

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,368

SAFECARE HEALTH CORPORATION,

Petitioner,

vs.

GRETEL LOEB,

Respondent.

FILED

SID J. WHITE

NOV 20 1991

CLERK, SUPREME COURT

By JPS
Chief Deputy Clerk

On review from the Fourth District
Court of Appeal, of Florida

BRIEF OF RESPONDENT
ON THE MERITS

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner's statement of the case and facts fails to accurately summarize the facts of this case. The original Plaintiff in this case, MRS. GRETEL LOEB (MRS LOEB), went to SAFECARE HEALTH MAINTENANCE ORGANIZATION (SAFECARE) in order to determine the cause of her decreased appetite and in early satiety. (R-Depo Dr. Howard pg. 5. Dr. Rosado), an employee of SAFECARE, ordered an upper GI series on November 5, 1986. Dr. Howard saw MRS. LOEB on December 31, 1986, for the first time because Dr. Rosado no longer worked at SAFECARE. (R-Depo Dr. Howard pg. 6) When MRS. LOEB saw Dr. Howard on December 31, 1986, she inquired about the results of the GI series performed in November, 1986. Dr. Howard was unable to discuss the findings of that diagnostic study due to the fact that the results of the test were not part of MRS. LOEB's chart. (R-Depo Dr. Howard pg 6-7)

MRS. LOEB settled her claim against the Defendant, DR. HOWARD, and a Release was signed which specifically excluded Defendant, SAFECARE.

On December 4, 1989, Judith Rimer, as Special Administrator of the Estate of MRS. LOEB, filed an Amended Complaint suing Defendant, SAFECARE, for their independent acts of negligence. The Amended Complaint sought damages provided by the wrongful death act for the alleged act of negligence of SAFECARE for their failure to exercise or possess that degree of care, skill, or knowledge ordinarily possessed by other health maintenance organizations.

The Fourth District Court of Appeals in reversing the trial court's decision on the set-off issue did not acknowledge that its decision departed from established Florida law on the issue of the viability of the wrongful death action. The Fourth District Court of Appeals' decision was based upon its interpretation of Devlin v. McNannis, 231 So2d 194 (Fla. 1970) and F.S. 768.041 and F.S. 768.31.

ISSUES INVOLVED ON REVIEW

UNDER THE CIRCUMSTANCES OF THIS MATTER SHOULD THE SUPREME COURT ACCEPT CERTIORARI WHERE THERE IS NO NEED FOR CLARIFICATION OF EXISTING FLORIDA DECISIONAL LAW?

IS AN ACTION FOR WRONGFUL DEATH AGAINST ONE TORTFEASOR BARED BY A PRIOR SETTLEMENT OF A CLAIM FOR PERSONAL INJURIES AGAINST ANOTHER TORTFEASOR WHERE THE DAMAGE ELEMENTS ARE ENTIRELY DIFFERENT?

IS A TORTFEASOR WHO IS INVOLVED IN A WRONGFUL DEATH ACTION ENTITLED TO A SET-OFF FOR A SETTLEMENT MADE WITH ANOTHER TORTFEASOR IN A PERSONAL INJURY ACTION SETTLED PRIOR TO THE CLAIMANT'S DEATH?

SUMMARY OF THE ARGUMENT

There is no need for the Supreme Court to exercise its discretionary jurisdiction because Florida decisional law is clear given the circumstances of this matter. The Supreme Court has recognized that the right to recover for wrongful death is separate and distinct from the injured person's right while living for personal injuries and that set-offs are inappropriate where there are separate and distinct actions involving different elements of damages.

The Fourth District Court of Appeals did not err in its decision. To bar a wrongful death suit against an independent tortfeasor because of the decedent's recovery of personal injury damages against another tortfeasor would be contrary to the purpose of Florida's Wrongful Death Act and would allow a tortfeasor to evade liability.

The perceived fear that if a wrongful death action is allowed to follow a personal injury recovery there would be double liability and thus double recovery is unfounded. A wrongful death judgment compensates the statutory beneficiaries for specific elements of damages while the personal injury judgment compensates the injured party for injuries the individual has sustained.

To permit a set-off would be to ignore the distinction between a personal injury action and a wrongful death action and would allow the tortfeasor who committed an independent act of negligence

to evade liability for his misconduct when that misconduct results in the death of a human being.

Under the circumstances of this case, there are two independent tortfeasors, there are two separate and distinct causes of injuries, and the elements of damages arising out of the personal injury action are separate and distinct from those arising out of the wrongful death claim. Florida decisional law is clear and therefore the Fourth District Court of Appeals decision should be affirmed and the two questions certified, if reviewed by this Court, should be answered in the negative.

ISSUE ONE

UNDER THE CIRCUMSTANCES OF THIS MATTER, SHOULD THE SUPREME COURT ACCEPT CERTIORARI WHERE THERE IS NO NEED FOR ANY CLARIFICATION OF EXISTING FLORIDA DECISION LAW?

Article V of the Florida Constitution embodies the idea of a Supreme Court that functions as a supervisory body exercising its appellate power in only certain specified areas that are essential to the settlement of issues of public importance and preservations of uniformity of principal and practice. Sanches v. Wimpey, 409 So2d 20 (Fla. 1982).

Under the circumstances of this case, Florida law is clear that where a person dies as a result of the negligence of another, two separate and distinct and independent rights have been violated. Epps v. Railway Express Agency, 40 So2d 131, 132 (Fla. 1949). The right to recover under a personal injury cause of action is the injured persons right to recover for the damages inflicted upon the injured individual. The statutory beneficiaries right to recover under a wrongful death action is the beneficiaries right to recover for the damages suffered by the statutory beneficiaries as a result of the death of the decedent caused by a wrongdoer's negligence.

The wrongful death judgment compensates the statutory beneficiaries for certain elements of damages which are different from those compensated by the personal injury judgment. The perceived fear that there will be double liability and double

recovery if a wrongful death action is allowed to follow a personal injury action is unfounded. The elements of damages which are capable of being duplicated would be acknowledged and taken into account prior to the wrongful death action.

The set-off contemplated by Florida Statute 768.041 "must be interpreted so as to preserve the identity of separate causes of action and the distinctive character of the damage elements accruing under each cause." Devlin v. McMannis, 231 So2d 194, 196 (Fla. 1970). This statute does not require set-offs where parties are entitled to compensation for particular damage elements under one cause of action and beneficial recipients are entitled to compensation for different elements of damages accruing under another cause of action. Id at 196.

In the present case, the original Plaintiff, MRS. LOEB, was entitled to compensation for her damages under her personal injury claim for DR. HOWARD's negligence and SAFECARE's independent acts of negligence. Judith Rimer, as a statutory beneficiary of MRS. LOEB's estate, is entitled to compensation recoverable under those elements of damages accruing under a wrongful death claim because the decedent was never compensated for the damages she suffered as a direct and proximate result of SAFECARE's misconduct which resulted in her death.

The Fourth District Court of Appeals decision does not depart from established Florida law. The Florida Supreme Court in Variety Children's Hospital v. Perkins, 445 So2d 1010 (Fla. 1984) stated that the purpose of the Florida Wrongful Death, was to prevent a

tortfeasor from evading liability for his misconduct when that conduct results in death. In Variety, the Court held that no right of action remains for the benefit of statutory beneficiaries if the injured party sues and recovers damages for fatal injuries during his lifetime.

This present case involves two different tortfeasors, not one, and the Estate seeks to recover damages from a Defendant whom the injured party, decedent, has not recovered from during her lifetime. MRS. LOEB's claim against SAFECARE was viable at the time of her death and Florida law does not preclude her survivors from recovering against SAFECARE for their independent acts of negligence.

The Supreme Court should not accept certiorari given the circumstances of this matter. There is no need for the Supreme Court to exercise its appellate power when Florida decisional law is clear.

ISSUE TWO

IS AN ACTION FOR WRONGFUL DEATH AGAINST ONE TORTFEASOR BARRED BY A PRIOR SETTLEMENT OF A CLAIM FOR PERSONAL INJURY AGAINST ANOTHER TORTFEASOR WHERE THE ELEMENTS OF DAMAGES ARE ENTIRELY DIFFERENT?

When a person dies as the result of the negligent acts of another, "two separate, distinct, and independent rights have been violated". Epps v. Railway Express Agency, 40 So2d 131 (Fla. 1339). The personal injury cause of action for negligence is based on the common law right, and the cause of action for wrongful death is statutory. Florida Statute 768.19.

A negligence action is in favor of the injured party and the right to recover is for the damages suffered by the injured party as a result of the injuries inflicted upon their person. A wrongful death action is in favor of the decedent's estate and the statutorily designated survivors. The statutory beneficiaries right to recover is for the damages suffered by the beneficiaries as a result of the death of the decedent caused by the tortfeasor's negligent acts. Taylor v. Orlando Clinic, 555 So2d 876 (Fla. 5th DCA 1989).

The original act of negligence of SAFECARE is the basis of all actions maintainable by MRS. LOEB in her lifetime and by Judith Rimer, the Special Administrator of MRS. LOEB's estate, after her death. The decedent has recovered for the failure of DR. HOWARD to diagnose her cancer; however, the decedent never recovered from

SAFECARE for their independent acts of negligence.

Prior to MRS. LOEB's death, she was entitled to litigate her personal injury claim against SAFECARE. To deny the wrongful death suit against SAFECARE for their independent acts of negligence, because of the recovery of personal injury damages against DR. HOWARD, would be tantamount to allowing SAFECARE to evade liability for misconduct which resulted in MRS. LOEB's death and contrary to the Florida Wrongful Death Act.

As the Fourth District Court of Appeals correctly noted, this case, unlike Variety, involves not only the question of a set-off, it also involves two different tortfeasors. In Variety, this Court held that the statutory beneficiaries were barred from bringing a wrongful death action against the Defendant Variety, because a decedent had recovered against the same defendant in a personal injury action prior to the decedent's death. In this case, the decedent did not recover from SAFECARE prior to MRS. LOEB's death. Therefore, MRS. LOEB's estate is entitled to recover from SAFECARE for its independent acts of negligence because the wrongful death claim is not based on the same tortious conduct of Defendant, DR. HOWARD.

It is error to try to apply the doctrine of Variety to the facts in this case. Not only are there two tortfeasors, but one of the tortfeasor, SAFECARE, has not been held accountable for its tortious conduct. This Court in Variety noted that "one of the paramount purposes of the Florida Wrongful Death Act was to prevent a tortfeasor from evading liability for its misconduct when such

misconduct results in death." Id at 1012. To bar the statutory beneficiaries from bringing a wrongful death claim against SAFECARE for its independent acts of negligence, not only defeats the purpose of the ACT but denies the statutory beneficiaries their right to damages. Damages which are entirely different from those elements of damages awarded to the decedent in her personal injury claim against separate and distinct tortfeasor for his acts of negligence.

The Third District Court of Appeal's decision in Warren v. Cohen, 363 So2d 129 (Fla. 3rd DCA 1978), cert. denied, 373 So.2d 462 (Fla. 1979), like Variety only bars the beneficiaries from filing a wrongful death claim against the tortfeasor when the decedent has already recovered against the same tortfeasor during his or her lifetime. Florida law is clear that where an injured party could recover against a tortfeasor during his lifetime, the statutory beneficiaries are not barred from bringing a wrongful death action against the same tortfeasor if the decedent had not been compensated for damages.

Based upon the foregoing a wrongful death claim against one tortfeasor is not barred by a prior settlement of a claim for personal injuries against another tortfeasor. To bar the statutory beneficiaries the right to bring a wrongful death claim against SAFECARE for its independent acts of negligence would be to allow SAFECARE to evade liability for its negligent conduct. Therefore, the Court should answer the first certified question in the negative.

ISSUE III

IS A TORTFEASOR WHO IS INVOLVED IN A WRONGFUL DEATH ACTION ENTITLED TO A SET-OFF FOR A SETTLEMENT MADE WITH ANOTHER TORTFEASOR IN A PERSONAL INJURY ACTION SETTLED PRIOR TO THE CLAIMANT'S DEATH?

The Estate of MRS. LOEB is seeking damages against SAFECARE for their independent acts of negligence, therefore, SAFECARE is not entitled to a set-off of a wrongful death action brought against them. A set-off from a Judgment against one tortfeasor is authorized only in the amount constituting a settlement for damage elements recoverable in the same cause of action against another tortfeasor. Devlin v. McMannis, 231 So2d 194, 196 (Fla. 1970).

This Court has held that the set-off contemplated by Florida Statute 768.041 "must be interpreted to preserve the identity of separate causes of action and the distinctive character of the damage elements accruing under each such cause". Id.

To permit a set-off would be to ignore the distinction between a personal injury claim and its elements of damages and a wrongful death claim and its distinctive elements of damages. The former is the right of an injured party to recover for damages they suffered by reason of the injuries inflicted upon them. The later right to recover is for the damages the statutory beneficiaries have suffered as a result of the death of the descendant caused by the negligent conduct of the tortfeasor. Epps v. Railway Express Agency, 40 So2d 131, 132 (Fla. 1949).

MRS. LOEB had been compensated for the damages she had suffered as a result of Defendant DR. HOWARD's negligence. Because

MRS. LOEB was not able to recover against Defendant SAFECARE prior to her death, her Estate has the right to bring a wrongful death action against SAFECARE and recover those damages the statutory beneficiaries have suffered as a result of SAFECARE's independent acts of negligence. The identity of these separate causes of action and the distinctive characteristics of the damage elements accruing under each of these causes must be preserved. Devlin v. McMannis, 231 So.2d 194 (Fla. 1970).

The principal of law expounded in Raben Builders v. First American Bank, 561 So.2d 1229 (Fla. 4th DCA 1990) is that absent proof that a Defendant is liable for damages which are separate and distinct and in excess of those damages recovered against one defendant, a claimant cannot recover against another Defendant for the same damages. In Raben, unlike the Loeb case, the amount the claimant settled with one Defendant for compensated the injured party for the total amount he lost through the embezzlement. The claimant could not pursue a cause of action against the Co-Defendant because he, unlike MRS. LOEB's estate, had been fully compensated for his losses. The Estate of MRS. LOEB, on the other hand, has not been compensated at all for its damages.

Allowing the Estate to recover in a wrongful death action would not be permitting a double recovery because a wrongful death judgment compensates parties for certain elements of damages which are separate and distinct from those damages compensated in a personal injury judgment. The Estate notes the potential duplication of medical expenses from the date of injury to the date

of death and those claims have been waived by the Estate, Rimer v. Safecare Health Corporation, 16 FLW D 1728 (Fla. 4th DCA 1991).

In cases cited by Petitioner, the Courts have denied a wrongful death claim because the decedent had already recovered against the tortfeasor while they were alive. The facts in this case can be distinguished from the cases cited by the Petitioner in several ways:

1. MRS. LOEB had a cause of action against both Defendant DR. HOWARD and Defendant SAFECARE while she was alive,

2. MRS. LOEB settled only with DR. HOWARD for those elements of damages brought under her personal injury cause of action for DR. HOWARD's negligence,

3. The Estate's Complaint alleges independent acts of negligence by SAFECARE that resulted in injury to MRS. LOEB,

4. The Estate seeks compensation from SAFECARE for its independent tortious conduct, and

5. A set-off cannot be contemplated because Florida Law must be interrupted so as to "preserve the identity of separate causes of actions in the distinctive elements of damages accruing under personal injury claims and wrongful death claims. Devlin v. McMannis, 231 So2d 194, 196 (Fla. 1970).

To allow a set-off in this matter would be to: (1) ignore the distinction between a personal injury cause of action and a wrongful death claim, (2) ignore the differences in the parties entitled to recovery, and (3) ignore the respective elements of damages accruing under each cause of action.

Florida Wrongful Death Act creates an independent cause of action in the Estate and the statutory beneficiaries. Therefore, any recovery obtained on the beneficiaries behalf cannot be set off by the Decedent's settlement of a personal injury claim against a separate and distinct tortfeasor who committed independent acts of negligence against the decedent.

CONCLUSION

The Supreme Court should not exercise its discretionary power to review this case as Florida decisional law is clear on this matter. If this Court decides to review this case on its merits, MRS. LOEB's estate asks this Court to find that the Estate's Wrongful Death claim is a viable cause of action and that there can be no set-off in the amount paid by Defendant DR. HOWARD as the tortious conduct alleged against Defendant SAFECARE is separate and distinct from that of Defendant, DR. HOWARD. Accordingly, this Court should affirm the decision of the Fourth District Court of Appeals and answer both certified questions in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this the 18th day of November, 1991 to: LINDA FENNER, 4000 Hollywood Boulevard, Suite 620 N, Hollywood, Florida 33021.

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