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SUPREME COURT OCT 30 2007

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Supreme Court No. 20070296

Darla Weigel, Melody Frieson,
Diana Seney and Lorna Strand
Appellants

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 29 2007

v.

STATE OF NORTH DAKOTA

Lane Lee, D.O.
and
Trinity Health
Appellees

**APPEAL FROM THE JUDGMENT ENTERED ON AUGUST 27, 2007,
DISMISSING APPELLANTS' WRONGFUL DEATH CLAIMS
AGAINST THE APPELLEES
OF THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,
WARD COUNTY, NORTH DAKOTA
THE HON. WILLIAM W. MCLEES, PRESIDING**

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

- I. Did the trial court misinterpret and/or misapply Chapter 32-21 of the North Dakota Century Code. Death by Wrongful Act?

- II. Did the trial court err in concluding that children in the State of North Dakota, as a matter of law, are not permitted to make a claim for non-economic damages, on behalf of themselves, for the death of a parent?

STATEMENT OF THE CASE

1. Nature of the Case.

This is a wrongful death action brought by the daughters of Darlene Rogers, who died at Trinity Hospital (Trinity Health) on May 7, 2004. In their claims against Dr. Lane Lee and Trinity Health, the daughters are seeking non-economic damages for the wrongful death of their mother. A judgment of dismissal of the daughters' claims was entered on August 27, 2007. The daughters are appealing the dismissal of their claims and ask that the judgment of dismissal be reversed and the matter remanded for trial.

2. Procedural History.

The Appellants (hereafter referred to as "daughters") are the surviving daughters of Darlene Rogers, a widower, who died on May 7, 2004, at Trinity Hospital, Minot, North Dakota. By Summons and Complaint dated March 8, 2005, the daughters initiated a wrongful death action against Trinity and its physician employee, Dr. Lane Lee, Darlene's treating physician. The action was brought pursuant to Chapter 32-21 of the North Dakota Century Code, Death by Wrongful Act.

The matter came on for jury trial on April 3, 2006, the Honorable William W. McLees, District Judge, presiding. On April 7, 2006, at the conclusion of the evidence and prior to final argument, the trial court ordered the entire case dismissed and discharged the jury. Numerous post trial motion were submitted and ruled on by the trial court. Ultimately, the trial court ordered the claims dismissed. The basis for the court's dismissal was the court's legal conclusion that under North Dakota law, children cannot maintain an action seeking non-economic damages for the wrongful death of a parent.

Since the Plaintiff's claims against the Defendants seek only non-economic damages pursuant to N.D.C.C. 32-03.2-04, the trial court ordered the daughters' claims dismissed on their merits, and with prejudice.

3. Standard of Review.

The trial court dismissed this case as a matter of law. Questions of law are fully reviewable on appeal. Romanyshyn v. Fredricks, 1999 ND 128, 597 N.W.2d 420; State Farm Mut. Auto Ins. Co. v. Estate of Gabel, 539 N.W.2d 290 (N.D. 1999). Whether a district court misinterprets or misapplies a statute is a question of law fully reviewable on appeal. DeMers v. DeMers, 2006 ND 142, 717 N.W.2d 545. A trial court's erroneous interpretation of a statute constitutes grounds for reversal. See: State v. Jackson, 2005 ND 137, 701 N.W.2d 887, and Anderson v. Hensrud, 548 N.W.2d 410, 413 (N.D. 1996).

4. Statement of Facts.

This is a wrongful death action brought by the surviving daughters of Darlene Rogers. The Complaint alleges that on May 6, 2004, Darlene Rogers was transferred by ambulance from St. Luke's Hospital, Crosby, North Dakota, to Trinity Hospital, Minot, North Dakota, for treatment of a small bowel obstruction. A nasal-gastric tube had been inserted to drain stomach and bowel contents due to the bowel obstruction. In the early morning hours of May 7, 2004, at Trinity, Darlene began gurgling and vomiting brown stool and feces. Shortly thereafter she aspirated (inhaled) her own stool and feces, causing her to go into cardio-pulmonary arrest. Resuscitation efforts failed and Darlene was pronounced dead. (App. p. 4)

Darlene's daughters allege the hospital and Dr. Lee were negligent in that, among other things, they failed to adequately monitor and treat Darlene and assure that the Nasal-gastric tube was functioning appropriately.

This case was tried to a nine person jury beginning April 3, 2006. No evidence of economic damages was presented. The daughters were seeking non-economic damages as provided by N.D.C.C. 32-03.2-04. Testimony concluded on April 7, 2006. Just prior to closing arguments the court dismissed the daughter's claims on the basis that this court's decision in Butz v. Worldwide, Inc. 492 N.W.2d 88 (N.D. 1992), prohibited non-economic damages to children as a result of the wrongful death of a parent. The jury was discharged.

On April 21, 2006, the trial court issued an Order stating that: "upon a more deliberate, less-pressured (i.e. not in the "heat of battle") and more thorough review of the applicable statutes, and case law, addressing and interpreting the same, the court has concluded that there was sufficient evidence for this case to have gone to the jury on the Plaintiffs' mental/emotional anguish claim----and that North Dakota law...does allow a fact finder (the jury in this case) to award damages for mental anguish and emotional distress sustained by children of a deceased parent in a wrongful death case." (App. p. 15) The court, therefore, concluded that a new trial was in order and invited the daughters to file a motion for such relief, should they be so inclined.

The daughters did file a motion for new trial. The motion was opposed by the Hospital and Dr. Lee. The trial court then again changed its mind, deciding that its previous order granting new trial was "flawed." While the trial court was still satisfied that the daughters should receive a new trial, it now ruled that rather than allowing the

daughters non-economic damages for their own loss as a result of the wrongful death of their mother, the daughters could only claim those damages their mother, the “decedent herself,” could have recovered for her pain, suffering, mental anguish, emotional distress or humiliation, prior to her death. The trial court concluded that the Wrongful Death Act only allowed the daughters, as surviving heirs, to “step into” their mother’s “shoes,” and recover those damages their mother could have recovered had she not died. (App. p. 21) Curiously, this argument had never been advanced or even suggested by the daughters, the hospital, or the doctor.

The daughters then filed yet another motion, asking that the court again reconsider its order regarding the type of damages they were entitled to under the Wrongful Death Act. The daughters respectfully suggested that the court had misconstrued the North Dakota wrongful death statutes. The trial court then came full circle and concluded that, at the “end of the day,” it was persuaded that the Butz case controlled damages in this wrongful death action, and that “children in this state have never been entitled in a *wrongful death* action, to bring a claim for non-economic damages---*in behalf of themselves*---for the death of a parent.” (App. p. 24)

By letter dated April 30, 2007, the daughters wrote to the trial court and candidly informed the court that they were only seeking their own non-economic damages as a result of the wrongful death of their mother. (App. p. 42) The attorney for the hospital and doctor then requested a status conference. (App. p.44) The trial court’s order of dismissal and judgment followed. The order of the trial court was that since the daughters were only seeking non-economic damages pursuant to N.D.C.C. 32-03.2-04, and since children in the State of North Dakota are not entitled, as a matter of law, to bring a claim

for non-economic damages, on behalf of themselves, for the death of a parent, their claims must be dismissed. (App. p. 31) The daughters now appeal the trial court's ruling and the judgment of dismissal. (App. p. 37)

ARGUMENT

Wrongful death actions are "creatures of statute." No such claims were permitted at common law. Satterberg v. Minneapolis, St. P. & S. S. M. Ry. Co. 19 N.D. 38, 121 N.W.2d 70 (1909). The present North Dakota enabling statute and the wrongful death statutes pertinent to this appeal provide as follows:

32-21-01. When action for death by wrongful act maintainable.

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tortfeasor, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 32-21-02 provides that the jury is directed to award damages to those persons entitled to recover. That section states:

32-21-02. Measure of recovery.

In an action brought under the provisions of this chapter, the jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery.

The persons entitled to maintain and recover damages in wrongful death claims, and their priority is identified in Section 32-21-03, which provides:

32-21-03. Who may bring action.

The action shall be brought by the following persons in the order named:

1. The surviving husband or wife, if any.

2. The surviving children, if any.
3. The surviving mother or father.
4. A surviving grandparent.
5. The personal representative.
6. A person who has had primary physical custody of the decedent before the wrongful act.

If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, that person may bring the action.

In 1987 the North Dakota Legislature enacted N.D.C.C. 32-03.2-04, which expanded and further defined the types of damages to be awarded in both wrongful death and personal injury actions. The types of damages are identified as "economic and non-economic damages". That section provides:

32-03.2-04. Economic and non-economic damages for wrongful death or injury to person.

In any civil action for damages for wrongful death or injury to a person and whether arising out of breach of contract or tort, damages may be awarded by the trier of fact as follows:

1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings follows: and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.
2. Compensation for non-economic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other non-pecuniary damage.

The daughters, as the children of Darlyne Rogers, are expressly identified in N.D.C.C. 32-21-03 as members of a class of individuals, authorized by law, to assert claims for damages as a result of the wrongful death of their mother. The Century Code

specifically allows them to make claims for both their economic and non-economic damages. Even though the daughters were not making claims for economic damages they were still, nonetheless, entitled to have a jury decide their statutorily permitted non-economic damage claims.

1. The trial court's "step in the shoes of" interpretation of the wrongful death act is reversible error.

The law in North Dakota regarding the measure of damages in wrongful death actions is discussed in detail in the case of Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988). This case also provides an excellent discussion of the history of wrongful death statutes. There, Antoinette Hopkins brought a wrongful death action against her physician for the wrongful death of her daughter. In its decision this Court specifically ruled that the survivors are entitled to damages for their loss of society, comfort and companionship, and their mental anguish. Mrs. Hopkins had lost a daughter. The daughter was a stillborn baby. Under the reasoning of the trial court in dismissing this case, Mrs. Hopkins could have only "stepped into the shoes of" her unborn daughter and recovered what her unborn daughter might have recovered, prior to her death. Such an interpretation can be found nowhere in any legal treatise, case law, or any decision of this court. Furthermore, a ruling such as this would certainly render damages incapable of determination, given the fact Mrs. Hopkins' daughter was unborn, had never taken a breath or, arguably, ever had a conscious thought. If the trial court here is correct, in its "step into the shoes of" theory, and wrongful death damages are simply limited to those damages the deceased might have recover from the time of the negligent act to death, then how does one explain the following language of this court in Hopkins?

“Antoinette has sons, but no daughters, and will be having no more children. Thus, she lost her only daughter. In Antoinette’s Native American society, the traditions and culture are passed down through the women. Antoinette would have taught her daughter the “values and the ways of the Indian people, the way we live.” In her society, the women are very close, and she would have anticipated having a closer relationship with her daughter than with her sons. When she sees children on the streets, Antoinette wonders what her daughter would look like, how big she would be, and “what we’d be doing.” Antoinette testified that she thinks about her daughter every day and will never forget her. Antoinette’s mother testified that six years later, Antoinette still talked about the baby “[p]robably every week that I see her.” As in Schultz v. Winston & Newell Co., *supra*, 283 N.W. at 73-74, “we are unable to give a safe ground upon which we can say that the verdict is so excessive as to justify our interference therewith.” We conclude that the trial court’s findings of damages in the amount of \$50,000 for mental anguish and grief and \$100,000 for loss of companionship, society and comfort are not clearly erroneous.” Hopkins, at 95.

The trial court’s analysis simply cannot be reconciled with this Court’s opinion in Hopkins.

The trial court here has clearly misinterpreted and misapplied the wrongful death act and the measure of damages in wrongful death claims.

2. The trial court has erroneously applied the law of consortium claims for personal injury to others to wrongful death claims.

In its third post-trial opinion and memorandum the trial court apparently abandoned its “in the shoes of” theory, and returned to its earlier opinion that children simply have no claim for non-economic damages as a result of the death of a parent.

The trial court seems to be saying that while parents are entitled to non-economic damages for the death of a child, the converse is not permitted under our wrongful death statute. The trial court’s erroneous conclusion is based on a misunderstanding of this Court’s decision in Butz v. World Wide, Inc., 492 N.W.2d 88, (N.D. 1992). In 1984

Charles Butz was severely injured in a boating accident. He brought a civil claim against the manufacturer of "Super Tube," seeking damages for personal injuries. A trial was held and a sizeable verdict was returned in his favor. Neither Butz's spouse nor his children were parties to the original suit. Later, after verdict, Mr. Butz's spouse and his children filed separate actions, claiming loss of consortium as a result of the personal injuries to Mr. Butz. With respect to the consortium claim of Mrs. Butz, this court ruled that for purposes of judicial economy, such claims should be considered "compulsory claims," brought concurrently with Mr. Butz's personal injury claims. Since this was the first time this issue had been raised, this Court applied the "sunburst doctrine" and allowed the Butz spousal consortium claim, but made its ruling "prospective" as to any future such claims.

Turning its direction to children's consortium claims on account their father's personal injuries, the court noted that the thrust of the children's argument was that because of the enactment of N.D.C.C. 32-03.2-04, the legislature indicated an "intent" to allow children a loss of consortium claim for personal injuries to a parent. In dismissing the children's consortium claims, this court noted that it had considered the issue before in Hastings v. James River Aerie No. 2337, Etc., 246 N.W.2d 747 (N.D. 1976), and Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980). In each case, this court denied personal injury consortium claims. In Hastings, then Chief Justice Erickstad stated: "What we say here should not be construed to prohibit recovery where a parent dies and recovery is allowed under the Wrongful Death Act, Ch. 32-21, N.D.C.C." (Hastings at 753). The Butz children were not allowed to make a claim of loss of consortium because the law did

not recognize them as being in a class of individuals to make such a claim. The same is simply not true in a wrongful death action.

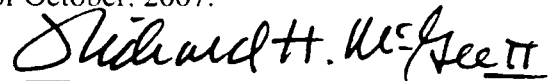
Under N.D.C.C. 32-21-03. Children are already a class of plaintiffs expressly recognized by the legislature as having the right to bring wrongful death claims. The enactment of N.D.C.C. 32-03.2-04 merely expanded the types of damages available to an existing class, a class to which the daughters already were members of. The Butz children were not allowed to recover non-economic damages because they were not an already-existing class of plaintiffs permitted to recover for personal injuries to their parent. Here, however, parents and children were already-existing classes of plaintiffs, permitted to recover. See N.D.C.C. 32-21-03. The Butz case, which addressed derivative personal injury claims, is simply not controlling in actions for wrongful death.

CONCLUSION

For all reasons stated, the Judgment of the District Court should be reversed and the matter remanded for trial on the merits.

Respectfully submitted this 29th day of October, 2007.

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CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2007, I mailed a true and correct copy of foregoing Brief of Appellant and the Appendix to:

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