

**Affirmed and Opinion filed May 17, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-01257-CV**  
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**DON POWELL, M.D., JOAN RICHARDSON, M.D., WILLIAM S. MAY, M.D., AND  
JAMES F. ARENS, M.D., Appellants**

**V.**

**JET A. JOHNSON, SR. AND JOYCE JOHNSON, Appellees**

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**On Appeal from the 122<sup>nd</sup> District Court  
Galveston County, Texas  
Trial Court Cause No. 99CV0623**

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**OPINION**

This is an interlocutory appeal from a trial court's denial of appellants' motion for summary judgment asserting the affirmative defense of official immunity. In two issues, appellants allege that appellants are entitled to summary judgment based upon the doctrine of official immunity and that their summary judgment is dispositive of all of appellees' legal claims. We affirm the trial court's denial of appellants' motion for summary judgment.

Appellees' suit against appellants arises from the death of appellees' son, Jet Johnson, Jr. Johnson died while hospitalized at the University of Texas Medical Branch—Galveston ("UTMB"). At the time of Johnson's death, appellants all held administrative positions within the hospital, but they did not directly participate in Johnson's medical care, who was stricken with a severe form of sickle-cell disease. The disease caused Johnson to periodically experience painful sickling crises that required hospitalization for pain control. On May 14, 1998, Johnson went to the Emergency Department of the hospital complaining of severe pain. He was subsequently admitted to the hospital. Once admitted, Johnson was treated with analgesics, including a transdermal fentanyl patch, for pain relief. He was given another fentanyl patch on May 15, 1998. On May 16, 1998, Johnson was discovered not breathing and pulseless in his hospital bed and was pronounced dead that day at 2:00 p.m. On May 18, 1998, Dr. W. E. Korndorffer, a UTMB pathologist, conducted an autopsy on Johnson's body and attributed his death to fentanyl intoxication.

Prior to his death, Johnson was admitted to UTMB for pain control on numerous occasions. He had previously complained that the fentanyl patches caused him to experience severe itching and a rash, and he had asked that they not be prescribed to treat his pain. Johnson initially forwarded these complaints to Dr. Joel David Bessman. Dr. Bessman discounted Johnson's complaints, but Johnson continued to complain to other hospital staff about the use of the patches and began complaining about the care he was being given by Dr. Bessman. In response to his complaints UTMB's Patient Services Department prepared a "Incident of Note" report documenting Johnson's complaints and the hospital's response to the complaints. Johnson also filed a complaint with the Texas Department of Health ("TDH") regarding the care he was given by Dr. Bessman. Dr. Arens, an appellee, responded to the TDH complaint with a letter which stated that Dr. Bessman would no longer be allowed to treat Johnson.

In April of 1998, however, Dr. Bessman was allowed to participate in a multidisciplinary conference the hospital held to discuss Johnson's treatment. At the conference, Dr. Bessman recommended the continued use of fentanyl patches to treat Johnson's pain. On May 14, 1998, Johnson was initially examined by Dr. James Lin. Dr. Lin

then consulted with Dr. Bessman. Despite the administration's assurances to the contrary, Dr. Bessman then examined Johnson and recommended the use of the fentanyl patch. Shortly thereafter, Johnson died from fentanyl intoxication in his hospital bed on May 16, 1998.

Appellees brought suit against appellants alleging negligence, gross negligence, and malicious credentialing. The allegations turn on the actions taken by appellants in their respective capacities as UTMB administrators. Appellants responded to the suit, and then filed their motion for summary judgment asserting the affirmative defense of official immunity. In their motion, appellants alleged that all of appellees' allegations against appellants arose out of their discretionary duties which were performed in good faith within the scope of their employment as governmental employees. Each appellant submitted a sworn affidavit in support of their motion for summary judgment. The affidavits all contain language asserting that they acted, "in the utmost good faith." The trial court denied appellants' motion.

In their first issue, appellants allege that the trial court's denial of their motion for summary judgment constituted error. Appellants assert that they are entitled to summary judgment based upon the doctrine of official immunity because they conclusively established each element of the defense. As the movants asserting an affirmative defense, appellants bear the burden of establishing all the essential elements of the affirmative defense as a matter of law. *Geick v. Zigler*, 978 S.W.2d 261, 264 (Tex. App.—Houston [14<sup>th</sup> Dist] 1998, no pet.). Official immunity is a defense that protects governmental employees from personal liability in suits arising from their performance of a discretionary function in good faith that was within the scope of the employee's authority. *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994); *Geick*, 978 S.W.2d at 264. Thus, the essential elements of the affirmative defense of official immunity are: (1) the performance of a discretionary function; (2) in good faith; (3) within the scope of the governmental employee's authority. *University of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000).

Appellants and appellees agree that appellants conclusively established they were performing a discretionary function within the scope of their authority. The remaining

element, whether appellants acted in good faith, is the lone disputed issue. Appellants contend that the sworn affidavits they submitted as summary judgment proof establish as a matter of law that they acted in good faith. Appellants also urge that appellants good faith is supported by evidence which establishes that Dr. Bessman served as the primary care physician for most of the hospital's patients who have sickle-cell disease and that Dr. Bessman is allegedly a nationally recognized physician in the treatment of sickle-cell disease. Appellants allege that the affidavits and evidence demonstrate that appellants assessed the benefit and risk in having Dr. Bessman continue to serve Johnson in a consulting capacity with restricted physician-patient contact.

Appellees aptly note that while appellants sworn affidavits do state the need to balance a patient's wishes against the limited resources available to a state institution, the affidavits do not address the underlying facts of this suit and do not contain any need/risk analysis. Instead, appellants appear to rely on the pronouncement contained in each of their affidavits that they, "acted in the utmost good faith." Bald, subjective pronouncements of good faith are insufficient, as a matter of law, to meet the summary judgment movant's burden of showing good faith. *Geick*, 978 S.W.2d at 265. To prevail on their motion, appellants must have established, as a matter of law, that a reasonably prudent administrator, under the same or similar circumstances, could have believed their conduct was lawful in light of clearly established law and the information possessed by the administrator at the time the conduct occurred. *Id.* Appellants failed to do so. Accordingly, we overrule appellants' first issue.

Appellants' second issue discusses the applicability of appellants' motion for summary judgment and appellants' affidavits to appellees' fifth amended petition. Because we have overruled appellants' first issue, we need not address appellants' second issue. Accordingly, we affirm the trial court's denial of appellants' motion for summary judgment.

/s/ J. Harvey Hudson  
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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