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THE SUPREME COURT OF FLORIDA

Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

84,289

HEIDI PATE and
JAMES PATE, her husband,

Appellants,

vs.

JAMES B. THRELKEL, M.D.; JAMES B. THRELKEL, M.C., P.A.; GESSLER CLINIC P.A.; SHANDS TEACHING HOSPITAL & CLINIC, INC.; and FLORIDA BOARD OF REGENTS,

Appellees.

_____/

INITIAL BRIEF OF APPELLANT HEIDI PATE AND JAMES PATE, HER HUSBAND

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STATEMENT OF THE CASE

This is a medical negligence action involving the issue of whether a physician owes a duty to the children of a patient to warn the patient of the inheritable nature of the patient's condition. The trial court granted summary judgment, finding the physician owed no duty to the children due to the lack of a patient-physician relationship with the children. The First District affirmed the trial court, but certified the following question to this Court as being an issue of great public importance:

> DOES A PHYSICIAN OWE A DUTY OF CARE TO THE CHILDREN OF A PATIENT TO WARN THE PATIENT OF THE GENETICALLY TRANSFERRABLE NATURE OF THE CONDITION FOR WHICH THE PHYSICIAN IS TREATING THE PATIENT?

STATEMENT OF THE FACTS

The operative facts are undisputed and are set forth in the Complaint filed herein. In early 1987, Marianne New, the mother of the Plaintiff, Heidi Pate, was diagnosed with medullary thyroid cancer, a hereditary cancer of the thyroid. She had the cancer surgically removed but none of her health care providers, Defendants herein, advised her that her cancer was hereditary and that she should immediately have her children screened for the disease.

In May 1990, three years after Marianne New's surgery, Plaintiff, Heidi Pate, learned that she had medullary thyroid cancer and had to undergo extensive surgery. She further learned from her doctor that the disease was hereditary and was advised that if she ever had children, she would need to have them tested for the presence of the disease.

Heidi Pate filed suit against her mother's doctors alleging they knew the disease was hereditary; that despite this knowledge, they failed to warn her mother that her children needed to be tested for the disease; that had Marianne New been warned in 1987, the children, including Heidi Pate would have been tested at that time; that testing at that time would have revealed Plaintiff, Heidi Pate, did have the disease but in a very early stage; and that diagnosis and treatment in 1987 would have prevented the substantial damage to her that did occur because her cancer was not diagnosed until three years later.

Suit was filed against the Internist who originally diagnosed Marianne New, Dr. Hammer; the surgeon to whom Marianne New was referred for removal of the cancer, Dr. Threlkel; and Shands Hospital through The Board of Regents.

Defendants answered that any duty they might owe to Marianne New did not extend to her children since Defendants were not in a physician/patient relationship with the children.

On these facts, the trial court was asked to rule whether any physician duty extends to the children of a patient with a hereditary disease, to warn that patient of the hereditary nature of the disease. The trial court found no duty exists and granted final summary judgment. An appeal ensued and the First District affirmed, declining to impose a duty on physicians to non-patients beyond the situation of contagious disease. However, the Court certified the issue to this Court as one of great public importance.

SUMMARY OF ARGUMENT

Plaintiff, Heidi Pate, inherited medullary thyroid cancer from her mother, Marianne New. Marianne New's condition was diagnosed in 1987, but her doctors failed to inform her that the disease was hereditary. Had she been informed, she would have told her children to be tested, and Heidi Pate's disease would have been discovered while it was still curable. Heidi Pate was not diagnosed until 1990 and by then her condition required extensive surgery, her life expectancy had substantially shortened, and she had suffered other significant damages. These damages could have been avoided had Heidi Pate's cancer been diagnosed in 1987.

The jurisdictions that have considered a physician's duty to a non-patient who is injured by the patient or by some disease of the patient, have adopted a "reasonably foreseeable" test. If the injury to the non-patient was reasonably foreseeable, recovery is allowed.

The Florida decisions most closely analogous to Heidi Pate's situation involve patients with a contagious disease. It is well-established that a physician owes an actionable duty to a non-patient who is at risk of contracting a contagious disease from a patient. The reasoning courts apply in imposing such a duty is equally applicable is cases of hereditary disease.

No Florida court has addressed the issue of a physician's duty to family members of a patient with a heredity disease. However, jurisdictions that have ruled on this issue have found the duty does extend beyond contagious disease cases.

Appellants submit that the physician owes a duty to persons foreseeably at risk in hereditary disease cases, as is owed in contagious disease cases. The physician is the first line of defense against the spread of preventable or curable disease. As such, the physician should be held liable for damages to the children of patients with an inheritable disease where there is a failure to adequately warn the patient of the hereditary nature of the disease. Clearly, it is reasonably foreseeable that a child will inherit a hereditary disease from a parent.

ISSUE

> DOES A PHYSICIAN OWE A DUTY OF CARE TO THE CHILDREN OF A PATIENT TO WARN THE PATIENT OF THE GENETICALLY TRANSFERRABLE NATURE OF THE CONDITION FOR WHICH THE PHYSICIAN IS TREATING THE PATIENT?

The broad category of cases within which this issue falls is what duty is owed by a physician to persons not in a physician-patient relationship for harm caused to those persons through the alleged negligence of the physician.

This issue can be closely compared to cases in which the patient has a contagious disease. The Fourth District Court of Appeal held in Hofmann vs. Blackmon, 241 So.2d 752 (Fla. 4th DCA 1970) that a minor child could recover from her father's physician based on the physician's failure to diagnose her father's tuberculosis. As a result of the physician's negligence, the child ultimately contracted the disease from her father. id at 753.

The Court held that the physician owed a duty to the child, stating at 753, "once a contagious disease is known to exist, a duty arises on the part of the physician to use reasonable care to advise and warn members of the patient's immediate family of the existence and dangers of the disease".

In its concluding paragraphs, the Court said:

> We hold a physician owes a duty to a minor child who is a member of the immediate family and living with a patient suffering from a contagious disease to inform these charged with the minor's well being of the nature of the contagious disease and the precautionary

> steps to be taken to prevent the child from contracting such disease and that duty is not negated by the physician negligently failing to become aware of the presence of such a contagious disease. id at 753.

The Florida Courts did not intend to limit the reasoning in Hoffmann to the facts of that case. This is exemplified by the case of Gill v. Hartford Accident and Indemnity, 337 So.2d 420 (Fla. 2nd DCA 1976) in which the court extended this duty to warn foreseeable third parties beyond immediate family members.

In Gill, the plaintiff occupied the same hospital room as the defendant's patient. The defendant failed to warn Gill that his patient had a highly contagious condition and failed to take any precautionary measures to prevent Gill from contracting the disease. Gill filed suit against the physician despite the lack of a physician-patient relationship between himself and the defendant. The second District Court of Appeal reversed the trial court, holding that the doctor was liable for Gill's injuries.

The issue as to a physician's duty has not been addressed by a Florida Court regarding hereditary or non-contagious diseases. However, courts in other jurisdictions have ruled that a physician's duty to foresee at-risk persons does extend beyond the situation of a contagious disease.

In 1993, the Supreme Court of Tennessee in Bradshaw v. Daniel, 854 S.W. 2d 865 (Tenn. 1993) ruled that a physician owed a duty to the wife of a patient with a non-contagious disease. In this case, the patient was diagnosed with Rocky Mountain Spotted Fever and the court found the physician had a duty to warn the patient's wife of her possible exposure to the non-human source of the disease. id. at 866.

The Tennessee court stated that though the disease at issue was not contagious, the case was analogous to the "contagious disease" line of cases in which the courts have imposed a duty to warn on the physician. The court said further, "as in these cases, there was a foreseeable third party and the reasons supporting the recognition of the duty to warn are equally compelling here." id. at 872.

In a Michigan case, Shepard v. Redford Community Hospital, 390 N.W. 2d 239, a child's mother brought a wrongful death action against her physician after her son died of spinal meningitis. There was no physician-patient relationship between the defendant and the son, however, the court found the doctor liable based on his failure to diagnose the disease in his patient, the mother. id. at 241.

The court found the defendant had a "special relationship" with the mother, and thus owed a duty of care to the son. The court concluded "as plaintiff's son and a member of her household, Eric was a foreseeable potential victim of defendant's conduct." id at 241.

The New Jersey Supreme Court addressed the issue of a physician's duty to the children of a patient with a hereditary disease in Schroeder v. Perkel, 432 A.2d 834 (S.Ct. N.J. 1981). The plaintiffs in this case are the parents of Ann Schroeder, a child diagnosed with cystic fibrosis at the age of four. By the time she was diagnosed, Ann's parents had conceived a second child who was also born with cystic fibrosis. Ann's parents were later determined to be carriers of the disease.

Ann's parents brought suit against the pediatricians for failing to diagnose Ann's condition at an earlier stage in her life. The plaintiffs argued that had Ann been diagnosed earlier, they would have been able to prevent having the second child who would also have the disease.

The defendants argued that Ann's parents could not recover from the pediatricians since there was no physician-patient relationship between the parents and doctors. id. at 838. The court held that despite the lack of privity, Ann's parents could recover based on the doctors' ability to foresee injury to the plaintiffs. The court said, "a physician's duty thus may extend beyond the interest of a patient to members of the immediate family of the patient who may be adversely affected by a breach of that duty." id. at 839.

The reasoning applied in the Florida contagious disease cases, as well as that applied in Bradshaw, Shepard, and Schroeder, should be followed in the instant case. In these cases, the courts allowed the plaintiff to recover from the physician without privity

between the plaintiff and physician because of the foreseeability of preventing the spread of the disease. Appellees argue that an inheritable disease cannot be prevented, thus Florida should not follow the contagious disease reasoning.

Appellants contend, however, that prevention and/or cure are essential factors with respect to hereditary disease. It is imperative that a physician warn his patient so that the patient's children will have the opportunity to detect the disease as early as possible and to take whatever preventative or curative measures are available.

Furthermore, in contagious disease cases, Florida courts have held that the physician has the duty to warn the third party who is likely to contract the disease. Whereas, with hereditary disease, the physician need only warn his patient in order to fulfill this duty to the patient's children, thus imposing a minimal burden on the physician.

In the Pate case, the First District expressed concern about exceeding the outer limits of a physician's duty. However, a decision in Appellants favor would not exceed the limits of a physicians duty because in hereditary disease cases, the physician has the ability to easily foresee who is in the "zone of risk." This key factor distinguishes the Pate case from those cases in which the physician could not have reasonably foreseen harm to the plaintiff.

In Coker v. Wal-Mart Stores, Inc., 19 Fla. L. Weekly D1910, the First District Court of Appeal found Wal-Mart liable to a foreseeable third party for breach of a duty to the third party arising out of the violation of a statute. Wal-Mart violated the Federal law prohibiting the sale of ammunition to person under the age of twenty-one, 18 U.S.C. §922(b)(1). The violation of this statute created a cause of action for Coker, a party who was foreseeably injured as a result of this violation, as Coker was murdered by the purchasers of the ammunition.

In Pate the physicians had a duty to Marianne New to warn her of the inheritable nature of her condition. When the doctors breached this duty a foreseeable third party, Heidi Pate, was injured.

The liability of a tortfeasor to third parties, as imposed in Coker, arises when the injury to the third party was a result of the natural and probable consequences of the defendant's negligence. The Florida Supreme Court said in Railway Exp. Agency v. Babham, 62 So.2d 713 (Fla. 1953) that a person may be liable for injuries to third parties where the tortfeasor "could have foreseen that some injury or damage to the person or property of another would reasonably be expected to ensue as a result of his action or conduct." id. at 714.

In the instant case, both parties agree that Heidi Pate's physician had a duty to inform Marianne New that medullary thyroid cancer was inheritable. The doctor failed to inform her of this essential information and thus Heidi Pate remained unaware she was

at risk of developing the disease. Being unaware of the disease's genetic transferability, Heidi Pate's disease went undetected and the injuries she suffered as a result of this late diagnosis are substantial. Dr. Threlkel admittedly breached his duty to Marianne New and consequently, as a natural and probable result of this negligence, Heidi Pate has been severely and permanently injured.

CONCLUSION

The decisions of the trial court and the First District Court of Appeal should be reviewed and the Appellees should be held liable for injuries suffered by Heidi Pate. Dr. Threlkel owed a duty to Marianne New to warn her of the inheritability of medullary thyroid cancer and when he neglected to do so, Heidi Pate was injured as a natural and probable consequence of his omission.

To hold the Appellees liable would not impose too great of a burden on physicians. Dr. Threlkel could easily foresee who was at risk of injury as a result of his breach and he could easily foresee the manner in which they were likely to be injured.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice has been furnished this 30th day of September 1994, upon the following: FRANK PIERCE, ESQUIRE, P.O. Box 1273, Orlando, Florida 32802-1273; and to J. BRENT JONES, ESQUIRE, P.O. Box 536487, Orlando, Florida 32853-6487.

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