times relevant to this case. The various statutes simply cannot be reconciled. Moreover, this court in Madsen v. Borthick, 658 P.2d 627 (Utah 1983), in footnotes 5 and 11, (quoted in appellants' brief), set forth situations in which personal liability is still available against a governmental employee. If the statutes are so clear and unambiguous as claimed by respondents, then there would have been no need for footnotes 5 and 11 in Madsen. In light of the ambiguities contained in the statute, appellants suggest that the statute must be given a reasonable interpretation.

Furthermore, appellants note with interest that neither of the respondents have made any statement in response to appellants' comments regarding the above-referenced footnotes from Madsen nor have they responded in any way to the policy arguments raised by the appellants with regard to §63-30-4. Appellants can only conclude that respondents agree that as a matter of policy §63-30-4 cannot be interpreted as they are arguing, and that this court must give a reasonable interpretation to the statute which does not deny these plaintiffs their rightful actions against the doctors for negligence.

POINT V.

APPELLANTS ARE NOT RELYING ON U.C.A. §78-14-6 FOR THEIR CLAIMS AGAINST DEFENDANTS.

Defendant Myers raises Utah Code Annotated §78-14-6 as a basis for denying any liability. This section requires that any guarantee, warranty, contract or assurance of result given by a health care provider may only be used as a basis for liability against that health care provider if it is in writing. Myers argues that since plaintiffs have not brought forth any writing guaranteeing that their second child would not be born with any genetic defects, that any claim of liability against Myers is barred.

Defendant Myers' argument falls wide of the mark. Plaintiffs are not alleging a breach of contract or guarantee against the defendant doctors. Rather, plaintiffs are claiming that said defendants gave negligent advice. This is a medical malpractice action, not a contract action. Therefore, any reference to Utah Code Annotated §78-14-6 is irrelevant. It is also outside the scope of any of the pleadings or arguments raised in this appeal and should not be considered by this court. None of the defendants raised §78-14-6 as an affirmative defense in their answers to plaintiffs' complaint. It was also not raised as a basis for any of defendants' motions for summary judgment. It, therefore, cannot be raised for the first time on appeal.

The Utah Supreme Court stated in Park City Utah Corp. v. Ensign Co., 586 P.2d 446 (Utah 1978):

> Where a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal. [586 P.2d at 450.]

An affirmative defense must be raised by way of answer, motion or demand so as to put the issue before the trial court, and it is not to be raised for the first time on appeal. The defense may be waived, or the party may be estopped to assert such defense. See Royal Resources, Inc. v. Gibralter Financial Corp., 603 P.2d 793 (Utah 1979).

Thus, Meyers cannot raise U.C.A. §78-14-6 as an affirmative defense for the first time on appeal.

POINT VI.

THE ISSUE OF WHETHER UTAH RECOGNIZES A CAUSE OF ACTION FOR WRONGFUL LIFE IS NOT PROPERLY BEFORE THIS COURT.

Defendant Myers also raises the issue of whether Utah acknowledges a cause of action for wrongful life. This is clearly outside the scope of this appeal and cannot be raised by Myers as a basis for affirming the lower court's decision. The lower court's summary judgment was based exclusively on the theory that §63-30-4 of Utah's Governmental Immunity Act precludes personal liability on the part of employees of the State.

The issue of whether Utah would recognize a cause of action for wrongful life is not an issue properly raised on appeal. In fact, that very issue was raised by both defendants Myers and Kesler in motions for partial summary judgment filed

1982, both of which motions were denied by Judge David Dee. Judge Dee's order was not made a final order, and is therefore not appealable at this time. Moreover, Judge Dee's ruling against said defendants' motions for partial summary judgment is the law of the case at this point, and it is totally improper for Myers to raise this issue as a point for affirmance of the lower court's summary judgment.

Furthermore, the references to Utah Code Annotated §§78-11-23 and 24 are also improper because said statute is not applicable to this case. Said statute was passed and became effective for the first time in 1983, and has no application to the facts of this case. Even if the statute is referred to for a statement of policy, it relates to claims made where the person making the claim alleges that a person would not have been born, but would have been aborted but for the conduct of the person against whom the claim is made. There is nothing on record in this case, and it is not plaintiffs' claim, that an abortion would have occurred had they discovered the genetic disease prior to the birth of their second child. Plaintiffs' claim is that they would not have conceived a second child had proper counseling and advice been given them by the defendant doctors. Therefore, the policy claimed by defendant Myers, is not applicable in this case.

POINT VII.

UTAH CODE ANNOTATED §63-30-4 DENIES EQUAL PROTECTION BECAUSE IT BEARS NO RATIONAL RELATIONSHIP TO A VALID STATE INTEREST.

Respondents argue that §63-30-4 does not deny plaintiffs equal protection because the statute bears a rational relationship to a valid state interest. The state interest they set forth is the vitality of the Governmental Immunity Act. Respondents argue that the amendment to §63-30-4 was necessary to prevent circumvention of the Governmental Immunity Act through the Indemnity Act. Although preservation of the Governmental Immunity Act may be a valid state interest, U.C.A. §63-30-4 bears no rational relationship to that interest. Rather than taking a course to preserve the vitality of the Immunity Act, §63-30-4 emasculates basic common law rights of these plaintiffs and of all other persons who are subjected to negligent medical care by physicians employed by the State. The statute brushes with too broad a stroke and therefore does not bear a rational relationship to a valid state interest. For that reason, equal protection has been denied these plaintiffs by this statute and it should be declared unconstitutional.

Further, retroactive application of the statute denies equal protection because it requires a class of persons such as plaintiffs to assume a risk of not being able to be adequately compensated for negligent medical care provided by state-employed physicians. That retroactive application of a statute can result in a denial of equal protection is shown in Shupe v.

Wasatch Electric Co., Inc., 546 P.2d 896 (Utah 1976).

CONCLUSION

The lower court's summary judgment in favor of defendants Myers and Kesler should be reversed by the Supreme Court because §63-30-4, as amended, cannot be applied to this case in a retroactive manner to deprive plaintiffs of their claims, and because §63-30-4, as amended, cannot be interpreted to deny any liability whatsoever on the part of physicians who have committed malpractice just because they happen to be employed by the State.

On the basis of the foregoing, appellants respectfully request the court to reverse the lower court's summary judgment.

Dated this 10th day of January, 1983.

STRONG & HANNI

By _____
R. Scott Williams

By _____
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CERTIFICATE OF HAND DELIVERY

I hereby certify that on this ____ day of January, 1984, two true and correct copies of the foregoing Appellants' Reply Brief were hand-delivered to the following:

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