

No. 80156-8

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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

ECHO LUNDEBURG et. al.,

Petitioner,

vs.

JOLIE SCHONDER,

Respondent.

RESPONDENT'S ANSWER TO WASHINGTON STATE
TRIAL LAWYERS ASSOCIATION FOUNDATION'S
AMICUS CURIAE

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I. STATEMENT OF FACTS

The facts in this matter have been set forth at length in previous briefing submitted to this Court. Below are the facts relevant to the specific issues addressed in this answer.

At trial the Petitioner sought to introduce into evidence a preinjury release form that was not signed by the Respondent or filled out by the Respondent in anyway. (R.P. 17-22) The preinjury release form purported to inform the Respondent of the risks associated with the cosmetic procedure and release the Petitioner from liability for any negligent conduct that may occur during the cosmetic procedure. (R.P. 18)

The Respondent brought a motion in limine before the Trial Court seeking to have the unsigned preinjury release form excluded from trial as being unduly prejudicial to the Respondent. (R.P. 17) Respondent's counsel also argued that the unsigned preinjury release form was untimely submitted under ER 904, and that such preinjury release forms were invalid under Washington Law. (R.P. 17)

In response to the Respondent's argument, the Petitioner indicated that there would be testimony from two witnesses at trial supporting the fact that all patients of the Petitioner were required to sign a preinjury release form prior to having cosmetic procedures, and that the Respondent did in fact sign a preinjury

release form similar to the exhibit the Petitioner was seeking to admit at trial. (R.P. 18-20) The Petitioner also indicated the intention to present testimony that the Respondent was employed at the business where the cosmetic procedure took place, the Respondent had access to her personnel file, and that the Respondent's personnel file disappeared after the Respondent left employment. (R.P. 19)

After hearing argument of the respective counsel, the Trial Court indicated that without a preinjury release form signed by the Respondent it was unnecessary to address the ER 904 issue or the issue of whether the preinjury release form was appropriate under Washington Law. (R.P. 21) The only issue addressed by the Trial Court was whether the unsigned preinjury release form was unduly prejudicial to the Respondent. (R.P. 21)

After hearing the argument of counsel, the Trial Court made the following decision:

It seems to me that, in the absence of something pretty definite here, what we are dealing with is a certain amount of speculation as to where an original signed copy may or may not have gone. It injects kind of an odd aspect into the case as to the control of such document. It seems to me that, really, you know, the defendant, I would view, had a responsibility to maintain such a document. It is in their interest to do so.

Really, in my view, to have the injection of an unsigned document which is supported only by what I would view as being self-serving testimony of a defendant and a former released defendant in the case I think would be insufficient

to even meet the foundational requirement to permit that to come in.

So leaving the other issues, I think just as a matter, you know, of authenticity and basic foundational requirements, I am not satisfied that those can be met. And for those reasons, I would exclude them.

(R.P. 21-22)

As a result of the Trial Court's decision to exclude the unsigned preinjury release form, the Petitioner was precluded from presenting any evidence or testimony at trial that the Respondent was informed of and understood the risks associated with the cosmetic procedure, and that the Respondent assumed those risks.

(R.P. 22)

II. ISSUES PRESENTED

1. Whether the offer of proof regarding the Plaintiff's knowledge of the risks associated with the cosmetic procedure made by Defense Counsel at Trial was sufficient to allow the defense of implied primary assumption of risk to be presented at trial.
2. If this Court determines the offer of proof was sufficient to present the defense of implied primary assumption of risk, the defense should be excluded because it violates public policy.

III. SUMMARY OF ARGUMENT

At trial, counsel for the Petitioner failed to make an adequate offer of proof to allow the Trial Court to submit the defenses of express or implied primary assumption of risk.

In Washington, the elements of proof for express and implied primary assumption of risk are the same. *Kirk v. Washington State University*, 109 Wash.2d 448, 453, 746 P.2d 285 (1987). For the defense of express or implied primary assumption of risk to be presented to the jury, the Petitioner would have had to present evidence that the Respondent had a full subjective understanding of the presence and nature of the specific risks associated with the cosmetic procedure, and voluntarily chose to encounter the risks. *Id.* at 453.

During the argument with regard to the Respondent's motion in limine, counsel for the Petitioner stated that two or three witnesses would provide testimony that the Respondent signed a pre-injury release form that made her aware of the risks associated with the cosmetic procedure. (R.P. 18) The counsel for the Petitioner did not state specifically what the Respondent understood the risks associated with the cosmetic procedure to be, nor did the counsel for the Petitioner state that the risks associated with the cosmetic procedure were explained to the Respondent apart from when the Respondent was allegedly presented with the pre-injury release form. (R.P. 18-19)

After hearing argument from respective counsel, Judge Cozza determined the Petitioner's offer of proof regarding the Respondent's knowledge of the risks associated with the cosmetic

procedure to be insufficient to meet the foundational requirements of evidence, and excluded the unsigned pre-injury release from and all related testimony. (R.P. 21-22)

Based upon the record of the proceedings, it is clear that the Petitioner failed to establish that the Respondent understood the risks associated with the cosmetic procedure and voluntarily chose to encounter the risks.

Alternatively, should this Court determine that the Petitioner's offer of proof was sufficient to allow the Trial Court to present the defense of implied primary assumption of risk to the jury, this Court should determine that the defense of implied primary assumption of risk should be found to violate public policy when the *Wagenblast* characteristics are applied to the facts and circumstances of this matter. *Wagenblast v. Odessa School District*, 110 Wash.2d 845, 851-852, 758 P.2d 968 (1988).

IV. ARGUMENT

- 1.) The Petitioner's Offer of Proof with Regard to the Respondent's Knowledge of the Risks Associated with the Cosmetic Procedure was Insufficient to Allow the Trial Court to Present the Defense of Implied Primary Assumption of Risk to the Jury.

In this matter, the Petitioner failed to make a sufficient offer of proof that the Respondent possessed a subjective understanding of the risks associated with the cosmetic procedure and voluntarily chose to encounter those risks. Therefore, the Trial

Court properly ruled that defense of assumption of risk would be excluded as a defense at trial.

“Implied primary assumption of risk arises where the plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve the defendant of a duty to plaintiff regarding specific *known* and appreciated risks.” *Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 497, 834 P.2d 6 (1992). In regard to implied primary assumption of risk, it is important to define the scope of the assumed risks so that it can be determined which risks were assumed and which risks still have the potential for liability. *Id.* at 497.

Implied primary assumption of risk is based on the consent of the plaintiff without “the additional ceremonial and evidentiary weight of an express agreement.” *Kirk*, 109 Wash.2d at 453 (1987). In order to show the existence of implied primary assumption of risk, the evidence must show that the plaintiff “(1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Id.* at 453.

In this matter, the record is absent of a showing by the Petitioner that the Respondent had a full subjective understanding of the risks involved with the cosmetic procedure. In fact, it was the uncertainty and speculative nature of the Petitioner’s offer of

proof regarding the Respondent's knowledge of the risks associated with the cosmetic procedure that led Judge Cozza to exclude the unsigned pre-injury release form and all related testimony.¹ (R.P. 21-22)

In the absence of evidence showing that the Respondent had a full subjective understanding of the risks associated with the cosmetic procedure, evidence showing that given that full subjective understanding of the risks involved, and that the Respondent consented to the negation of the Petitioner's duty with regard to the risks assumed, the defense of implied primary assumption of risk was properly excluded by the Trial Court.

- 2.) If this Court Determines the Offer of Proof was Sufficient to Present the Defense of Implied Primary Assumption of Risk, the Defense Should Be excluded because it violates public policy.

If this Court should determine that the Trial Court abused its discretion by granting the Respondent's motion in limine excluding the unsigned pre-injury release form and all related testimony, this Court should affirm the exclusion of the defense of express and implied primary assumption of risk as under the facts and circumstances of this matter as each defense violates public policy.

¹ In ruling that the unsigned pre-injury release form and related testimony would be excluded at trial, Judge Cozza stated, "[r]eally in my view to have the injection of an unsigned document which is supported only by what I would view as being self-serving testimony of a defendant and a former defendant in the case I think would be insufficient to even meet the foundational requirement to permit that to come in." (R.P. 21)

In *Wagenblast*, this Court set forth six characteristics to consider when determining whether or not an exculpatory agreement violates public policy. *Wagenblast*, 110 Wash.2d 845, 851-852 (1988) The six characteristics set for by the Supreme Court are as follows:

- (1) The agreement concerns an endeavor of a type generally thought suitable for public regulation.
- (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
- (3) Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
- (4) Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services.
- (5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provisions whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
- (6) The person or property of members of the public seeking such services must be placed under the control of the furnisher of services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

Id. at 852-855.

The above characteristics are to be considered when determining the validity of an exculpatory agreement because

“there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for the freedom of contract.” *Vodopest v. MacGregor*, 128 Wash.2d 840, 850, 913 P.2d 779 (1996) (citing, *Wagenblast*, 110 Wash.2d at 849, 758 P.2d 968, *Scott*, 119 Wash.2d at 493, 834 P.2d 6. Where *one or more* of the above factors are present, a pre-injury release form may violate public policy. *Vodopest*, 128 Wash.2d at 855.

Looking at the six characteristics set forth in *Wagenblast* in context of this matter, it is clear that the pre-injury release form allegedly provided to the Respondent would violate public policy. Of the six characteristics stated, two of the characteristics are highly relevant in this matter.

First, the cosmetic procedure performed by the Petitioner is one that is subject to public regulation. *See*, RCW 70.54.320-350; WAC 246-145-001 -040. Secondly, the Respondent was placed under the control of the Petitioner and subjected to the risk of carelessness of the Petitioner and her agents.

The first *Wagenblast* characteristic simply requires the activity be “a type generally thought to be suitable for public regulation.” *Vodopest*, 128 Wah.2d at 854. The fact that there are statutes regulating electrology and tattooing, which is the basis of

permanent cosmetic application, satisfies the first *Wagenblast* factor.

More importantly, the Respondent was clearly under the control of the Petitioner and subjected to the carelessness of the Petitioner and her agents. In this instance, the Respondent was in a vulnerable state where she faced the risk of permanent disfigurement at the hands of the Petitioner, as the Petitioner controlled the outcome of the cosmetic procedure. Under these facts and circumstances, it is clear that sixth characteristic set forth in *Wagenblast* was met in this matter.

There are no other cases in Washington that address the enforceability of a pre-injury release form excluding the performer of a permanent cosmetic procedure from negligence. While there is no case law directly on point, the Court in *Vodapest* provided an example of when a pre-injury release form would be ineffective to bar a suit for negligence which bears similarity to the facts of this case. *Vodapest*, 128 Wash.2d at 844.

The Court in *Vodapest* drew the distinction between a high risk sport and a medical experiment in terms of the validity of a pre-injury release form. *Id.* In this respect the Supreme Court stated:

In the present case, if the plaintiff had fallen on a steep trial as the result of the Defendant's negligence, the release may have been effective (because the context would be only a high-risk sport). However, if the

Defendant had misused used a piece of medical equipment in the course of a medical experiment, the release would not be effective to bar the action if contracts which release a medical researcher from negligence are void as violative of public policy.

Id. at 853. The Supreme Court ultimately found that contracts releasing medical researchers from negligence violated public policy. *Id.* 862. The above example provided by the Supreme Court is similar to the facts in this case, in that the Petitioner's negligence stemmed from the misuse of a piece of medical equipment.²

“[A]n exculpatory clause can contravene public policy when it meets ‘some or all’ of the six enumerated characteristics.” *Vodapest*, 128 Wash.2d at 860, *Citing, Wagenblast*, 110 Wash.2d at 851. In this matter it is clear that the *Wagenblast* characteristics are present in this matter, in that the cosmetic procedure performed by the Petitioner was suitable for public regulation and that the Respondent was placed under the control of the Petitioner and subjected to the carelessness of the Petitioner and her agents. Under the facts and circumstances of this matter, the defense of express or implied primary assumption of risk is in violation of public policy and was rightfully excluded at trial.

² The Respondent was injured in this matter when under the Petitioner's supervision, the application of the permanent cosmetics went out of the Respondent's lip line causing an unsightly appearance, disfigurement, scarring, and infection to the Respondent's lips and face.

V. CONCLUSION

The Court should affirm the Appellate Court's decision.

DATED this 12th day of May, 2008.

AXTELL & BRIGGS, L.L.P.

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