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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20060261

FILED
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OCT 24 2006
STATE OF NORTH DAKOTA

William Chamley
Appellant

v.
Inder V. Khokha, M.D.
and
Mercy Medical Center
Appellees

APPEAL FROM SUMMARY JUDGMENTS DATED AUGUST 16, 2006
AND ORDERS GRANTING SUMMARY JUDGMENT OF DISMISSAL
DATED MAY 19, 2006 AND JULY 17, 2006
OF THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,
WILLIAMS COUNTY, NORTH DAKOTA
THE HON. DAVID W. NELSON, PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. Did the trial court err when it concluded that the hospital and its employees are "Good Samaritans" and thereby immune from liability under Chapter 32-03.1 of the North Dakota Century Code?

II. Did the trial court err when it concluded that there existed no genuine issue of material fact, and, as a matter of law, Dr. Inder V. Khokha and Mercy were acting as a "Good Samaritans" in providing medical services to Rosie Chamley, and therefore immune from suit pursuant to Chapter 32-03.1 N.D.C.C.?

STATEMENT OF THE CASE

1. *Nature of the Case.*

This is a wrongful death action by the Appellant, William "Will" Chamley, hereafter referred to as "Will," against Inder V. Khokha, M.D. (hereafter Dr. Khokha or Khokha), and his employer, Mercy Medical Center (hereafter referred to as Mercy or the hospital). Will is seeking damages as a result of the wrongful death of his mother, Rosie Chamley.

2. *Procedural History.*

By Summons and Complaint dated February 9, 2005, Will initiated this wrongful death action against Dr. Khokha and the hospital. (App. p. 4.) Will alleged that the negligence of the hospital, and its employee, Dr. Khokha, proximately caused the death of his mother. In his answer Dr. Khokha alleged that at the time he provided medical services to Will's mother he was acting as a "Good Samaritan," and was therefore immune from suit and protected by the provisions of Chapter 32-03.1 of the North Dakota Century Code. (App. p. 11.) With permission of the trial court, the Complaint was later amended, adding Dr. Salem Shahin as an additional Defendant. (App. p. 13.) Will's claims against Dr. Shahin have been settled and are not a part of this appeal. (App. p. 88.)

After considerable discovery, both Dr. Khokha and the hospital filed motions for summary judgment, claiming immunity under the provisions of Chapter 32-03.1 of the North Dakota Century Code. (App. p. 29 and 30) Will responded, arguing that the "Good Samaritan" law did not apply, but if so, there existed questions of fact which rendered summary judgment inappropriate. After briefing and oral argument on the

motion, the trial court concluded that there existed no evidence of disputed material fact and, as a matter of law, both Dr. Khokha and the hospital were immune from suit. Will's claims were ordered dismissed, on their merits and with prejudice. The trial court was then asked to reconsider its decision. (App. p. 92.) On reconsideration the court again concluded that there existed no issues of material fact and again ordered that the doctor and the hospital be dismissed as a matter of law. (App. p. 102.) Judgments of dismissal were entered on August 16, 2006. Cost judgments were taxed against Will. (App. p. 106 and 107.) Will now appeals the dismissal of his action. He is asking that the trial court's decisions be reversed and that the matter be returned to the trial court for further proceedings, including trial.

3. *Standard of Review*.

Summary Judgment is a procedure for prompt resolution of controversies, on their merits and without trial, if there are no disputes of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Ernst v. Acuity, 2005 ND 179, 704 N. W. 2d 869. The party moving for summary judgment must show there are no disputed issues of material fact. On appeal, the evidence is viewed in the light most favorable to the opposing party, and that party must be given the benefit of all favorable inferences. Whether the district court properly granted summary judgment is a question of law that this court reviews de novo on the entire record. Sandberg v. American Family Insurance, 2006 ND 198.

In this case there existed no basis, factually or legally, for the trial court to have concluded that the hospital and Dr. Khokha were "Good Samaritans," and thus immune from legal responsibility. In fact, it is submitted that the only conclusion that can be

reached is that the hospital and its employee. Dr. Khokha, cannot be considered "Good Samaritans." At the very least, the issue constitutes a question of fact, which precludes summary judgment.

4. *Statement of Facts.*

On February 2, 2004, Rosie Chamley was admitted to Mercy Medical Center to undergo a surgical procedure to remove kidney stones. This surgery was performed by Dr. Salem S. Shahin, an Urologist on staff at Mercy. [Shahin Depo., pg 6, l. 19-23; pg. 12, l. 1-22; pg. 13, l. 11-13] Following the procedure, and while Rosie was in the recovery room, excessive blood flow was noted to be coming from a drainage tube. Dr. Shahin decided to return Rosie to the operating room for renal exploration to determine the cause of the excessive bleeding. [Shahin Depo., pg. 26, l. 12-25; pg. 27, l. 2-25; pg. 28, l. 1-20]

During renal exploration, Dr. Shahin concluded that the kidney would need to be removed (a nephrectomy). [Shahin Depo., pg. 36, l. 1-17] Dr. Shahin testified that given the presence of scar tissue from previous surgeries, he had difficulty visualizing the blood vessels both to and from the kidney. Consequently, he requested that the hospital's vascular surgeon, Dr. Khokha, assist with the kidney removal. [Shahin Depo., pg. 37, l. 3-24]

Dr. Khokha is a general surgeon with special vascular training. At the time Dr. Khokha was a salaried employee and staff physician of the hospital. (App. p. 18.) His general surgical privileges included treatment and surgical repair of the vascular system. Specifically, he was authorized to treat trauma to the vena cava. (App. p. 51-54.) His employment responsibilities and compensation were spelled out in a "Physician

Employment Agreement" entered into with the hospital in May, 2003. (App. p. 31.) The agreement prohibited his working for any other employer. In addition to other customary employer-employee benefits, including a base annual salary, Khokha's compensation package also included an "incentive clause," providing "bonus compensation" in the event his net revenue production, collected by the hospital, exceeded a set dollar figure. The employment contract required that Khokha assign to the hospital "all rights to bill for, and all fees due, owing, and/or received for, the professional services of physician (Khokha), during the term of the employment agreement. This employment agreement was in effect during Rosie's hospitalization.

Pertinent provisions of the "Physicians Employment Agreement" were as follows:

> a. The physician "agrees to be employed by the hospital and to render such services in accordance with the terms and conditions of this agreement...."
>
> b. The hospital has determined that the employment of the physician will "facilitate the establishment and improvement of medical services available to patients within Hospital's service area, and will therefore, substantially contribute to the promotion of quality health care within such service area, thereby promoting the charitable purposes of the hospital.
>
> c. Physician's duties and Responsibilities: At the direction of the hospital, physician shall provide such professional medical services as are set forth in Exhibit A, including call coverage, hospital rounds, and such other responsibilities as are reasonably requested by the hospital.

Exhibit A of the employment contract is entitled "Physician's Duties". (App. p. 42.) Those duties included the following:

"Physician Shall"

> 1. Treat patients according to and consistent with Physician's licensure, clinical specialty, privileges, practice and training....
>
> 14. Attend to patients in hospitals, nursing homes and other facilities whenever they are admitted for care in such facilities.

In accordance with the terms of the Physician Employment Agreement Khokha:

- Was required to perform a minimum of 40 hours per week at the hospital facility, 36 hours of which would involve direct patient contact. (App. p. 31, Section 2a)

- Could not accept employment with any other employer or engage in any other activities for profit that related to his status as a physician or which might interfere with his duties for the hospital, without first obtaining written consent from the hospital. (App. p. 32, Section 2a)

- Was required to turn over to Mercy all revenue he generated including fees, as such compensation belonged "exclusively" to the hospital. (App. p. 32, Section 2a)

Khokha entered the operative suite, and participated in the procedure to remove the kidney. What occurred after Khokha's arrival is the subject of considerable dispute. However, by all accounts, during the removal of Rosie's kidney, she experienced massive bleeding as a result of the kidney being torn from the vena cava. [Shahin Depo., pg. 48, l. 8-25] The vena cava is the major blood vessel (directly connected with the kidney) which returns blood to the heart. Doctors Khokha and Shahin disagree as to who caused the tear. Their testimony is irreconcilable. So much so that they even disagree as to which side of the operating table each was standing. [Khokha Depo., pg. 41, l. 24-25; pg. 42, l. 1; Shahin Depo., pg. 42, l. 3-8] Each claims that the other physically removed the kidney when the lethal tear to the blood vessel occurred. [Khokha Depo., pg. 61, l. 1-3; Shahin Depo., pg. 51, l. 19-21] Khokha claims he was assisting Dr. Shahin when the tear

occurred. Will was informed by Dr. Shahin that Khokha simply reached in and "ripped" Rosie's kidney out, tearing the vena cava and causing the massive blood loss that caused Rosie's death. The Plaintiff's expert witness disclosure established that Khokha's conduct was below the standard of care, and negligent. (App. p. 74.) Finally, Dr. Shahin testified that Khokha lied in his operative report as to what actually occurred during surgery. (Shahin depo. p. 162, l. 1-20) A "patchwork" attempt was made to repair Rosie's torn vena cava and she was then returned to the intensive care unit. The next day Rosie was taken by ambulance to Bismarck, where another surgery was performed to try and save her life. Rosie Chamley was pronounced dead on February 7th, 2004. (App. p. 13.)

A pathologic examination of the kidney was performed after the surgery. The hospital says it directed that the kidney be preserved, but curiously, in spite of the specific directive, the kidney has been lost without explanation. (App. p. 77.)

In keeping with the "Physician Employment Agreement" entered into between the hospital and Khokha, almost a year earlier, Mercy billed and was paid for Rosie's hospital stay and the surgical services of its employee, Khokha. (App. p. 55-73.)

The trial court, with no legal analysis and no comment on the facts, simply concluded there existed no material dispute of the facts and found Khokha and the hospital immune from liability under the "Good Samaritan law".

ARGUMENT

I. Did the trial court err when it concluded that the hospital and its employees are "Good Samaritans" and thereby immune from liability under Chapter 32-03.1 of the North Dakota Century Code?

North Dakota's "Good Samaritan" law is found in Chapter 32-03.1 of the North Dakota Century Code. The act bars, in limited circumstances, actions against persons who render aid and assistance. Not too long ago this court had an opportunity to discuss the history of the "Good Samaritan" law and its interpretation. According to this court, the purpose of the law is to protect individuals from civil liability for any negligent act or omission committed while voluntarily providing emergency aid or assistance. See McDowell v. Gillie, 2001 ND 91, 626 NW2d 666. The law also provides that where the individual is deemed a "Good Samaritan," his employer, as well, is entitled to the protections afforded under the act.

The following sections of North Dakota's "Good Samaritan" law are determinative of the issues on appeal:

> **Actions barred.** No person, or the person's employer, subject to the exceptions in sections 32-03.1-03, 32-03.1-04, and 32-03.1-08, who renders aid or assistance necessary or helpful in the circumstances to other persons who have been injured or are ill as a result of an accident or illness, or any mechanical, external or organic trauma, may be named as a defendant or held liable in any personal injury civil action by any party in this state for acts or omissions arising out of a situation in which emergency aid or assistance is rendered, unless it is plainly alleged in the complaint and later proven that such person's acts or omissions constituted intentional misconduct or gross negligence. *N.D.C.C. 32-03.1-02.*
>
> **Physicians or surgeons.** Nothing in this chapter may be construed to deprive any physician or surgeon licensed in this state of the right to collect reasonable fees for any acts of aid, assistance or treatment; or any other person rendering aid or assistance under this chapter, or those whose property is necessarily damaged in the course of such aid or assistance under this chapter, of the right to reimbursement, from the injured or ill

> person or that person's estate for any expenses or damages which appeared reasonable and necessary to incur under the circumstances. **Any person rendering aid or assistance with an expectation of remuneration shall not be covered by the provisions of this chapter.** *N.D.C.C. §32-03.1-04.* (Emphasis ours.)
>
> Exceptions. **This chapter does not encompass a person who, at the time of the emergency was employed expressly or actually for the purpose of providing emergency medical aid to humans, either within or outside of a hospital or other place or vehicle with medical equipment, for emergency medical aid or other assistance rendered in the regular course of their employment. Such persons and their employers are liable for their acts and omissions in rendering emergency medical aid in the regular course of their employment, according to the prevailing law in this state.** *N.D.C.C. § 32-03.1-05.* (Emphasis ours.)

With respect to the "exception" identified in N.D.C.C. §32-03.1-05, it is difficult to conclude Khokha was not hired by the hospital to provide emergency aid to its patients. The very first requirement of the "Physician's Duties" section of his employment contract states: "Physician shall: 1) Treat patients according to, and perform such clinic procedures as are consistent with physician's licensure, clinical specialty, privileges, practice and training." Dr. Khokha's privileges authorized the following procedures:

> "Trauma
> - Management of:
>   - Major lacerations
>   - Penetrating wounds of:
>   - Neck
>   - Chest
>   - Abdomen
>   - Extremities
>
> Blunt trauma of
>   - Chest
>   - Abdomen
>   - Extremities
>
> Management of Burns
>   - Minor
>   - Major....

Vascular
- Trauma of
  - Arteries
  - Veins
  - Vena cava"

(App. p. 51.)

Khokha was hired to treat hospital patients with traumatic injuries. At the time of the negligent conduct, he was doing specifically what he was hired to do in the ordinary course and scope of his employment. It is hard to believe the provisions of N.D.C.C. §32-03.1-05 have not been met. Considering the provisions of N.D.C.C. §32-03.1-04, not only did Khokha have an "expectation of remuneration," under the terms of his employment contract with the hospital, he had in fact already been paid for Rosie's treatment and had assigned his collection rights for payment to the hospital. In truth, the more Rosie Chamleys Khokha treated the more "bonus compensation" he earned. And, of course, as was contractually contemplated by both Khokha and Mercy, Rosie was billed and payment was made for medical services, including Khokha's charges. To provide immunity under these circumstances cannot be what the legislature intended when enacting N.D.C.C.32-03.1-04. Clearly, Dr. Khokha and Mercy are not entitled to immunity under Chapter 32-03.1 of the Century Code.

A review of the governing statutes does not indicate that the legislature ever intended to immunize hospitals and its employees in situations where a "hospital-patient relationship" exists at the time of a negligent act. As this court has said: "in construing a statute, consideration should be given to the ordinary sense of the statutory words, the context in which they are used, and the purpose which prompted their enactment." County of Stutsman v. State Historical Society, 371 N.W.2d 321, 327, N.D. 1985.

Following the statutory interpretation of the trial court to its logical conclusion. would lead to a result certainly never intended, much less even considered. by the legislature. Theoretically. every event in a hospital could be considered an "emergency" or "potential emergency". Patients are not there on holiday. All patients arrive in the hospital for treatment of medical conditions. some more dire than others. Health emergencies can arise quickly and without warning in a hospital setting. In all such events. the patient expects appropriate treatment and the hospital and its employees expect payment for services provided. Very few patients would take comfort knowing that their hospital health care providers are really nothing more than "Good Samaritans" not responsible for their conduct. and can disregard patient emergencies.

Imagine a hospital nurse reporting to a physician that his or her patient has suddenly deteriorated. and the condition is urgent. In response. the physician orders special medications or diagnostic procedures as the situation has become. at least by someone's definition. an "emergency." Suppose that the hospital employed nurse decides to ignore the doctor's orders with disastrous results. A suit ensues and the defense is that the nurse need not comply with the doctor's orders because this was an emergent situation and she was simply acting as a "Good Samaritan." and is therefore immune from responsibility and liability. Following that reasoning further. what if the nurse simply elects to not call the doctor or otherwise report the patient's condition as. again. she is simply a "Good Samaritan." On the other hand, assume the nurse does intervene and. instead of giving the correct medication. the nurse gives the exact opposite medication. causing the patients death. Is she still a "Good Samaritan" with no responsibility? Certainly this cannot be what the legislature intended when enacting

"Good Samaritan" legislation. Yet this is exactly the result if the trial court's summary dismissal of Will's claim is upheld.

We would direct the court's attention to the New Jersey Supreme Court's decision in Valazquez ex rel. Valazquez v. Jiminez, 172 N.J. 240, 798 A.2d 51. In addition to giving a reasoned summary of the status of "Good Samaritan" legislation in all jurisdictions, the decision also offers practical insight to the situation of hospitalized patients.

> "Obviously, in enacting our Good Samaritan law, the legislature was aware that a hospital patient is present at that venue for the very purpose of receiving medical care and is not a person who ordinarily would lack care in the absence of Good Samaritan immunity. Further, physicians in a hospital ordinarily do not come upon a hospital patient "by chance" as would be the case if an accident or emergency occurred on a roadway. Most importantly, our legislature knew that the fundamental problem facing a Good Samaritan on the street (the ability to do little more than render first aid under less than optimal circumstances) is not present in a fully staffed and equipped facility like a hospital, whose very purpose is "to make available the human skill and physical material of medical science to the end that the patients' health be restored. (citations omitted)
>
> Physicians who care for patients in hospitals are not volunteers in the sense of the person who by chance comes upon the scene of an accident. Moreover, physicians who provide emergency care in hospitals have at their disposal all the modern diagnostic and therapeutic equipment. Granted, they may not be familiar with the patient's medical history or disease and are at somewhat of a disadvantage when compared with the patient's personal physician. However, this disadvantage does not rise to the level of the difficulty that confronts the physician who stops at the site of a roadside accident, who can provide little more than first-aid until the EMS team arrives." Valazquez, at 259-260.

Here, neither Khokha nor Mercy were acting as "Good Samaritans." They were hired and paid to provide emergency medical services. They clearly had an expectation of remuneration from the moment Rosie stepped into the hospital lobby. They are by statute excluded from the definition of "Good Samaritans." Likewise, the result of the

trial court's decision is clearly one that could never have been considered or intended by the legislature. Had the legislature intended such a result it could have done so simply and directly.

> II. Did the trial court err when it concluded that there existed no genuine issue of material fact, and, as a matter of law, Dr. Inder V. Khokha and Mercy were acting as a "Good Samaritans" in providing medical services to Rosie Chamley, and therefore immune from suit pursuant to Chapter 32-03.1 N.D.C.C.?

Under Rule 56 of the North Dakota Rules of Civil Procedure, "in considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, and that party must be given the benefit of all favorable inferences which can be reasonably drawn from the evidence." First State Bank v. McConnell, 410 N.W. 2d 139 (N.D. 1987). Assuming for the sake of argument this court finds it "unclear" whether Khokha or the hospital had an anticipation of "remuneration," or that Khokha was providing medical services to Rosie in the regular course of his employment, then there clearly exists a question of fact for jury determination.

CONCLUSION

Based upon the foregoing the Appellant requests that the District Court's summary judgments in favor of Khokha and Mercy be reversed and the case remanded for further proceedings, including trial.

Respectfully submitted this 24th day of October, 2006.

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