Supreme Court No. 89772-7

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

HU YAN, individually and as Personal Representative of the Estate of GUIZHEN YAO, deceased,

Appellant,

v.

PLEASANT DAY ADULT FAMILY HOME, INC., P.S., a Domestic Corporation, YU CHEN YIN and unknown JOHN DOES,

Respondents.

RESPONSE TO PETITION FOR REVIEW

Court Of Appeals, Division I No. 68976-2-I

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I. IDENTIFICATION OF RESPONDENT

Respondents Pleasant Day Adult Family Home, Inc., PS and Yu Chen Yin, the defendants in the underlying case, Respondents on Appeal and Respondents herein, hereinafter "Respondents," oppose the Petition for Review.

II. INTRODUCTION

First, Petitioner provides no basis for this Court to accept review under RAP 13.4. From the argument presented we can only assume the basis is pursuant to RAP 13.4(b)(1). However, since the Court of Appeals Division I properly analyzed the issues raised on appeal; properly applied existing law to those issues and Petitioner's argument to the contrary is erroneous, the petition should be denied.

III. ISSUE PRESENTED

1. Did the Trial Court, in the first instance, and the Court of Appeals in affirming on Appeal, properly conclude that the dismissal of appellant's breach of contract claim was proper when that claim alleged emotional distress damages which were the same damages alleged in appellant's tort claim and appellants admitted they could not articulate any damages arising from the purported breach of contract other than general emotional distress damages associated with the tort, wrongful death claim?

2. Did the Court of Appeals properly determine that the trial court's refusal to strike DSHS as an empty chair was harmless error given the fact that the jury instructions did not instruct on fault of others in addressing the potential negligence of the defendant; that the jury instructions instead properly instructed that as to plaintiff's negligence claim if the plaintiff established all three propositions (that the defendant acted or failed to act in a way alleged by the plaintiff, thereby acting negligently; plaintiff was injured; and that the defendants' negligence was a proximate cause of that injury), that the verdict should be for the plaintiff; that the jury instructions further advised that there could be more than one proximate cause for an injury; that the instructions identified three potentially at-fault entities in addition to the defendant (Ms. Yao's healthcare agents, Ms. Yao's healthcare provider and DSHS); that the special verdict form asked as its first question "Were the defendants negligent?" which was answered "no" thereby rendering the question of fault of any of the other three potentially "at-fault" entities, of which DSHS was the third, immaterial and therefore also rendering the inclusion of DSHS in the instructions on the theory of negligence inconsequential/harmless error?

IV. COUNTERSTATEMENT OF FACTS

A. Relevant facts as respects dismissal of the breach of contract claim and the three empty chair entities, of which only one was DSHS.

Petitioner's wrongful death action was filed by Mr. Yan as the personal representative of Ms. Yao's estate. In the initial Complaint, filed October 6, 2010, Mr. Yan asserted a wrongful death claim and a loss of consortium claim. CP 1-5. On October 26, 2010, Mr. Yan filed an Amended Complaint abandoning his loss of consortium claim and purported to assert a claim for neglect under RCW 74.34 *et seq.* and a breach of contract claim. CP 20-32. On December 16, 2010, Respondents filed their Answer to the Amended Complaint for Damages and Affirmative Defenses, CP 33-42, and asserted affirmative defenses for contributory negligence and comparative fault of third parties, including, but not limited to, Ms. Yao's family members who served as her healthcare agents and Ms. Yao's healthcare providers "who failed to provide full and accurate information regarding Plaintiff's condition and needs." CP 40.

On March 15, 2012, less than a month before trial, Mr. Yan moved to amend the operative Complaint to assert claims for negligence, breach of contract, and neglect under Washington's Vulnerable Adults Act (RCW 74.34 *et seq.*). CP 724-73. The trial court granted Mr. Yan's motion and

permitted the amendment. CP 1303-04. Two weeks later, Mr. Yan filed another motion to amend seeking to "add clarity to plaintiff's loss of consortium." CP 1521-27. Respondents opposed both motions, noting the futility of Petitioner's breach of contract claim and prejudice to Petitioner based on the untimely filing. CP 774-814, 1616-1622. On March 27, 2012, just prior to the start of trial, the trial court granted Mr. Yan's motion and permitted the amendment. CP 1303-4.

The trial court addressed Respondents' assertion of fault by other parties in Petitioner's motion in limine to exclude evidence and statements concerning fault, liability, and responsibility, of Ms. Yao's healthcare agents, her healthcare providers, and DSHS, as well as in argument on Respondents' motion to strike. CP 1168-79, CP 1506-16; Vol. II, RP 94:12-96:12; Vol. I, RP 5-42. The parties briefed the issue and the trial court heard hours of argument regarding the duties owed to Ms. Yao by her healthcare providers, healthcare agents (her husband Mr. Yan and daughter Ms. Gwo), and DSHS. *Id.* The trial court considered the arguments of the parties and Washington law on the imposition of duties for protecting vulnerable adults and concluded that there were duties imposed upon each of them. Respondents were therefore permitted to argue their defenses to the jury. Vol. II, RP 94-95.

On March 26, 2012, Respondent filed a motion to dismiss Petitioner's neglect and breach of contract claims. CP 1417-28. After considering the parties' briefing and oral arguments, the court dismissed Petitioner's breach of contract claim noting the general rule that emotional distress damages were not recoverable for breach of contract; that the damages articulated by Petitioner's counsel for the breach were "almost precisely duplicative of the tort claims;" a belated amendment to add the claims resulted in a lack of discovery, that there was a failure to plead wanton or reckless conduct permitting recovery of emotional distress damages under a contract; and that the legislature had articulated a specific tort-based scheme to recover for wrongful death. Vol. II, RP 96:23-99:18; CP 1842-43. The trial court denied Respondents' motion to dismiss the neglect claim and the issues of negligence/wrongful death and neglect went to the jury. CP 1842-43.

At trial the parties presented opposing expert witness testimony on issues of the standard of care, neglect and potential fault of others who were not named as parties. Defendants presented expert testimony on those issues from Elizabeth Johnston. Vol. VIII, RP 904-905:9; 921:13-933:21; 934:19-22 and 973:21-976:25. Johnston opined upon the obligations of Ms. Yao's healthcare provider, ARNP Lee; Ms. Yao's healthcare agents (Ms. Gwo and Mr. Yan) and DSHS caseworker Ms. Ho

asserting each of them should have provided, or made sure one of them provided, a copy of ARNP Lee's letter to Respondent before Ms. Yao moved in to Pleasant Day Adult Family Home; the role of ARNP Lee and her duties, responsibilities and shortcomings in this case as a registered nurse and the duties, responsibilities and shortcomings of Ms. Yao's healthcare agents (Ms. Gwo and Mr. Yan). *Id.*

As respects testimony of fault however, Ms. Johnston testified only as respects Ms. Yao's healthcare agents and ARNP Lee (Vol. VIII, RP 927 and 974).

Jury instructions were submitted and argued by the parties. At the time the trial court took exceptions, plaintiffs did not take exception to the jury instructions pivotal to this petition No. 9. (CP 2201-2202 and Vol. X, RP 1136); the first 5 paragraphs of No. 10 (CP 2203 and Vol. X, RP 1137); No. 15 (CP 2208 and Vol. X, RP 1138) and the form of the Special Verdict Form that specifically did NOT include consideration of any other entities' fault in addressing the potential negligence of the defendant. (CP 2232-2235 and Vol. X, RP 1150-51.)

The jury commenced deliberations at approximately 3:55 p.m. on April 23, 2012 (Vol. X, RP 1260). Over a full day later, on the morning of April 25, the jury returned a verdict for the defense as to both the claim of negligence and neglect. (Vol. XI, RP 1276).

B. The Court of Appeals Analysis.

On December 16, 2013, the Court of Appeals affirmed the trial court's dismissal of Petitioner's breach of contract claims and determined there was harmless error by the trial court in allowing DSHS to be included in the list of empty chair entities.

On appeal, in its reply to Respondents' argument that the inclusion of DSHS was harmless error, if an error at all, Petitioner did not argue for the application of either *Zukowsky v. Brown*, 79 Wn.2d 586 (1971) or *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745 (1962) nor address the Respondents' "harmless error" argument at all.

Despite no argument or authority cited by Petitioner, the Court of Appeals did analyze whether DSHS being included in Respondents' empty chair defenses was prejudicial to Petitioner. The Court of Appeals properly analyzed the context of DSHS's inclusion as one of three empty chair entities on the negligence claim and also thoroughly analyzed the jury instructions given (and not excepted to in pertinent part by Petitioner) in reaching its decision that the inclusion of DSHS as one of three empty chair entities on the negligence claim was harmless error.[1]

[1] As further support that the verdict moots this issue, no empty chairs were answerable to Petitioner's claim of "neglect" and the jury returned a verdict in favor of Respondent on that issue as well.

The Court of Appeals also analyzed Petitioner's argument regarding the trial court's dismissal of Petitioner's Breach of Contract claim, which nearly mirrors Petitioner's submission to this court. There, the Court of Appeals again properly relied upon and applied this court's decision in *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 426, 440 (1991) and noted Petitioner could not articulate any damages arising from the purported breach of contract other than general emotional distress damages associated with his wrongful death tort claim nor could Petitioner point to any Washington case authority that applied the exception recognized in *Gaglidari*. Declining to break new ground and allow recovery of emotional distress damages for breach of contract where the same damages were cognizable in tort, the Court of Appeals affirmed dismissal of the breach of contract claim.

The Court of Appeals also affirmed the trial court's rulings on (1) the inclusion of Ms. Yao's healthcare agents as empty chair entities; (2) the admission of expert testimony on neglect; and (3) the admission of evidence that Ms. Yao's healthcare providers did not report neglect to the State authorities. None of these issues addressed by the Court of Appeals are a part of this Petition for Review.

V. ARGUMENT

A. This Court Should Deny Review as Petitioner Has Not Shown a Basis for Review under RAP 13.4(b).

Petitioner has failed to cite to any basis for review as required by RAP 13.4(b). From the argument presented it is assumed the Petitioner is arguing that the Court of Appeals failed to follow existing Supreme Court authority (RAP 13.4(b)(1): conflict with a decision of the Supreme Court). Assuming that is the basis of the petition, the analysis employed by Petitioner is legally and factually flawed and the Petition should be denied.

B. The Court of Appeals properly applied existing Supreme Court precedent and there is no conflict between its decision and any decision of this Supreme Court.

1. Damages for emotional distress are not recoverable in contract where the same damages are cognizable in tort.

The Court of Appeals properly analyzed the law as established by this court when addressing breach of contract and tort claims: "The law of contracts is designed to enforce expectations created by agreement, while the law of torts is designed to protect citizens and the property by imposing a duty of reasonable care on others," citing *Berscauer/Philips Const. Co. v. Seattle Sch.Dist No. 1*, 124 Wn.2d 816, 821 (1994). In its decision the Court of Appeals specifically considered the arguments here again put forth by the Petitioner and specifically quoted and followed this

Supreme Court's precedent as set forth in *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 426, 440 (1991) in rejecting Petitioner's interpretation of that case and Petitioner's misapplication of this court's decision in that case to the matter at hand.

In *Gaglidari* this Supreme Court discussed a possible exception to the above general rule in a situation where the breach "also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." *Id.* at 443. The trial court and the Court of Appeals both properly found the alleged contract here at issue did not meet the threshold of this narrow exception.

Contrary to Petitioner's argument, it is not sufficient to assert that just because it is potentially foreseeable that one could suffer emotional distress damages as a result of a breach of contract one is entitled to pursue recovery for emotional distress damages under both a tort and contract theory. This very argument was rejected by this Supreme Court in *Gaglidari*: "by allowing emotional distress damages whenever they are a foreseeable result of the breach [of contract], the traditional predictability and economic efficiency associated with contract damages would be destroyed." *Gaglidari v. Denny's*, 117 Wn.2d at 446. The Court of Appeals correctly followed this Supreme Court's precedent, and in so doing specifically noted there is NO Washington Case that has applied the

exception discussed, but not implemented, in *Gaglidari* and also noted, as the trial court noted, that when specifically asked what damages arose from the alleged breach of contract other than the same general damages that were being alleged to have suffered from the wrongful death tort claim, the plaintiff could not articulate any damage caused by the alleged breach of contract. Vol. II, RP 96:23-99:18.

Here, the damages sought by Petitioner were fully compensable under his wrongful death claim and in response to a challenge to this claim, which was added within one month of trial, Petitioner could not articulate any "serious emotional disturbance" that was likely to have resulted from the alleged breach of contract. Given the lack of facts and legal authority to warrant breaking new ground by allowing recovery of emotional distress damages for a breach of contract claim, where the same exact damages were cognizable in tort, the trial court's dismissal of Petitioner's breach of contract claim, and the Court of Appeals' affirmance of that ruling, were proper and were in accord with this Supreme Court's precedent as set forth in *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 426 , 446-448 (1991).

2. The charge of negligence was refuted by the verdict rendering the potential fault of the three identified potentially at fault entities, of which DSHS was only one, immaterial, and the instruction including DSHS as a possible empty chair, inconsequential.

The Court of Appeals properly found that the trial court's refusal to strike DSHS as an empty chair was harmless error. It is not contested in this petition that the evidence of DSHS's involvement in how Ms. Yao came to be placed at Respondent's adult family home was material and relevant, in part, to establish that Respondent Yin acted reasonably given the circumstances and information provided to her. Instead, what Petitioner argues is that because DSHS was identified, along with two OTHER potentially at-fault entities not named in the action, in the jury instructions, that the jury must have disregarded the instructions of the court and must have assumed DSHS was solely at fault for the plaintiff's injuries and thereby must have erroneously rendered a verdict finding there was no negligent conduct by the defendant. This convoluted argument is not only factually devoid, but it is an argument made of whole cloth. The argument also implies, although does not analyze, alleged juror misconduct by asserting the jury failed to follow the court's instructions.

Lastly, Petitioner's argument that the Court of Appeals decision is in conflict with this Supreme Court's decisions in *Zukowsky v. Brown*, 79 Wn.2d 586 (1971) and *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745 (1962) demonstrates an erroneous understanding of this Court's decisions in those cases.

First, the evidence elicited at trial from defendant's expert Elizabeth Johnston as respects DSHS was limited to her belief that DSHS, as well as ARNP Lee and the family members who served as healthcare agents for Ms. Yao, should have seen to it that Respondents received a copy of ARNP Lee's letter that described Ms. Yao's medical needs. Vol. VIII, RP pp. 921-923. As respects fault however, defense expert Johnston only provided testimony of her opinion that the family members who served as healthcare agents for Ms. Yao and her healthcare provider, ARNP Lee, shared in the fault of not seeing to it that Ms. Yao was placed in a more secure skilled nursing facility. RP Vol. VIII, 974:19-975:25. Petitioner's assertion that at trial the ONLY defense to the claims was the fault of DSHS is quite simply factually erroneous.

Secondly, DSHS was not the only unnamed at-fault entity identified by the defense and was not the only at-fault entity listed in the jury instructions or on the Special Verdict Form at the time of trial. For Petitioner to divine that the jury must have only wrongly considered the possibility of DSHS's potential fault, but NOT the potential fault of the other two identified potentially at-fault entities (ARNP Lee and Ms. Yao's healthcare agents) AND then must have disregarded the trial court's instructions on negligence AND disregarded the order in which to answer the questions on the Special Verdict Form, is simply not factually

supportable or credible, nor is it legally sound. What Petitioner is in essence arguing, without any evidence from the jurors themselves, is juror misconduct. However, in addition to having no factual support in the form of juror declarations or testimony, this argument also fails as a matter of law because the alleged misconduct "inheres in the verdict": testimony may not be considered if the facts alleged "are linked to the juror's motive, intent or belief, or described their effect upon him or if the evidence concerns the mental processes of jurors." *State v. Hatley*, 41 Wn.App. 789, 793 (1985).

Third, and of particular importance, the case authority cited by Petitioner does not support his argument but instead, demonstrates that the Appellate Court's decision is actually in accord with this Supreme Court's precedent on harmless error.

Both *Zukowsky v. Brown*, 79 Wn.2d 586 (1971) and *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745 (1962) stand for the proposition that if a jury instruction interjects a theory that was not properly at issue, and the court cannot determine from the verdict that the verdict was not influenced by the improper interjection, a new trial is warranted. This proposition is not at issue in this case.

In *Zukowsky*, the issue was whether interjecting contributory and comparative negligence, which were not supported by the evidence, may

have influenced the jury. In *Zukowsky*, this Court held that because the instructions "spoke in comparative terms, thus encouraging the jury to consider alleged contributory negligence *in conjunction* with its consideration of plaintiff's alleged negligence, rather than distinct from and subsequent to that determination" it could not "positively state, from the existence of a general verdict for the defendants...that the jury must have determined that the defendant was free from negligence and that its verdict was reached sans any influence of the erroneous assertions." *Id.* at 590-591. (Emphasis supplied.)

In *Albin*, the issue presented was whether an instruction on *volenti non fit injuria* (voluntarily exposing oneself to injury) should have been given when there was a complete lack of evidence that either plaintiff knew of and appreciated the danger at hand. *Id.* at 753-754. There the Supreme Court reasoned that the instruction indicated to the jury that the court must have thought there was some evidence on the issue, *Id.* at 754, so a new trial was warranted.

Here, there are no facts similar to either *Zukowsky* or *Albin*, and instead there is evidence, as the Court of Appeals determined, that the instructions to the jury assured there was no comparative fault of others interjected into the instructions addressing the alleged negligence of the defendant, Jury Instruction No. 10, and that the jury was specifically

instructed that there could be more than one proximate cause, Jury Instruction No. 15. Further, it is undisputable that the defense argued there were THREE potentially at-fault entities, NOT just DSHS, that proximately caused the alleged damages and lastly, rather than a general verdict form, the trial court gave the jury a Special Verdict Form that had as Question 1: "Were the defendants negligent?" When that question was answered in the negative no additional questions were to be read or answered by the jury on the issue of negligence, be they questions about Ms. Yao's healthcare agents, her healthcare provider, ARNP Lee, or DSHS.[2]

Because Instruction 10 explicitly instructed the jury to render a verdict for the plaintiff if they found the defendant negligent, WITHOUT regard at all for the potential negligence of others, and one must assume the jury followed the Court's instruction, the facts at hand positively support the conclusion that negligence was refuted by the verdict and therefore including DSHS as one of three potentially at-fault entities on the negligence claim was harmless error.

VI. CONCLUSION

The Court of Appeals decision is fully in accord with this Court's decisions in *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 426, 440 (1991);

[2] See Footnote 1 at page 7.

Zukowsky v. Brown, 79 Wn.2d 586 (1971); and *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745 (1962). There being no other possible, or articulated, basis for this petition, Respondents respectfully submit this Petition for Review be denied.

Respectfully submitted this 12th day of February, 2014.

ANDREWS • SKINNER, P.S.

By _____
Pamela M. Andrews, WSBA #14248
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date she caused to be served the foregoing document on:

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DATED this 12th day of February at Seattle, Washington.

JANE JOHNSON, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Attachments: Response to Petition for Review.pdf

Re: Hu Yan, et al v. Pleasant Day Adult Family Home;
Supreme Court No. 89772-7

Attached please find the following document for electronic filing with the court:

Response to Petition for Review

The name, telephone number, bar number and email address of the attorney filing the document are as follows:

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