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Torts--Negligence--Malpractice--Abandonment of Patient

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may lead to a reversal of the conviction, even if they were not brought to the attention of the trial court.⁴ A certification by the district court that the claim is frivolous carries great weight in determining whether leave to appeal should be granted, but this certification is not conclusive.⁵ Counsel must be appointed for the petitioner if he challenges the certification of the trial court.⁶

In a similar case where the prosecution had asked prejudicial questions the Court ordered a full transcript since the government failed to effectively controvert the claim of error. The Court ruled the defendant did not have an adequate opportunity to show the error was not frivolous.⁷

In the principal case, the concurring Justices gave a strong indication of what their decision would be if an indigent defendant petitions the Supreme Court with the same attorney that represented him at the trial court. The four concurring Justices agreed that the indigent defendant should be granted a full transcript as a matter of course. Justice Douglas indicated he would also agree to the full transcript.

This decision is another step toward the equalization of due process for all defendants in criminal trials in federal courts. The federal judicial system will arrive at this equalization only when it accepts the view presented by the concurring opinion. Only then will all persons receive due process of law in the federal courts.

Appeal is not a matter of right in the state courts.⁸ A state can make an appeal a right, but they can only do it in a non-discriminatory fashion; therefore some form of appeal must be provided for indigent defendants.⁹ Kentucky has already solved the indigent problem by not only providing them with the right to appeal,¹⁰ but also furnishing them with the entire transcript of the trial.¹¹

Marshall Loy

TORTS—NEGLIGENCE—MALPRACTICE—ABANDONMENT OF PATIENT.—Decedent, a forty-six year old colored man, had been shot in the neck and promptly taken to the hospital about one o'clock in the morning. He was bloody, breathing with difficulty, vomiting, and in a critical condition. Defendant was called to attend him and after administering

⁴ Fed. R. Crim. P. 52(b).

⁵ *Johnson v. United States*, 352 U.S. 565 (1957).

⁶ *Ibid.*

⁷ *Farley v. United States*, 354 U.S. 521, 523 (1957).

⁸ *McIntosh v. Commonwealth*, 368 S.W.2d 331, 335 (Ky. 1963).

⁹ *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁰ Ky. Rev. Stat. § 453.190 (1958).

¹¹ Ky. Rev. Stat. § 28.440(1) (1956).

preparatory treatment defendant returned home. Decedent's condition worsened and another doctor was called. When he arrived, he found the decedent in shock with "bubbling blood within the bronchial tubes and blood coming out of his mouth." After finally securing the decedent's release from the defendant, the doctor operated, but the patient died as a result of the injuries. Decedent's family then brought action against the defendant for negligent practice charged to have been the proximate cause of the decedent's death. The trial court directed the verdict for the defendant and the plaintiff appealed. *Held*: Reversed. Whether the defendant abandoned decedent at a crucial time was a jury question. *Johnson v. Vaughn*, 370 S.W.2d 591 (Ky. 1963).

This case shows the perplexity in determining whether a doctor's abandonment of a patient constitutes culpable dereliction of his duty. There are four issues which should be examined in fixing culpability for abandonment: (1) what is the duty of the physician; (2) whether there was abandonment in the legal sense; (3) whether the abandonment was justified; (4) whether it was a breach of the duty owed by the defendant to the patient.

It is a general rule that a physician or surgeon on undertaking an operation or treatment is under a duty to continue this attendance after the operation or first treatment as long as the case requires attention.¹ The defendant undertook the treatment of the decedent; therefore, he was under the duty ". . . to devote his best skill and attention, but not to leave a patient precipitately, without making arrangements which might be reasonably concluded to accomplish favorable results."²

It is a matter of interpretation whether the defendant's leaving the decedent constituted abandonment in the legal sense. Abandonment as a cause for malpractice must be voluntary, with or without the intention to return, and without the consent of the patient. In the present case defendant intended to return, but he failed to do so. He left voluntarily without the consent of the patient.

It was alleged that the defendant negligently abandoned the decedent. It is questionable whether or not he had legal justification. Consent of the parties will justify abandonment;³ lack of cooperation is also justification.⁴ The defendant was not ill nor was there any indication the decedent would not cooperate. Defendant's demand for twenty-five dollars before releasing the decedent to the other doctor

¹ 70 C.J.S. *Physicians & Surgeons* § 48 (1951).

² *Williams v. Tarter*, 286 Ky. 717, 151 S.W.2d 783, 786 (1941).

³ 41 Am. Jur. *Physicians & Surgeons* § 72 (1942).

⁴ *Urrutia v. Patino*, 297 S.W. 512 (Tex. Civ. App. 1927).

suggests he may have worried about payment for his services. In a somewhat different case, but similar circumstances, it was held a question for the jury whether the doctor's refusal to treat the patient who owed him money was legal justification for abandonment.⁵

It is an accepted rule, that where evidence is so clear and convincing that reasonable minds could not differ in their conclusions, the question of the defendant's guilt or innocence is for the court, not for the jury.⁶ In this case the court left to the jury the question whether or not the defendant's conduct was a breach of his duty to the decedent. This decision was in accordance with an earlier decision of the court which held that a surgeon was not negligent as a matter of law in leaving the hospital while the patient was still in shock and obviously in critical condition following an operation.⁷

There is no doubt but that the court was correct in reversing the directed verdict for the defendant. All the elements necessary in constituting malpractice through abandonment are evident in this case. Even though the court could not rule as a matter of law that the defendant was guilty of dereliction of his duty, the remanding of the case for another trial will afford ample opportunity for the jury to find for the plaintiff.

Scotty Baesler

CONTRACTS—ADAMS V. LINSELL RULE—UNJUSTIFIED SIGNIFICANCE PLACED ON LOSS OF CONTROL.—Appellants, as purchasers, executed a contract for the sale and purchase of certain property and mailed the contract to appellees. Appellees executed the contract and mailed it to appellants' attorney. After mailing the contract, but prior to its receipt, appellees called appellants' attorney and cancelled the contract. Appellants nevertheless recorded the contract upon its receipt. Appellees sought to have the appellants enjoined from making any claim under the recorded land purchase contract. Appellants counter-claimed, seeking specific performance. The lower court entered a summary decree for the appellees. *Held*: Reversed. Where an offer is by mail the letter of acceptance completes the contract the moment it is posted. *Morrison v. Thaelke*, 155 So. 2d 889 (Fla. 1963).

The principal case is not unusual because of any departure from well-established contract law, but because of the thorough discussion given the "Adams v. Lindsell Doctrine." The arguments both for and

⁵ *Ricks v. Budge*, 91 Utah 307, 64 P.2d 208 (1937).

⁶ *Droppelman v. Willingham*, 293 Ky. 614, 169 S.W.2d 811, 814 (1943).

⁷ *Engle v. Clarke*, 346 S.W.2d 13 (Ky. 1961).