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CASE BRIEF
LORNSON v. SIDDIQUI

Pablo A. Godoy

The Wisconsin Supreme Court, in a recent decision, established a claimant's cause of action in a wrongful death medical malpractice suit does not (1) survive the death of the claimant; and (2) that adult children of the deceased are not eligible claimants in a wrongful death suit.¹ The Court's decision effectively put an end to the inconsistent application of Chapter 655 of the Wisconsin Statute, which established an exclusive procedure for the prosecution of medical malpractice claims against a health care provider.² Prior to this decision, courts struggled to determine whether the lack of statutory provisions in Chapter 655 enabled or precluded the application of statutory provisions not referenced in the statute.³

I. LORNSON LITIGATION HISTORY

Joseph Sanders filed a wrongful death claim against the defendants for medical negligence in the death of his wife, Janice.⁴ Sanders filed the complaint on behalf of himself individually and as special administrator of his wife's estate.⁵ After initial discovery but before trial, Sanders died.⁶ Plaintiffs Lornson and Hoertsch, Sanders' adult daughters, sought compensatory damages under three theories of recovery: (1) on behalf of the estate of Janice Sanders in their capacity as special administrators; (2) on behalf of the estate of John Sanders in their capacity as personal representatives, citing Wis. Stat. § 895.04(2); and (3) in the alternative of the second theory, citing Wis. Stat. § 895.04(2), on behalf of themselves in their individual capacities as the surviving daughters and lineal heirs of Janice Sanders.⁷

¹ Lornson v. Siddiqui, 735 N.W.2d 55 (Wis. 2007)

² See Wis. Stat. ch. 655.

³ See Dziadosz v. Zirmeski, 501 N.W.2d 828 (Wis. Ct. App. 1993); Storm v. Legion Ins. Co., 665 N.W.2d 353 (Wis. 1995)

⁴ Lornson, 735 N.W.2d at ¶3.

⁵ *Id.*

⁶ *Id.* at ¶8.

⁷ *Id.* at ¶10.

All defendants joined in a motion to dismiss the wrongful death claim asserted on behalf of Joseph Sanders' estate and the claim asserted on behalf of Lornson and Hoertsch individually. The defendants asserted both plaintiffs lacked standing to bring a wrongful death claim in the capacity of personal representatives of their father's estate or as individuals.⁸ However, the defendants conceded the survival claim by the special administrators on behalf of Janice Sanders' estate was unaffected by Joseph Sanders' death.

The Winnebago Circuit Court granted the defendants' motion to dismiss the wrongful death claims, reasoning that Wis. Stat. § 655.007 provided the exclusive list of claimants eligible to bring a medical malpractice action.⁹ The court concluded that the exclusion of adult children or a spouse's representative in § 655.007, indicated that the legislature did not intend for adult children or the spouse's representative to bring a wrongful death claim. The court of appeals certified the case to the Wisconsin Supreme Court to address the issue of whether "a surviving spouse's wrongful death claim in a medical malpractice action survive[s] his or her own death such that his or her personal representatives have standing to pursue that claim."¹⁰ After accepting certification, the Supreme Court addressed the individual wrongful death claims that were a result of medical malpractice of adult children.

II. DISCUSSION

In determining whether the adult children of a deceased parent or the personal representatives of a surviving but now deceased spouse are eligible to bring a medical malpractice wrongful death claim, the court began its analysis by looking to the language of the relevant and related statutes, followed by examining case law, legislative history and legislative intent.

⁸ *Id.*

⁹ *Id.* ¶ 12.

¹⁰ *Id.*

A. Standing of Adult Children of Deceased Parent to Bring Forth a Medical Malpractice Wrongful Death Claim

The court began its analysis with provisions of Chapter 655 of the Wisconsin Statutes. Wis. Stat. § 655.006, provides in part that “On and after July 24, 1975, every patient, every patients representative and every health care provider shall be conclusively presumed to have accepted to be bound by this chapter.”¹¹ Wis. Stat. § 655.007, which enumerates the eligible claimants of a medical malpractice claim, provides “Patients’ Claims. On and after July 24, 1974, any patient or the patient’s representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter.”¹²

No dispute existed between the parties that Lornson and Hoertsch had a direct claim as successor special administrators of their mother’s estate. The issue faced by the court was whether Lornson and Hoertsch had a derivative claim under Wis. Stat. § 655.007 for their mother’s death given the absence of language indicating the phrase “child of the patient” included adult children.

Relying on the statutory language of Wis. Stat. § 655.007 and its previous interpretation in *Czapinski v. St. Francis Hosp.*¹³, the court held only minor children and minor siblings, in addition to the spouse and parents of the patient, have derivative claims under Wis. Stat. § 655.007. Thus, Lornson and Hoertsch’s individual claims failed.

B. Standing of Personal Representatives to Bring Forth a Medical Malpractice Wrongful Death Claim of a Surviving But Now Deceased Spouse

The other issue confronted by the court is whether the original claimant’s derivative wrongful death claim, as the spouse of the deceased, survives the claimant’s death, if death occurs before a judgment has been rendered. Given that Wis. Stat. § 895.01 is a separate statute on what actions survive the death of a claimant, the court had to determine whether the language and history of Chapter 655

¹¹ See WIS. STAT. § 655.006 (1)(a) (2006).

¹² See WIS. STAT. § 655.007.

¹³ See *Czapinski v. St. Francis Hosp.*, 613 N.W.2d 120 (Wis. 2000).

limited potential claimants to those enumerated in Wis. Stat. § 655.007 or whether the list of claimants may also include potential claimants allowed under the wrongful death statute within Chapter 895.¹⁴

The court looked to legislative intent as a result of what it perceived to be ambiguousness within the various statutes. While Wis. Stat. § 655.007 clearly permits a spouse to bring a wrongful death claim, the chapter is silent as to what happens in the event the spouse dies before judgment.¹⁵ As a result of this silence, the court referred to the general wrongful death provision in Chapter 895 to determine the survivability of a spouse's claim, and relied exclusively on statutory provisions rather than common law.

The general wrongful death provision may be found in Wis. Stat. § 895.01(1) and when read along with paragraph (o), which addresses the survival of a wrongful death claim, provides:

(1) In addition to the causes of action that survive at common law, all of the following also survive:

(o) Causes of action for wrongful death, which shall survive the death the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person.¹⁶

In its analysis and final determination that medical malpractice wrongful death claims do not survive the death of the claimant, the court looked to the additional language found only in paragraph (o). This language made mention of the "death of the wrongdoer" while making no such mention of the claimant's death. The court noted the legislature intentionally made paragraph (o) inconsistent with the other paragraphs in the survival statute by making a distinction between the wrongdoer and the claimant through the use of restrictive language exclusive to paragraph (o).¹⁷

In further examination, the court noted paragraph (o) had more than one possible interpretation based on its language and when read in conjunction with Wis. Stat. § 895.04(2), both provisions were in direct

¹⁴ See WIS. STAT. §§ 895.01 (1)(o) and 895.04 (2) (2006).

¹⁵ See WIS. STAT. ch. 895 (2006).

¹⁶ See WIS. STAT. § 895.01(1)(o).

¹⁷ See WIS. STAT. § 895.01.

conflict with each other. Wisconsin Stat. § 895.04(2) provides a hierarchy of eligible claimants in a general wrongful death action. The statute provides “if any such relative dies before judgment in action, the relative next in order shall be entitled to recover for the wrongful death.”¹⁸ Therefore, an interpretation that a wrongful death claim survived the death of the claimant would render the provision meaningless because a cause of action would be assumed by the claimant’s personal representative rather than pass to the next relative in line. The conflicting provisions of the statute and the resulting ambiguousness required the court to examine the legislative history of both provisions to determine their meaning.

After examining the legislative history and case law including the 1999 amendment to the survival statute in Wis. Stat. § 895.01(1), the court found the legislature had historically used the wrongful death statute¹⁹ to define the eligibility and priority of claimants. Therefore, the court held a claimant’s personal claim does not survive his death; rather it is succeeded by a new claim for someone lower in the hierarchy.

In holding that the 1999 amendment was not intended to make any substantive changes to the statute, the court relied on five pieces of evidence in arriving at this conclusion. The court held the amendment was intended merely to reorganize the statute based on: (1) the amendment as a Revisor’s Correction Bill, which rarely makes substantive changes to laws;²⁰ (2) the use of descriptive language in the “relating clause” within the 1999 Wis. Act 85, which mirrors the Revisor’s duties in Wis. Stat. § 13.93;²¹ (3) the legislative note to the revision of Wis. Stat. § 895.01;²² (4) the length of the assembly bill that promulgated 1999 Wis. Act 85 and the lack of amendments to it²³; and (5) the fact that the assembly bill has no amendment or cross-reference to Wis. Stat. § 865.04(2)²⁴.

The court rejected the plaintiff’s argument that the survival rule should be applied more expansively to medical malpractice wrongful death claims because the court had never held the succession rule of

¹⁸ See WIS. STAT. § 895.04(2).

¹⁹ See WIS. STAT. § 895.04.

²⁰ See WIS. STAT. § 13.93(3)(j) (2006).

²¹ See 1999 Wis. Act 85, available at <http://www.legis.state.wi.us/1999/data/acts/99Act85.pdf>.

²² See Note, 1999 Wis. Act 85, § 171.

²³ See 1999 A.B. 925.

²⁴ *Id.*

Wis. Stat. § 895.04(2) did not apply to medical malpractice actions. Here, the court held the case law did not support this argument²⁵ and such a ruling would conflict, not complement, the statutory provisions of Chapter 655. This effectively ended any claim Lornson and Hoertsch had as representative's of their father's estate for damages because the original claim did not survive their father's death.

C. Constitutional Claims: Deprivation of Property without Due Process and Deprivation of Equal Protection Under the Law

Lornson and Hoertsch asserted that an interpretation of Wis. Stat. § 655.007 which denies their claims as personal representatives of Joseph Sanders' estate cannot stand on constitutional grounds.

The court quickly disposed of the argument that Joseph Sanders' statutory right to recover damages for the death of his wife became a vested property right, and as a result, denial of their claim deprives his estate of a vested property interest without due process. The court held Joseph Sanders did not acquire a vested property right in a wrongful death cause of action because a cause of action for wrongful death is purely statutory.

Furthermore, the court rejected the argument that Joseph Sanders and his estate were deprived of equal protection of the law. The court reasoned that unless a statute impinges on a fundamental right, it need only meet a rational basis of review. The court continued that since Wis. Stat. § 655.007 is not based on a fundamental right and a rational basis exists for the distinction between claimants who die before judgment and those who do not, the equal protection clause was not violated. In addition, the court held its interpretation of Wis. Stat. § 655.007 in conjunction with §§ 895.01(1)(o) and 895.04(2) has an equal effect on all claimants, and thus, does not violate the equal protection clause.

²⁵ See *Schmidt v. Menasha Woodenware Co.*, 74 N.W. 797 (Wis. 1898).

III. CONCLUSION

The Wisconsin Supreme Court's decision served to clarify conflicting statutory provisions related to medical malpractice wrongful death claims. In doing so, the court placed a limitation on who is eligible to file a claim following the death of the original claimant in a cause of action.

Under the court's ruling, an eligible claimant's cause of action does not survive the death of the claimant in wrongful death actions. However, in non-medical malpractice wrongful death claims under Wis. Stat. § 895.04(2), a new cause of action is available to the next claimant in the statutory hierarchy. In medical malpractice wrongful death cases, in contrast, eligible claimants under Wis. Stat. § 655.007 are not subject to the statutory hierarchy like claimants under Wis. Stat. § 895.04(2), but the exclusivity of Wis. Stat. § 655.007 precludes adult children of the deceased, in addition to all other individuals not listed as eligible claimants under the statute, from filing a claim.

The court's decision in this matter leaves an improbable possibility of further litigation on constitutional grounds, but more importantly, the decision seems to undermine the purpose of legislation that ensures the quality of health care for individuals through tort action for meritorious malpractice claims. The court's ruling detracts from the deterrent effect legislation such as Wis. Stat. § 655.007 could have in preventing careless medical practices by severely limiting the scope of whom an eligible claimant is following the death of the original claimant before a judgment is rendered. Thus, the court shielded the negligent party(s) from taking responsibility for not fulfilling the duties owed to their patients or clients. The language of Wis. Stat. § 895.01(1)(o) is unambiguous and based on a plain reading of the statute, permits all claims of action for wrongful death to survive the death of the claimant.²⁶ While the court held that Wis. Stat. § 895.01(1)(o) and Wis. Stat. § 655.007 conflicted, it is arguable that a ruling in favor of permitting the survival of a cause of action following the death of a claimant in a medical malpractice wrongful death claim would complement and further the purpose of wrongful death legislation.

²⁶ See *Lornson*, 735 N.W.2d at ¶ 82 (Crooks, J., concurring in part, dissenting in part).

