SUING ON BREACH OF CONTRACT UNDER WRONGFUL DEATH ACT

Zoestautas v. St. Anthony De Padua Hospital
23 Ill. 2d 326, 178 N.E.2d 303 (1961)

Plaintiffs, as mother and father, sued defendant surgeon for the death of their son. Count IV of their petition, alleging a breach of express contract by the surgeon,[1] was dismissed by the trial court for failure to state a cause of action. The Supreme Court of Illinois upheld the trial court's dismissal because count IV referred to a common-law contract action separate from the Wrongful Death Act, and was barred by the death of the patient. However, it also held that a breach of a physician's contract resulting in the death of the patient may constitute a "default" within the terms of the Illinois Wrongful Death Act.[2]

The court based its decision on a survey of United States case law which revealed that there was some authority for a *surviving* patient to base an action against his physician on breach of contract.[3] Secondly, the court held that to allow a distinction between tort and contract actions would create inconsistencies which would be unjust,[4] and would continue the old formalized method of pleading which most states have abolished. The court also held that a breach of a physician's contract resulting in the death of a patient constitutes a default, and put considerable emphasis on the fact that the Illinois Wrongful Death Act included the word *default*[5] which was defined as "the non-performance of a duty whether arising out of a contract or otherwise."[6]

Actions based on contract under wrongful death acts have been accepted in only a few jurisdictions. As early as 1917, Minnesota allowed a wrongful death action based on contract due to a landlord's failure to perform a contract to keep leased premises heated.[7] New York has gone the furthest

---

[1] Count IV of the petition alleged that defendant surgeon expressly contracted to perform a tonsillectomy on plaintiff's son with the degree of care which physicians and surgeons of ordinary skill, care, and diligence would exercise under the circumstances, and that defendant breached his contract by treating plaintiff's son in a careless manner directly resulting in his death.

[2] Ill. Ann. Stat. ch. 70, § 1 (Smith-Hurd 1959).

[3] Calamari v. Mary Immaculate Hosp., 3 Misc. 2d 780, 155 N.Y.S.2d 552 (Sup. Ct. 1956); Roche v. St. John's Riverside Hosp., 96 Misc. 289, 160 N.Y.S. 401 (Sup. Ct. 1916), *aff'd*, 176 App. Div. 885, 161 N.Y.S. 1143 (1916).

[4] Zoestautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 334, 178 N.E.2d 303, 307 (1961): ". . . [I]t would permit complete recovery for death caused by the breach of a contract duty, while denying all recovery for death caused by the breach of a duty imposed by law."

[5] Ill. Ann. Stat. ch. 70, § 1 (Smith-Hurd 1959): "Wherever the death of a person shall be caused by wrongful act, neglect or default. . . ."

[6] 1 Bouvier Law Dictionary 814 (Rawle's 3d rev. 1914).

[7] Keiper v. Anderson, 138 Minn. 392, 165 N.W. 237 (1917).

in allowing contract actions under a Wrongful Death Act.[8] The majority of jurisdictions in the United States, however, have held that actions under wrongful death acts are limited to those based on tort,[9] and that a breach of contract is not actionable under such statutes.[10]

If a breach of contract action were to be allowed under the Ohio Wrongful Death Act,[11] it would be subject to certain inherent limitations. There is a special two-year statute of limitations applicable.[12] Similar provisions can be found in most wrongful death acts.[13] Moreover, the contract theory could not be used to obtain damages other than those allowed by the statute itself which are limited to "the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought."[14]

However, there are numerous benefits which can be derived by a plaintiff in using a contract theory rather than a tort theory for malpractice to recover from physicians.[15] A breach of contract action may allow the use of lay testimony and require less reliance on expert medical testimony because the contract would state the standard of care which the physician must meet.[16] A physician might also be sued on an implied warranty basis.[17] The contract theory would seem to be useful for the same reasons under a wrongful death act when the patient does not survive. Another use for an action on a theory of breach of contract is related to the effect of releases.

---

[8] In Calamari v. Mary Immaculate Hosp., *supra* note 3, it was held that the administrator of an infant who died in a hospital could base his action for the hospital's failure to furnish a qualified pediatrician on either contract or tort under the Wrongful Death Act. See also Kilberg v. Northeast Airlines, 10 App. Div. 2d 261, 198 N.Y.S.2d 679 (1960); Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1936).

[9] See, *e.g.*, Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 553 (1881); Barley's Administratrix v. Clover Splint Coal Co., 268 Ky. 218, 150 S.W.2d 670 (1944).

[10] Whitely v. Webb's City Inc., 55 So. 2d 730 (Fla. 1951). Florida amended its Wrongful Death Act in 1953 to permit actions *ex contractu*.

[11] Ohio Rev. Code §§ 2125.01, 2125.02, 2125.03, and 2125.04 (1953).

[12] Ohio Rev. Code § 2125.02 (1953). See Klema v. St. Elizabeth Hosp., 170 Ohio St. 519, 525, 166 N.E.2d 765, 770 (1960): ". . . But should an action be brought against a carrier for a claimed breach of contract to safely transport which resulted in death, such action certainly would be controlled by the wrongful death limitation rather than the statute of limitations on contracts."

[13] See, *e.g.*, Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959); N.Y. Deced. Est. Law § 130.

[14] Ohio Rev. Code § 2125.02 (1953). See Kilberg v. Northeast Airlines, *supra* note 8; Steel v. Kurtz, 28 Ohio St. 191 (1876). Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959) states that the maximum that may be recovered is $30,000.

[15] Belli, Belli Seminar: Trial and Tort Trends 1958, at 55. See Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955).

[16] Under an action for malpractice, the standard of care is the amount of care, knowledge, and skill common to the profession as determined by expert testimony.

[17] Belli, *op. cit. supra* note 16. An example of such a case would be if a doctor were to tell his patient: "If you take a spinal rather than an inhalation anesthesia, you will be better off."

If a plaintiff has released his tort claim, he might still be able to sue if he is allowed a cause of action based on contract. This would especially be true in cases involving joint tortfeasors. The general rule is that an unqualified release, in full satisfaction of a joint or concurrent tortfeasor, releases all tortfeasors, unless the release contains an express reservation of the right to sue other tortfeasors.[18] In *Knight v. Strong*,[19] it was held that a release of the initial tortfeasor was a bar to an action of malpractice against the physician who treated the plaintiff's original injuries. If the release in a similar action by the beneficiaries under a wrongful death act were construed to apply only to the tort claim, and the administrator or executor could sue a physician on the basis of an express or implied contract, the estate might still have its cause of action for breach of contract.

An action based on a contract theory under a wrongful death act may also be beneficial in the area of warranties. If a thing is made and sold for a special purpose, there is an implied warranty that it is fit for that purpose.[20] The Uniform Commercial Code provides for a warranty that goods are merchantable which is implied in a sale if the seller is a merchant.[21] It has been held that a suit for wrongful death based on a breach of implied warranty is within the scope of the wrongful death statutes,[22] but if warranty actions are contractual, such actions would not be available in the majority of states which still bar contract-based actions under wrongful death acts.[23] Suits based upon breach of warranty are well recognized in Ohio. The Ohio Revised Code lists sales in which a warranty is implied,[24] and a recent Ohio Supreme Court decision holds that under this section restaurants impliedly warrant that the food they serve is reasonably fit to eat.[25] *Rodgers v. Toni Home Permanent Co.*[26] has extended the warranty of fitness for preparations

[18] Dearhouse v. Bethlehem Steel Co., 118 F. Supp. 936 (N.D. Ohio 1954); Connelly v. U.S. Steel Co., 161 Ohio St. 448, 119 N.E.2d 843 (1954).

[19] 101 Ohio App. 347, 140 N.E.2d 9 (1955).

[20] Loxtercamp v. Lininger Implement Co., 147 Iowa 29, 125 N.W. 830 (1910).

[21] Ohio Rev. Code § 1302.27 (1953) (Uniform Commercial Code § 2-314).

[22] Greco v. S. S. Kresge Co., *supra* note 8. The court held that breach of an implied warranty that food was fit for consumption was within the terms of the New York Wrongful Death Act. See also Greenwood v. John R. Thompson Co., 213 Ill. App. 371 (1919).

[23] Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791 (1944); Hinds v. Wheaden, 115 P.2d 35 (Cal. Ct. App. 1941), *rev'd on other grounds*, 19 Cal. 2d 458, 121 P.2d 724 (1941).

[24] Ohio Rev. Code §§ 1302.27, 1302.28, 1302.29 and 1302.30 (1953) (Uniform Commercial Code §§ 2-314, 2-315, 2-316 and 2-317).

[25] Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960). For other cases holding liability for one who prepares food and breaches a warranty of fitness, see Leonardi v. Haberman Prov. Co., 39 Ohio L. Abs. 253, 52 N.E.2d 85 (Ct. App. 1943), *aff'd*, 143 Ohio St. 62, 56 N.E.2d 232 (1943); Yockem v. Gloria Inc., 134 Ohio St. 427, 17 N.E.2d 731 (1938).

[26] 167 Ohio St. 244, 147 N.E.2d 612 (1958). See also Gauder v. Canton Prov. Co., 130 Ohio St. 43, 196 N.E. 634 (1934), holding manufacturer and retailer of food in original container liable for presence of deleterious substance.

sold in sealed packages. The court held that a warranty exists between the manufacturer and the ultimate consumer regardless of any direct privity. In a case where death results, it would be beneficial to plaintiffs to have a cause of action in contract against the manufacturer under the wrongful death statutes on the basis of warranty.[27]

There are several other reasons why a cause of action based on breach of contract may be useful to plaintiffs. (1) Certain immunities, such as those protecting municipal corporations, may prevent a recovery in tort, but would not prevent recovery for breach of contract.[28] (2) A contract claim may be assignable when a tort claim is not.[29] The general rule is that a chose in action is not assignable unless it will survive the holder,[30] and some courts hold that a cause of action in tort, for injuries purely of a personal nature, is not assignable.[31] The common law will generally recognize assignments of choses in action arising *ex contractu*.[32] (3) The contract might set a higher standard of care than the defendant owed the decedent under tort law.[33] (4) There is a possibility that the jury will react favorably if they are shown that defendant had a duty based on a consensual obligation, especially if an express contract has been breached.

In Ohio, the rule is that actions under the Wrongful Death Act[34] can only be in tort.[35] An Ohio court impressed by the breach of contract theory could, however, allow recovery under the existing statutes for breach of contract since the Ohio Wrongful Death Act, like the Illinois Act, employs the word *default*.[36] However, it seems unlikely that Ohio courts will soon allow contract actions under Ohio's Wrongful Death Act. In Ohio, actions against physicians and dentists by patients are actions for malpractice and not breach of contract.[37] The Ohio courts follow the maxim of strictly construing statutes in derogation of the common law while implementing the purpose of the Act, which in this case is to compensate beneficiaries for their losses.[38] For a death to qualify under the Ohio Wrongful Death Act,

---

[27] Kilberg v. Northeast Airlines, *supra* note 8. New York has allowed an action on breach of implied contract of care against an airline under the Wrongful Death Act.

[28] Kerns v. Counch, 141 Ore. 147, 12 P.2d 1011 (1932). See Note, 31 Mich. L. Rev. 864 (1933).

[29] Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276 (1943).

[30] Lehman v. Farrell, 95 Wis. 185, 70 N.W. 170 (1897).

[31] Erickson v. Brookings Co., 3 S.D. 434, 53 N.W. 857 (1892).

[32] Park Nat'l Bank v. Globe Indem. Co., 332 Mo. 1089, 61 S.W.2d 733 (1933).

[33] Busch v. Interborough Rapid Transit Co., 187 N.Y. 388, 80 N.E. 197 (1907).

[34] Ohio Rev. Code §§ 2125.01, 2125.02, 2125.03 and 2125.04 (1953).

[35] Russell v. Sunbury, *supra* note 9. The court, however, would not extend the opinion to cover the possibility of an action on express contract.

[36] Ohio Rev. Code § 2125.01 (1953): "When the death of a person is caused by wrongful act, neglect or default. . . ."

[37] Klema v. St. Elizabeth Hosp., *supra* note 12.

[38] In Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350 (1937), Mr. Justice Cardozo made this much quoted statement: "Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow

the defendant must have violated a legal duty to the decedent.[39] There is authority in the United States allowing breach of a duty arising out of a contract to be actionable as a tort,[40] but there would seem to be no valid reason why the action should not be allowed for the breach of the contract itself. To do otherwise is to ignore the fact that formalized pleading is no longer followed, and to deny the public many of the remedies which should be available to it.

The principal case is illustrative of a trend in the United States toward increasing liberality in the use of the wrongful death acts, which is the result of a realization by the courts of the close relationship between tort and contract. The dictum in the instant case is not likely to be accepted in the near future, however, in Ohio.

---

or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."

[39] Ford v. Cleveland C.C. & St. L. Ry. Co., 107 Ohio St. 100, 140 N.E. 664 (1923).

[40] Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937); Mueller v. Winston Bros. Co., 165 Wash. 130, 4 P.2d 854 (1931).