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The Supreme Court of Washington Rejects Claims of Patent Who Contracted Aids through Blood Transfusion

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breach of duty. The court stated that under the Ohio forcible entry and detainer statute (Ohio Rev. Code § 1923.061(B)), in a landlord's action for nonpayment of rent, the defendant-tenant may counterclaim for any amount recoverable under the rental agreement or the LTA. Consistent with this, the LTA stated that a landlord's forcible entry and detainer action does not prohibit the tenant from recovering damages for the landlord's violation of the rental agreement or the LTA.

Continued Occupancy Does Not Waive Damages. The court also held that a tenant does not waive the right to recover damages merely because the tenant continues to pay rent and attempts to convince the landlord to make repairs, rather than utilizing the LTA remedies. Even though the Ritchies occupied the apartment for two years without pursuing the LTA remedies, this did not indicate their acquiescence to the defective condition of the apartment. Miller initially promised to repair the apartment and the Ritchies repeatedly requested those repairs. The court stated that as a matter of policy, those who seek to resolve disputes without litigation should not be discouraged by a threat of waiving their legal rights. Moreover, even if the Ritchies had acquiesced to the flawed condition of the apartment, Miller would not be relieved of his duty to maintain the apartment in accordance with the LTA.

Similarly, a tenant's acquiescence does not constitute an enforceable contractual waiver of the tenant's right to recover damages. The LTA prohibits any agreement that purports to relieve the landlord of his duties or to waive the tenant's right to bring an action for damages.

Necessary to Recalculate Damages. The Ohio Supreme Court held that the trial court erred in awarding \$3,000 in damages to the Ritchies and \$800 to Miller. Although the trial court stated that the apartment was of no value to the Ritchies, the court awarded Miller the full back rent of \$800. The supreme court observed that if the apartment had no rental value, Miller was not entitled to an award

for rent. Conversely, if the property had a value less than the rental price but greater than zero, the trial court erred in failing to ascertain that amount and award damages in accordance with that finding.

In an effort to sustain the trial court's award, the Ritchies argued that the supreme court should either adopt a reduction-in-use measure of damages or find that the rent was completely abated. The court rejected this view and reaffirmed *Smith v. Padgett*, 32 Ohio St.3d 344, 513 N.E.2d 737 (1987), a previous decision concerning the proper measure of damages. The *Padgett* court held that where a landlord breaches a duty to maintain rental property and the tenant does not make the repairs, the measure of damages is the difference between the rental value of the property in its defective condition and the rental value had the property been maintained. The supreme court in the instant case found that evidence of reduction-in-use can be a relevant factor in determining damages, but that damages should be determined by measuring the effect of the reduction-in-use on the rental value of the property.

Miller argued that the record did not contain sufficient evidence from which to make a damage award. Rejecting Miller's argument, the court noted that the rent charged is presumptive evidence of the rental value of the property without defects. The Ritchies' undisputed testimony regarding the extent of the defects was sufficient evidence on which to base a damage award, despite the fact that the Ritchies never stated their opinion as to the value of the defective property. The finder of fact must determine the monetary amount by which the defects and the reduction in use have decreased the value of the rental property. The supreme court reversed the court of appeals and remanded the case to the trial court for a recalculation of the damages.

Sheila M. Hanley

THE SUPREME COURT OF WASHINGTON REJECTS CLAIMS OF PATIENT WHO CONTRACTED AIDS THROUGH BLOOD TRANSFUSION

In *Howell v. Spokane & Inland Empire Blood Bank, et. al.*, 785 P.2d 815 (Wash. 1990), the Supreme Court of Washington ruled on issues arising from the Plaintiff's contraction of the Human Immunodeficiency Virus ("HIV") after receiving a blood transfusion. The court held that the amendment including AIDS among diseases shielded by the Washington blood shield statute only applied prospectively. The court also held that blood transfers by hospitals and blood banks are services, and not sales of goods, and therefore could not serve as the basis for strict liability or implied warranty claims. In addition, the court rejected the patient's Washington Consumer Protection Act ("CPA") claims against the hospital and blood bank.

Background

Virgil T. Howell ("Howell") was admitted to Deaconess Medical Center ("Deaconess") in early October of 1984 for elective knee surgery. After surgery Howell received two units of packed red blood cells. Spokane & Inland Empire Blood Bank ("the SIEBB") provided the blood, which a third party had donated to the SIEBB in the fall of 1984. One of the units of blood allegedly was contaminated with the HIV. Howell himself had been a lifetime donor to the SIEBB and in November of 1985, after Howell donated blood, the SIEBB learned that Howell tested positive for HIV. The SIEBB did not inform Howell that he had contracted the HIV until October of 1986.

Howell and his wife, Geraldine Howell, filed an action in the Superior Court for Spokane County, Washington, pleading twelve causes of action against several defendants, including Deaconess

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and the SIEBB. The Howells sued Deaconess and the SIEBB on the theories of negligence, *res ipsa loquitur*, negligent infliction of emotional distress, violation of the CPA, strict liability, breach of express and implied warranty, and loss of consortium. The Howells also claimed a lack of informed consent against Deaconess for failing to inform Howell that he could store his own blood for future transfusions. The Howells also sued the SIEBB for negligence per se, fraudulent concealment and nondisclosure, and outrage.

The trial court granted partial summary judgment in favor of the SIEBB and Deaconess on the strict liability, express and implied warranty, and CPA claims. The trial court also granted Deaconess partial summary judgment regarding lack of informed consent, negligence per se, outrage, and *res ipsa loquitur* claims against it. The Howells appealed to the Supreme Court of Washington for pretrial review of these orders. The Court found the trial court's orders unappealable, but nonetheless granted discretionary review.

The Supreme Court of Washington

After narrowing the issues, the Supreme Court of Washington addressed the Howells' claims of strict liability and breach of implied warranty against the SIEBB and Deaconess. The court first addressed whether the 1985 amendment to the blood shield statute (Wash. Rev. Code § 70.54.120) applied retroactively to bar claims based on blood transfusions that occurred before the amendment was enacted. Prior to the 1985 amendment, the blood shield statute precluded civil liability against any person, firm, or corporation who provided blood transfusions, if their conduct was not willful or negligent. This statute only applied to liability based on contracting hepatitis or malaria through the transfusion. On May 16, 1985, the legislature amended

the statute to preclude liability based on contracting AIDS through a blood transfusion.

The court initially noted that statutes are presumed to apply prospectively unless the legislature indicates its intent that the statute apply retroactively, or the statute is remedial and retroactive application of the statute would further the remedial purpose. Statutory amendments also are presumed to apply prospectively absent a contrary legislative intent or a clear remedial purpose. A remedial statute or statutory amendment provides a remedy or means to enforce a right, but does not affect contractual or vested rights.

The court summarily concluded that neither the blood shield statute nor its 1985 amendment were remedial. Therefore, to overcome the presumption application, contrary legislative intent must be present.

To determine legislative intent, the court looked to the expressed language of the statute, the purpose of the statute, and any legislative statements made regarding the statute. It found the text of the blood shield statute implied a retroactive application. The statute, as originally enacted, stated that "nothing in this section shall be considered by the courts in determining or applying the law to any blood transfusion occurring before June 10, 1971, and the court shall decide such case as though this section had not been passed." Laws of 1971, ch. 56, § 1, p. 131. When the statute was amended in 1985 to provide immunity from liability for AIDS contracted by blood transfusion, the June 10, 1971, date was retained. Thus, the court reasoned that the legislature intended that the amendment be retroactively applied to the transfusions occurring on or after June 10, 1971.

The court found that the purpose of the statute was similar to the purpose of similar blood shield statutes enacted by forty-eight other states: to encourage a readily available blood supply. The court concluded that retroactively applying the statute would further this purpose. Otherwise, strict liability actions could be brought against

blood banks and hospitals for transfusions that took place at a time when there was no way of detecting whether blood was infected by HIV.

Although both the language and purpose of the statute indicated the legislature intended retroactive application, the court found the general assembly discussions dispositive. Representative Locke stated that he had "spoken with Senator Zimmerman, the sponsor of this legislation, and Senator Granlund, the Chair of the Senate committee which considered and passed this legislation and both have said that it is their intent that this legislation apply prospectively." House Journal, 49th Legislature (1985) at 1453-54. Therefore, the court concluded that in spite of the language and purpose of the statute, the legislature intended to apply the amended statute prospectively. Thus, the Howells' suit was not precluded by the blood shield statute.

Blood Transfusion: Service or Sale of Goods?

The court cited a line of cases holding that strict liability and breach of implied warranty claims arise from the sale of goods rather than services and are actionable only for defective products, not for defective services. Thus, in order to recover their strict liability and breach of implied warranty claims, the Howells had to prove the blood transfusion was a sale of goods and not a service.

Concerning the claims against Deaconess, the court held that the blood transfusion was a service, not a sale of goods. In following the view held in a majority of states, the court reasoned that "[one who enters a hospital as a patient] goes there, not to buy medicine or pills, not to purchase bandages or iodine or serum or blood, but to obtain a course of treatment in the hope of being cured..." *Howell*, 785 P.2d at 821. Therefore, the court upheld the trial court's grant of partial summary judgment in favor of Deaconess on the Howells' claims of strict liability and breach of implied warranty.

As to the claims against the SIEBB, the court noted that some

jurisdictions have held that blood banks are distributors of blood rather than providers of medical services and therefore subject to strict liability and breach of warranty claims. The court declined to make this distinction, citing three reasons why the purposes of strict liability would not be furthered when applied to blood and blood products: (1) the public needs an affordable and readily available blood supply; (2) strict liability does not promote accident prevention in cases that arose at a time when no means of screening blood for HIV existed; and (3) although blood banks can better distribute the costs of liability, society's best interests are not promoted by having the price of a transfusion reflect its true cost. Therefore, the court held that, because of these policy concerns and the fact that the SIEBB is a nonprofit entity providing a community service, the Howells' strict liability and breach of warranty claims must fail.

Lack of Informed Consent

The Howells first alleged that, according to the doctrine of corporate negligence, a hospital has a duty to obtain informed consent from its patient. The court noted that the doctrine of corporate negligence imposes upon hospitals a duty to exercise reasonable care in selecting, retaining, supervising the performance of their medical staff. The Howells, however, did not allege that the hospital was negligent in retaining or supervising Mr. Howell's doctor, but that the hospital should have obtained informed consent.

Alternatively, the Howells argued that section 7.70.050 of the Washington statutes places a duty upon the hospital to obtain informed consent. Section 7.70.050 subjects health care providers, including hospitals, to liability for failure to obtain informed consent. The court concluded, however, that section 7.70.050 does not impose equal informed consent obligations upon hospitals and physicians. The court reasoned that imposing equal obligations would be unjust where, as here, the hospital had no specific knowledge regarding Howell's condition, only

general knowledge of the risk applicable to all patients. The physician, rather than the hospital, more appropriately bears the obligation of informing the patient of such general risks. Therefore, the court upheld the trial court's summary judgment in favor of Deaconess on the informed consent claim.

Consumer Protection Act Claims

To establish a Washington CPA claim, the plaintiff must establish the following: "(1) the act or practice must be unfair or deceptive; (2) the action had to occur in the conduct of trade or commerce; (3) there must be a sufficient showing of public interest; (4) there must be an injury to plaintiff's business or property; and, (5) there must be a causal link between the unfair acts and the injury suffered." *Howell*, 785 P.2d at 823.

With respect to the SIEBB, the court found no causal link between the SIEBB's alleged failure to promptly notify Howell that the SIEBB had detected HIV in Howell's blood sample and Howell's initial transfusion because the transfusion occurred before the SIEBB discovered the information. Therefore, the SIEBB did not cause Howell's injury as a matter of law. As to Deaconess, the court found that because Deaconess had no duty to obtain an informed consent, there was nothing unfair or deceptive in failing to do so. Therefore, the CPA claim against Deaconess also failed as a matter of law.

Res Ipsa Loquitur

Finally, the court addressed the Howells' claim against Deaconess based on the doctrine of *res ipsa loquitur*. For *res ipsa loquitur* to apply, "(1) the occurrence producing the injury must be of a kind which ordinarily does not occur in the absence of negligence; (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury causing occurrence must not be due to any contribution on the part of the plaintiff." *Howell*, 785 P.2d at 824. The court noted that an anonymous person donated the blood, the SIEBB collected the blood, and Deaconess

transfused the blood. Therefore, the *res ipsa loquitur* claim failed because no one party exclusively controlled the blood from which negligence could be inferred.

Joseph J. Morford