

Gilman v. Shames (AC 41412)

Brief Summary: Plaintiff sought to recover damages for bystander emotional distress, allegedly caused by insufficient treatment by the defendant on the decedent, who was the plaintiff's fiancée. The court held: (1) that the bystander emotional distress claim against the defendant was barred by sovereign immunity as he failed to establish the defendant acted recklessly; and (2) that the plaintiff's derivative bystander emotional distress claim against the state is not viable in the absence of a predicate wrongful death action brought by the decedent's estate.

Background

The defendant, Brian Shames, was employed as a physician by the University of Connecticut Health Center. He provided medical care and treatment to the decedent, who was the plaintiff's fiancée. The decedent died on October 1, 2015. On February 23, 2017, the Office of the Claims Commissioner authorized the plaintiff to sue the state for damages of up to \$500,000 for alleged medical malpractice. On June 26, 2018, the plaintiff commenced a complaint against Shames and the hospital sounding in bystander emotional distress. The defendants moved to dismiss the action, asserting that the court lacked subject matter jurisdiction. They argued that the claim directed at Shames was barred by sovereign immunity and/or statutory immunity pursuant to § 4-165, and that the plaintiff could not pursue a bystander emotional distress action in the absence of a wrongful death action commenced by the decedent's estate. On November 6, 2017, the defendants filed a reply brief to the plaintiff's response to the motion to dismiss, in which they argued that the decedent's estate would be time barred from bringing a wrongful death action because the statutory limitations period set forth in § 52-555 had already expired. On November 13, 2017, the plaintiff filed his operative complaint alleging that Shames had

administered ineffective treatments to the decedent for approximately eight months and that, notwithstanding the lack of improvement in her condition, Shames had failed to alter the course of the treatments or to take “further diagnostic action as is consistent with standard practice,” which constituted a substantial factor in the decedent’s death. Further, he alleged that he had sustained injuries stemming from his “contemporary sensory perception of observing and/or experiencing the demise of the decedent, the decedent’s suffering, the decedent’s health deteriorating, the decedent’s pain and suffering, the administration of life support and, the decedent’s death. The court granted the motion to dismiss, concluding that: (1) to the extent that the plaintiff was suing Shames in Shames’ official capacity as an employee of the hospital, which was an agent of the state, the plaintiff’s claim was barred by sovereign immunity, and (2) to the extent that the plaintiff was suing Shames in Shames’ individual capacity, the plaintiff’s claim was barred by statutory immunity pursuant to § 4-165. Furthermore, that the plaintiff’s bystander emotional distress claims were derivative claims that were not viable absent a wrongful death action commenced by the decedent’s estate, which it had not commenced and, as a result of the expiration of the limitations period set forth in § 52-555, could not commence such an action.

Issues

The issues on appeal were whether the court erroneously concluded: (1) that the plaintiff’s bystander emotional distress claim against Shames was barred by sovereign immunity pursuant to § 4-165; and (2) that it lacked subject matter jurisdiction over the bystander emotional distress claim directed to the state on the basis that, as a derivative claim, the claim could not be raised in the absence of a predicate wrongful death action commenced by the decedent’s estate.

Holding

The court held: (1) that the bystander emotional distress claim against Shames was barred by sovereign immunity as the plaintiff failed to allege facts establishing that Shames' conduct rose to the level of egregiousness necessary to be considered wanton, reckless, or malicious; and (2) that the plaintiff's derivative bystander emotional distress claim against the state is not viable in the absence of a predicate wrongful death action brought by the decedent's estate. Thus, affirming the judgment of the trial court.

Discussion

The sovereign immunity statute, Section 4-165 provides: "no state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment." Meaning that state employees have statutory immunity for their negligent actions performed within the scope of their employment. However, they do not have immunity from wanton, reckless, or malicious acts performed within the scope of their employment. To establish that the defendant's conduct was wanton, reckless, willful, intentional, and/or malicious, the plaintiff must prove the existence of a state of consciousness on part of the defendant with reference to the consequences of their actions. Essentially, the defendant's conduct must indicate a reckless disregard of the rights or safety of others or the consequences of the action. The defendant must have been aware of a risk and consciously disregarded it.

To resolve the first issue, the court had to determine whether the facts alleged in the plaintiff's complaint established Shames' conduct as wanton, reckless, or malicious. The plaintiff

alleged that despite the treatments not working, Shames continued to administer ineffective treatment for eight months and “failed grossly negligently and/or recklessly” to alter the course of treatments or to take “further diagnostic action as is consistent with standard practice.” The court concluded that the facts viewed most favorably to the plaintiff do not indicate an aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. Furthermore, the court noted that the plaintiff merely using the term “reckless” in describing Shames’ conduct is insufficient to establish that his conduct was reckless. Thus, the court concluded that the trial court properly dismissed the plaintiff’s claim directed to Shames in Shames’ individual capacity based on statutory immunity pursuant to § 4-165. The court then moved onto the next issue.

Bystander emotional distress is a derivative claim, pursuant to which a bystander who witnesses another person suffer injury or death as a result of the negligence of the third party seeks to recover from that third party for the emotional distress they suffered as a result. Because emotional distress, by itself is not a bodily injury, it can be compensable only if it flows from the bodily injury of another person. The plaintiff’s recovery is consequently governed by the fact that the damages arise out of the same bodily injury. Thus, bystander emotional distress results from and arises out of the underlying personal injury or death. A derivative cause of action, like bystander emotional distress, is dependent on the existence of a predicate action. Simply, to recover for bystander emotional distress there must be a predicate action regarding the injury or death that allegedly caused the bystander emotional distress.

The plaintiff argued that his bystander emotional distress claim was not dependent on the existence of a wrongful death action brought by the decedent’s estate, rather, it was a viable freestanding claim. The defendant argued, and the court agreed, that like a loss of consortium

claim, a claim for bystander emotional distress is a derivative claim. Consequently, it cannot be brought as a freestanding claim where there is no valid underlying predicate action. The court noted that neither party cited any authority specifically addressing whether a bystander emotional distress claim may be pursued without being joined to a predicate claim asserted by the injured principal. Consequently, it looked for guidance from the Connecticut Supreme Court decision in *Jacoby v. Brinckerhoff*. In *Jacoby*, the court held that an action for loss of consortium, although independent in form, is derivative of the injured spouse's cause of action. Thus, failing to join a loss of consortium claim with a predicate action by the former spouse was fatal to the plaintiff's claim in *Jacoby*. The court here noted that the inherent nature of both bystander emotional distress and loss of consortium claims is that the scope is defined by the injury done to the principal. Thus, relying on *Jacoby*, the court concluded that the plaintiff's derivative bystander emotional distress claim against the state is not viable in the absence of a predicate wrongful death action brought by the decedent's estate.

Lastly, the plaintiff argued that the court erred in dismissing his bystander emotional distress claim directed to the state based on his failure to join the decedent's estate in the present action, which deprived the court of subject matter jurisdiction. However, the court rejected this argument because the court did not conclude that the estate was an indispensable party that the plaintiff failed to join, rather, it concluded that it could not reach the derivative claim in absence of a predicate claim brought by the decedent's estate. Consequently, the court affirmed the judgment of the trial court.

Takeaways

The key takeaway from this case is that a bystander emotional distress claim is a derivative claim, meaning that it cannot be brought in absence of a predicate claim from the

party who suffered the bodily harm or death. An additional takeaway is that merely stating a state official's conduct was reckless is insufficient to establish that their conduct was reckless to avoid dismissal on the basis of statutory immunity. Thus, one in a similar position as the plaintiff here ought to assure that their complaint contains specific factual allegations regarding recklessness and that there is a predicate claim by or on behalf of the principal who was injured.