

ORAL ARGUMENT – 01/31/01
00-0091
SHAH V. MOSS

LAWYER: This is a medical malpractice case. We appeal this case to this court because the El Paso CA, 8th district, reversed the case based on the statute of limitations under 4590i, the medical malpractice statute. It is our contention that this action was barred by the statute of limitations and the court erred in reversing on that basis.

I would point out a couple of things. When we initially filed our summary judgment motion what we had before us was an allegation of an unnecessary or negligent surgery on a date certain, Nov. 28, 1992. There's no doubt about that date. That's when the surgery took place.

The first report from their expert, Dr. Moore, the entire report was in essence saying that surgery should not have been performed. The scleral buckle, the medical device that was placed on the retina, shouldn't have been removed from the eye.

We don't think there is any doubt that the statute of limitations as to a surgery runs from the date of that surgery.

HANKINSON: Are you saying that there was a different affidavit other than the one that's included in our appendix here, and that the affidavit which talks about course of treatment, that it was the combination of the follow-up care and the surgery that caused the plaintiff harm is not what we should be looking at?

LAWYER: No. What I'm saying is there is an affidavit and there's a report. The report came first. And in the initial report Dr. Moore said that it was negligent to take that scleral buckle off that that removal surgery shouldn't have taken place. Then after we filed our summary judgment motion, they came forward with an affidavit from Dr. Moore.

HANKINSON: And that's what we should really be looking at is the affidavit at that point in time. At this point in time the report is immaterial to our determining whether or not there is a fact issue on the question of limitations. Is that right?

LAWYER: I don't agree with that. I think you can consider both, but it doesn't make any difference.

HANKINSON: But I just need to understand procedurally what you're asking us to look at. If we have a summary judgment motion, you filed evidence in support of it, there is controverting evidence that's been filed by the plaintiff, and that is in fact the summary judgment record that we look at to determine whether or not there's a fact issue on the question of limitations. Correct?

LAWYER: I think that's correct. I would point out that we did reply and supplemented our motion for summary judgment twice to address those matters, and to specifically address the affidavit that was filed.

HANKINSON: But this affidavit is what we look at with respect to the plaintiff's controverted proof as opposed to the report?

LAWYER: I don't disagree with that. As to the surgery, we don't think there is any doubt that that occurred on an ascertainable date. As to what was added in the affidavit to which the court has referred, in our opinion that affidavit - the essence of it is, that there was a failure to order follow-up treatment, follow-up visits on the basis that Dr. Moore would have it done. He says that you either do it weekly or monthly. He would have this patient come 52 times a year, or 12 times a year. Well that's not what Dr. Shah's medical decision was.

ABBOTT: Was there any follow-up treatment?

LAWYER: Yes.

ABBOTT: Where does it show that in Dr. Shah's affidavit?

LAWYER: He list the dates in his affidavit. Also it's pages 160 to 164 in the clerk's record.

ABBOTT: What does that show?

LAWYER: It shows follow-up visits.

ABBOTT: Is that his affidavit on pages 160 through 164?

LAWYER: No, that is the part of the medical record that shows the medical charting of those visits.

ABBOTT: Here's why I'm curious. Looking at his affidavit he list these office visits which followed the surgery. The office visits were Dec. 8, 1992; Jan. 8, 1993; Feb. 18, 1993; May 6, 1993; Oct. 21, 1993; and Nov. 22, 1994. And he says after Nov. 28, 1992, I was not providing continuous treatment for any condition of the plaintiff. He doesn't say whether or not any, all, or none of those were on-going treatment follow-up visits for the surgery.

LAWYER: He doesn't say that because that's not what they were. In his practice, he is an eye surgeon and he just does rechecks after the surgery is done.

ABBOTT: Which one of those were rechecks?

LAWYER: As is shown on page 164, his schedule is basically to do a 1-week recheck, a 2-week recheck after the surgery, then a 1-month recheck, then a 3-month recheck. That's typed on his form. And at that 3-month recheck, down at the bottom when that visit actually occurs on May 6, 1993, which is page 162 in the clerk's record, he made a medical decision as to when he needed to see that patient again.

ABBOTT: Are you saying that the May 6, 1993 was a 3-month recheck?

LAWYER: Yes. It was delayed - if you look at page 163 in the clerk's record, it was originally scheduled to be earlier than that, but the patient is an elementary school principal and he delayed some of his visits because he was busy at school with school matters. And so that got delayed a number of weeks.

ENOCH: But if the court determines that there was a duty for continuing follow-up care, then a competing affidavit on what you're supposed to do, either 1-week, 1-month, 3-month, or a 52-week deal, that just creates a fact issue on the issue of whether it's a standard of care _____, right?

LAWYER: What I'm saying, we're not contesting whether or not he should see this patient again. What we're saying is the medical decisions were made on those days with respect to when he needed to next be seen, or whether he ran this test or ordered some other test for him, much like the cancer cases.

ENOCH: So you're saying there's a date certain based on once he decided that he didn't need to see him for the next several months, then that's negligence. One of the difficulties I may have here, let's assume there was no negligence from the surgery, but the standard of care is to have follow-up checking because even without negligence, I assume the medical community assumes that something could happen and either because of physiological circumstance of the patient, they don't heal as easily as others do or something, they just assume even without the negligence you've got to have follow-up care because something may happen. Well if that scenario is proper, then is it possible that no injury occurs even though a medical decision may be wrong? In other words, I make the medical decision that I don't need to see this patient for 3 months. The patient has no injury at the time I make that medical decision, but because of the physiological circumstances of the patient 1-month into it, the surgery falls apart and there is an injury. I mean the injury didn't occur at the time the doctor saw him, because the patient had no injury. This is a problem where the injury occurs after the doctor makes this medical decision. I'm wondering if you can determine when the negligence occurred. Wouldn't the negligence have occurred at the 2-month time when another doctor said well a wait a minute, no, you've got to check every 2 months because there's this possibility out there that might exist, and so the negligence occurred not at the time I made the decision not to see him for 4 months, but at the time that I didn't see him in 2 months, and that's when the injury actually happened to the patient.

LAWYER: Respectfully, I think that would be contrary to what this court has done in the failure to diagnose cancer cases. In those cases, what the court looked at was the last date prior to the diagnosis of the cancer, that the doctor could have ordered a biopsy, mammogram, whatever it was...

ENOCH: But we're dealing with the standard of care that said when you see a patient you have a duty to check on it; and, therefore, having not checked on it the negligence occurred. What I'm talking about is just a follow-up care. There's no - the follow-up care is required simply because you had certainty. Not because there's a risk - I guess it's because there's a risk out there that this _____ so there is a duty to follow-up care and the reason of that follow-up care is because at some point in time you might find that you might not find it.

LAWYER: I don't think it's really that different from the cancer cases. And if the woman comes in with a lump in her breast and you check it, and you don't find that it's cancerous at that time, does that mean you never see her again? In the cases that this court has heard in _____ v. _____ and _____ v. Maxwell, the stump cancer case, what this court said in essence was that there was some sort of duty to follow that patient. Yes. But what it said is you look at the last date prior to the diagnosis as far as the last date that the doctor was negligent in not ordering some level of follow-up that he failed to order. They have said that my client failed to order weekly or monthly follow-up with this patient.

HANKINSON: And they are entitled to do that for purposes of making an allegation. And since our focus here is on limitations, do you agree that Dr. Moore's affidavit indicates that his complaint about the care and, therefore, the basis of the claim that you contend is barred by limitations is the combination of the performance of the surgery without adequate follow-up care?

LAWYER: Yes.

HANKINSON: So they are not separate events. He is in fact viewing it as one thing: surgery plus follow-up care is what led to the harm and that's what was negligent?

LAWYER: That is his allegation.

HANKINSON: It's not a question of - the surgery in and of itself wasn't negligent. It's the surgery plus the follow-up care. So this is a course of treatment case.

LAWYER: I don't think this is a course of treatment case.

HANKINSON: Then what is it?

LAWYER: It's alleged negligent surgery on a date certain and a failure to order follow-up after that surgery in the method that this particular expert says should have been ordered.

HANKINSON: Well why isn't that a course of treatment for a particular condition - surgery plus follow-up care as opposed to - let's look at the Kimball case for example in which this court indicated for the first time that the way we review the provision of the malpractice limitations statute is that we look at the date certain. And in that case we had a hospitalization. We had an allegation of negligence against the anaesthesiologist. And so the court said, no, no, we're not looking at the end of the hospitalization, because one day the anaesthesiologist treated. That's when the negligence was. Why is this more like that kind of a case than a course of treatment case if you agree that the allegations that are made or was the combination of the surgery and the follow-up care or the lack of follow-up care that amounted to negligence?

LAWYER: Because this court has said and a number of the CA's have said that just because an expert says it was continuous course of treatment, it may or may not be. That's a legal decision. And in this case we have huge gaps in him even seeing the doctor. He's got good vision and a retina that is attached. He's not having any problems. This guy is coming back in just rechecks.

HANKINSON: But that's a question as to whether or not we've got negligence in this case. For purposes of summary judgment aren't all the inferences to be made against your client and in favor of the nonmovant?

LAWYER: But what you look at is when do you know that there is a problem. And we know that for sure. That's on Nov. 22, 1994, with a detached retina diagnosed that day - 6 days short of the 2 years.

HANKINSON: He had no injury basically until Nov. 22, 1994, is that your position?

LAWYER: It is our position it didn't have a physical injury till then, but it is also our position as stated in our brief that he has a legal injury on Nov. 28, 1992...

HANKINSON: What would he have sued for at that point in time, because he didn't go blind until 1994? So what would you sue for if after the surgery in 1992?

LAWYER: In his pleading he pled a breach of an oral medical services contract. And he said he had a contract with a doctor in Nov. 1992, that he would leave part of this medical device on the back of the eye.

HANKINSON: And you've already won that claim. Right?

LAWYER: He won that claim, but it shows that he knows on that date.

HANKINSON: Let's go back to the negligence claim. His claim is that he went blind as a result of surgery and the combination of surgery and failure of follow-up care. And it was not until

the retina actually detached, and that was unable to be repaired apparently to the point where he lost his sight, and that occurred in 1994. And you are asking us to impose a limitations period that would have cutoff his cause of action before that damage actually occurred. Is that what you're asking us to do?

LAWYER: No.

HANKINSON: Then I'm unclear about that. That's the way I read your briefs. Please explain.

LAWYER: What we're saying is he had the surgery on an ascertainable date, and then there are five follow-up visits before you get to the visit where the injury is diagnosed. The retina detachment has been diagnosed. We're saying that if the court wants to they can look at the surgery separately, as in the Shook case the court did, and then looks at the follow-up separately, or you can put that all together. You can put the surgery and that amount of the follow-up together and you still get to Oct. 21, 1993, would be the last follow-up visit in which he could have ordered this weekly or monthly follow-up that's allegedly going to prevent this retina attachment.

ENOCH: You mentioned the legal injury. And it seems to me the liability act, doing away with the discovery rule simply says that once the legal injury occurs the tort is complete and there is no delay on when you have to bring your cause of action. And the tort is complete on the date that the negligence occurs. And that seems to be your argument. But in fact if the retina has not detached at the last visit, there would have been nothing to have diagnosed at that last visit nor had there been a legal injury occurring at that last visit. So doesn't that present a kind of an interesting problem here. If there is no negligence - assuming you cut out the cause of action for the negligent surgery, you simply have maybe the follow-up care and an injury results from negligence in a follow-up care. You still have to have a commission of a tort it seems to me for the statute of limitations to run and buying that it has to be a legal injury that occurs, what is the legal injury that arises from a failure to diagnose a condition that does not exist?

LAWYER: What they are saying is that he should have ordered this follow-up to prevent that retina detachment from occurring. And that's the negligence they allege. And the last date that he could have done that prior to the actual diagnosis of that retina detachment that's Oct. 23, 1993.

HANKINSON: But the physician/patient relationship continued until sometime in 1995. There is no claim that the physician/patient relationship was discontinued in Oct. 1993.

LAWYER: No, we don't claim that.

HANKINSON: So the physician/patient relationship continued and the ongoing duty continued to exist between Oct. 1993 and Nov. 1994.

LAWYER: I don't disagree with that. I'm just saying he made a medical decision on Oct. 21, to not have weekly or monthly follow-ups.

HANKINSON: And the problem I'm having is that in order to have a completed tort, there must actually be a legal injury, there must actually be some damage. Maybe not all the damage, but some damage. And the damage that is alleged in this case is the detached retina, which is alleged to have occurred from removing the scleral buckle and then failing to adequately monitor and follow-up in order to prevent a subsequent detachment. So I am having a hard time understanding how the tort could be completed and how you could have a legal injury before that retina detached.

LAWYER: Basically, on the legal injury claim, I don't base my whole argument on that. That basically comes out of James v. Burgess, where this court recognized that the negligent referral was made on a date certain. And just because the patient went to this physician to whom she was referred, it wasn't the plastic surgeon or the specialist that she asked for, the limitations ran from the date that medical decision was made.

HANKINSON: That was the end of that doctor's treatment of that patient. That was the end of the physician/patient relationship at that point in time. So nothing that doctor could have done after that point in time made any difference.

LAWYER: That's true.

ABBOTT: You said that the last scheduled follow-up visit that was established by Dr. Shah was May 6, 1993. Correct?

LAWYER: And at the bottom of that one you will see where it says RE, and then a check mark, and it says 1 year. So he was going to see the patient annually after that. That was the medical decision he made.

ABBOTT: And the purpose of seeing him annually was what?

LAWYER: He is an eye surgeon and he just sees these patients once a year if he's done any surgery on them. He was not having any complications, didn't have a post-operative infection, nothing like that, but that's just his procedure.

ABBOTT: And he was going to see him annually both in Oct, 1993 and Nov. 1994?

LAWYER: He says that in May of 1993. The patient on his own comes back in Oct. - 5 months later because he's had some floaters, and he wants the doctor to check it. So he was not really scheduled to come back till May 1994, but he comes in early.

ABBOTT: Let's go back. You're saying that after the surgery occurred, Dr. Shah said

my standard procedure is we require X number of follow-up visits to ensure that post-op everything is okay, and that those visits concluded on May 6, 1993?

LAWYER: Yes. That's the 3-month visit but it's delayed because of _____ schedule.

ABBOTT: At what point in time does the record show Dr. Shah prescribed or requested that the patient come in in Oct. 1993?

LAWYER: He did not request the patient come in in Oct. 1993. The patient did that on his own because he was having some floaters.

ABBOTT: So the Oct. of 1993 visit had nothing to do with what Dr. Shah requested?

LAWYER: That's true. That's just the last date prior to the retinal detachment that the doctor could have ordered anything that he didn't order; whether it be weekly follow-up, monthly follow-up, whatever.

ABBOTT: And the Nov. 22, 1994 visit was not scheduled by Dr. Shah?

LAWYER: That was scheduled by Dr. Shah. That was to be the one-year but it got delayed from Oct. of 1994 because of the patient's busy schedule. He lived 40 miles from - Big Springs was 40 miles from Midland. He's an elementary school principal, and he had to delay some visits. But that was the annual visit that should have been 1 year after Oct. 1993, but was delayed due to the patient's schedule.

ABBOTT: So the Nov. 1994 visit was part of let's say the package follow-up with regard to the original surgery?

LAWYER: That was the annual rechecks that he does on his patients.

ABBOTT: But he doesn't do annual rechecks like let's say a person goes in and sees their eye doctor on an annual basis. He didn't go see Dr. Shah for this because he was seeing his other doctors for that. He was seeing Dr. Shah on Nov. 1994 for the purpose of follow-up with regard to the eye surgery. Is that correct?

LAWYER: His procedure was to do annual rechecks, whether or not the standard of care requires that or not. That was his procedure.

ABBOTT: Was that annual recheck related to the surgery?

LAWYER: It's not necessarily related to the surgery.

ABBOTT: Would he have seen the patient on Nov. of 1994 regardless of whether or not the patient had surgery?

LAWYER: He would have seen this patient annually from some date starting back in 1991 when he put that buckle on the eye. He puts it on in June 1991. Under his scheme he would have done the closer together follow-up, the 1-week, 2-week, the 1-month and the 3-month and then go to an annual schedule. That's what he did with his patients.

ABBOTT: Let's assume that a course of treatment began with the surgery in 1992. And that part of that course of treatment included the preset follow-up visits. One of your contentions seems to be that looking at the language of the statute the health care treatment for which a claim is made was completed on May 6, 1993. For reasons which I don't understand. you argue, I think, that the course of treatment was completed on Oct. 21, 1993. Here's what I need to figure out. Why would it not be fair to say that the course of treatment for the health care problem was completed on Nov. 22, 1994?

LAWYER: I'm not contending that there was a course of treatment. What I am contending is that there was a surgery and some routine recheck visits. And what the doctor is looking for is to see if there is any kind of a problem. We're dealing with whether or not there's any effects of that surgery.

ABBOTT: You're saying that there was surgery and some recheck visits. On those recheck visits, why would it not be fair to say that the Nov. 22, 1994 visit was one of those recheck visits?

LAWYER: It is a recheck visit. But if you're going to use a course of treatment analysis when you've got visits 13 months apart, long distances apart, then you're never going to run the statute of limitations from the date of the breach or the date of the tort. You're not dealing with a case where you've got a patient taking the medication, that you're monitoring...

HANKINSON: But the breach that's alleged in this case is that if he was going to perform that kind of surgery, he shouldn't have allowed 13 months to go by without checking the patient. I mean that's the whole point is is that this particular surgery and given this man's condition required follow-up. And I know you disagree that that wasn't required, but that's the allegation that is put before us that we have to deal with. So the fact that there's a 13 month is the gap during the course and treatment that's alleged to be a breach of the standard of care. Isn't that what the allegation is?

LAWYER: That is part of their allegation. What I'm saying is that's too large a gap to apply continuous treatment, doctoring, or whatever you want to call that theory to this case.

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RESPONDENT

SMITH: I want to answer the question: Was his annual recheck related to surgery? The answer is yes. It had to be...

ABBOTT: Where is that in the record?

SMITH: It's in the medical records. He is an eye surgeon. That's all he does. So it has to be related to the surgery. He saw various eye specialists. And he was referred to this doctor, in his own records, because he is an eye surgeon. The letterhead on his records show that he does surgery. And that's all he does.

ABBOTT: I thought I recall from the briefing that the Nov. 1994 visit wasn't a visit due to any preset concept of the patient coming back to visit with the doctor but was a visit at the behest of the patient because the patient was experiencing problems. In other words, it just kind of came out of the blue as opposed to being related to the on-going checkups set by Dr. Shah.

SMITH: As I understand the records and as I understand the plaintiff's expert's affidavit, re-checks are really important for retinal surgery because of the danger for it to happen.

ABBOTT: I'm not quarreling with that. And I'm assuming that certain rechecks are part of the treatment and follow-up of surgery. What I'm trying to figure out is whether or not this Nov. visit was one of the rechecks or was unrelated to rechecks and was something let's say spontaneous by the patient who recognized that he was experiencing further difficulties and thought man I need to go back and see the doctor.

LAWYER: What I have in the records, and it's at the clerk's record at 127 and 398, and it's under our Tab C in our brief, because we have basically - we put together a chronology of the course of treatment. And it says at those points in the record, and I don't remember anymore whether that's our client's affidavit, Mr. Moss's affidavit which he filed in the record, or the medical records or both. But it says he's not experiencing problems but he sees him on a regular routine check-up. Dr. Shah diagnoses another retinal detachment and he schedules surgery, which comes up less than 1 month later.

OWEN: I want to talk to you about the legal injury argument. It looks to me from the briefs that the doctor put in summary judgment evidence that your client had eye problems decreasing vision as early as June of 1993, before he saw Dr. Shah, and after he had vision problems. What evidence did you put on in the record about when his injury from Dr. Shah's treatment occurred?

SMITH: First of all with all due respect, because this is a limitations case than a summary judgment, we do need to respond, but it's their burden.

OWEN: Some people seem to be concerned that his legal injury didn't occur until he

actually had a retina detachment. But it seems to me from reading Dr. Shah's brief that they put in summary judgment evidence that, no, he actually had problems with his eyesight, an injury to his eyesight that he now says was attributable to Dr. Shah as early as June 1993. What evidence did you put in that no, the first time he suffered a coverable injury from Dr. Shah was what date? What evidence did you put in on that that would controvert or raise a fact question that his legal injury occurred as early as June 1993?

SMITH: That would be Mr. Moss's affidavit, which he filed in response to summary judgment. It's about a 2-3 page affidavit where he talks about what he experienced and when, and how he didn't go blind until December.

OWEN: What expert testimony did you put on to controvert the other expert's testimony that his eyesight was starting to fail or having problems as soon as June 1993?

SMITH: I guess that would be our expert's testimony about the follow-up, that there were two things that were wrong: that he shouldn't have taken off the scleral buckle; and the follow-up for a period of time.

OWEN: And what did your expert say about when that actually injured the patient?

SMITH: He didn't say, and that's the problem in this case.

OWEN: When do you contend the legal injury accrued?

SMITH: We don't know. And that is the problem.

OWEN: But there is summary judgment evidence, so what did you use to controvert that?

SMITH: The problem with continuing treatment is that it's really difficult to tell. And if we did know a particular date, then this court's opinion in *Kimball v. Brothers* would apply, where we said everybody knew it was on this date: somebody died, some event happened that we are all really clear on. What we have is a man with bad eyesight going in, getting it corrected, it deteriorating again, it getting better, deteriorating again and eventually two years later he goes blind. And that's why continuing course of treatment works.

OWEN: Your client saw him on Oct. 21, 1993, and that was the last time he saw Dr. Shah before Dr. Shah diagnosed detached retina.

SMITH: Some time in 1993. I'm not sure exactly the date.

OWEN: Why didn't a negligence occur then because Dr. Shah didn't then say I need

to see you every week or every month? Wasn't that when the negligence occurred at the very latest was Oct. 1993?

SMITH: The negligence was ongoing. From the time he removed the scleral buckle, the negligence was ongoing. That's what our expert says.

OWEN: But the last time that he saw him before he clearly had a problem was Oct. 1993, and that would have been the last time for him to have told the patient you need to come in weekly or monthly, and he failed to do that on Oct. 1993. So why isn't that the date of the negligence, the last date of the negligence, the latest possible date of the negligence?

SMITH: Because Dr. Shah continues to treat the same eye, continues to see him for the same eye for the same problem...

OWEN: But the next time he saw him was the time when he discovered he did in fact have a detached retina. So don't we have to look before that to see when the negligence occurred?

SMITH: I would ask the court the question: What was his injury at that point in time?

OWEN: And my response to you is there is evidence in the record that he was injured as early as June 1993. And I'm asking you what evidence you put on to say no he was not injured in June 1993, he was not injured in Oct. 1993. His injury was some time after Oct. 1993.

SMITH: That would be shifting the burden to him.

OWEN: But they've come forward with evidence and so unless you controvert why don't we take that evidence as true?

SMITH: Because it is the doctor's burden to negate whatever defense we have to limitations.

OWEN: But he comes forward and puts on evidence that you were injured certainly before Oct. 1993, and you don't controvert that, shouldn't we take that as true that yes he was injured before Oct. 1993?

SMITH: Well the evidence that we have is that the injury was ongoing. Perhaps I'm just not understanding the court's question. The injury was ongoing. Our affirmative defense to limitations was this is continuing treatment. He continued to see him. He continued not to follow-up as he should have...

HECHT: If the injury was ongoing when did it start?

SMITH: That's the rub(?).

HECHT: What's your position?

SMITH: My position is that we don't know because when he took off the scleral buckle, then this patient was at risk.

HECHT: Don't you claim it started with the surgery in Nov. 1992?

SMITH: No, because of this...

HECHT: There's was nothing wrong with that surgery? I thought that was your claim.

SMITH: Yes that is part of the claim. The problem is that the second half, the injury, doesn't happen until the retina detaches again. And we don't know when that happened. Mr. Moss doesn't know when that happened, and certainly the petitioner can't tell you when that happened. We don't know when that happened.

HECHT: But you think it happened as a result of the Nov. 1992 surgery?

SMITH: Yes, we do.

HECHT: So that's when it started.

SMITH: That's when it started, but the tort was not complete.

ABBOTT: Let's assume, to be consistent with what Justice Hecht just asked you, that it's irrelevant when the tort is pled because the way the statute reads it says from the date of the breach or the tort. So we could look at the earlier of the two, and what we're looking for is when did Dr. Shah breach the standard of care. And consistent with what Justice Hecht was just talking about, when do you consider was the time, the latest time when Dr. Shah breached the standard of care by failing to prescribe further checkups?

SMITH: First, let me go to the statute and that is with all due respect the court recited part of the statute. The statute does say in the first part it's the occurrence of breach or tort. But there are two other clauses to that statute. The second one which is part of the continuing treatment clause says the day the medical or healthcare is completed. So what I'm saying is it's the second clause of 4590i, §2.01 that we take advantage of here because we can't tell when the occurrence of the breach or tort happened because we have a surgery, but nothing bad happens. We don't want anybody suing doctors when nothing bad happens. Just because the doctor is negligent if there is no completion later on why would we want anybody suing doctors.

ABBOTT: When is the latest date that you contend Dr. Shah should have recommended further follow-ups?

SMITH: I don't have an answer for that for this reason, because we don't know when the detachment happened.

PHILLIPS: Does the record show that Dr. Shah made this 1 week, 1 month, 3 months, 1 year plan at the time of the surgery, or did he decide that after each visit?

SMITH: I do not recall the record reflecting the reasoning behind that.

PHILLIPS: We do have this one notation about see you again in 3 months, but we don't know after that if that was a normal routine that was decided at the time of the surgery.

SMITH: I do not know that for a fact. That would be outside the record.

PHILLIPS: Do you contend that Dr. Shah's interpretation of the statute violates the Texas constitution?

SMITH: I say that it does if this court doesn't find continuing treatments. I'm saying we don't need to get to unconstitutionality if this court finds continuing treatment, that this case was continuing treatment. And we say that if there is a continuing treatment it's this one where no one can tell exactly when the tort was completed.

ENOCH: Going to the question of legal injury. Can a legal injury occur merely from an act that increases a risk of injury? Let's assume that there is alternative to the surgery. You either take the buckle out or you don't take the buckle out, and the follow-up care is dictated based on the decision whether to take the buckle out or not take the buckle out. Suppose that the doctor makes the decision I'm going to take the buckle out, and then does not do the follow-up care that another physician in the same practice would say you need to do because of a difference in the risk that occurs. Can there be a legal injury that occurs at the time the doctor makes a medical decision to do a follow-up care that does not meet the medical standard of care? Has the legal injury occurred because of a recognition of an increased risk from the type of surgery that is performed without this kind of follow-up care?

SMITH: I would argue that the tort has to be completed. That's a legal injury hasn't occurred just because a patient is at high risk if actually he doesn't suffer damage. And indeed I would hope the law is that way, that doctors or lawyers or anybody couldn't be sued even when they do something wrong unless there is harm, unless the tort is complete and unless there is damage.

BAKER: Are you saying that in Nov. 1992, if he had not removed the buckle then there is no risk of a further detachment or that that buckle if it's still there prevents another detachment

at that time?

SMITH: I wouldn't argue either way because that would be arguing the facts.

BAKER: It seems to me most of the discussion is about the buckle and what that procedure brought on for the months and years that went after that. So if the basic statement is, if he had left the buckle in the second detachment wouldn't have happened. Don't we have a specific date for an erroneous medical decision in your client's view on Nov. 28?

SMITH: Well we do have an erroneous medical decision...

BAKER: So that is a date certain for purposes of limitation under the act, is that correct?

SMITH: No, it's not a date certain because nothing bad happened then.

BAKER: But if the alternative to that question is if he had left the buckle on nothing would have happened anyway where are we with that set of facts? If the operative thing that happened is the removal of the buckle, then the decision to take it off is the malpractice isn't it?

SMITH: Not necessarily for this reason. Admittedly and the record is pretty clear medically that a second retinal detachment can happen anyway. And so yes one is at increased risk...

BAKER: But he's already had one, correct, which is the purpose...

SMITH: Exactly before he ever got to this position.

BAKER: And that's the purpose of putting the buckle in is to prevent a reoccurrence?

SMITH: Absolutely. And if the doctor decided to remove that for whatever his reasons were, obviously our expert says you shouldn't have done it. I wouldn't have done that. That's negligent.

BAKER: And so that is an act by the doctor that's contrary to the standard of care of your expert witness?

SMITH: Right.

BAKER: Which translates to be a negligent act, isn't that correct?

HANKINSON: Is it a negligent act in and of itself or - your opponent says you're alleging that it's a negligent act only when coupled with the lack of follow-up care.

SMITH: That's right.

HANKINSON: If you remove it but you do adequate follow-up care, then it may be okay to remove it. If you remove it without the follow-up care, then it wasn't okay to remove it. Do you agree with her that that's your claim?

SMITH: Yes, that is pretty much what we are saying.

HANKINSON: Whether the surgery is negligent or not depends on what happens afterwards?

SMITH: Absolutely because the increased risk determines whether or not he's going to have a retinal detachment that cannot be repaired. He may have one anyway, but it's the repeated follow-up. The record reflects that if one catches a retinal detachment soon enough then you can fix it.

HANKINSON: So it's your position that your expert's affidavit and your petition in this case raises the claim that is different from some other cases in which the surgery and the acts associated with the surgery can be separated from what happens after the surgery? In this case you're saying that's it's all and inextricably intertwined and it's what happened afterwards that makes the determination of whether or not the surgery in and of itself was negligent?

SMITH: Absolutely. Specifically what we have here is we have _____ v. Stover, but we actually have what this court said that Mr. Stover didn't have. This court told Stover that he had no case, because all he had was a surgery but nobody had alleged there was bad follow-up. And so we've brought to this court both. We have a surgery that probably shouldn't have happened. And even if it did happen, then we better follow-up really quickly so we don't have _____.

* * * * *

REBUTTAL

LAWYER: As I read the court's opinions in this field, if you can come up with a breach or a tort on an ascertainable date, you go from that date. If you can't, then you look at those other two clauses.

ENOCH: But if you divorce the breach from a legal injury or the tort from a completed tort, meaning a legal injury, and if you _____ it seems to me in any circumstance you could always point to the minute and the hour the doctor did or did not do something. It seems to me that the only way the statute that allows these other dates to have any meaning is because we don't know when that retina detached. And as a result there may be a period of time after it detached that a negligence might have occurred. And so it's when the treatment ends as opposed to the discrete act that the doctor committed. Isn't that the way that statute ought to be looked at?

LAWYER: I don't disagree with that. What I'm saying in looking at the court's opinions in this field, is that you look at the breach or the tort. You don't look at the date of injury to make that determination. And if you can find an ascertainable date of the breach or the tort, you go from that date.

HANKINSON: But in most instances the injury occurs on the date of the breach of the tort. For example, doctor negligently performs a surgery and takes the wrong leg off, amputates the wrong leg. I mean typically we have an injury at that point in time. Correct?

LAWYER: Sometimes you don't.

HANKINSON: But that's the discovery rule as opposed to the question of when the tort is complete, the injury, or whatever actually occurred at the point in time that the surgery was performed. What place do you believe that the continuing treatment prong of §2.01 plays in medical malpractice jurisprudence?

LAWYER: I think that applies if this patient had had some sort of surgical complications. There are also some cases dealing with post-op infections where you have to keep treating and giving them antibiotics or that sort of thing. But where you're just dealing with the effects of the surgery, not some infection, not some surgical complication...

HANKINSON: What's the difference between an effect of a surgery as opposed to an infection from a surgery for purposes of course of treatment? In fact the doctor has to still treat for the effect of the surgery in terms of providing appropriate follow-up care as part of the surgical treatment.

LAWYER: May or may not. The doctor may determine there's no need to see this patient again unless the patient makes some complaint.

HANKINSON: I'm having a hard time understanding your position on what role the course of treatment prong of 2.01 plays in limitations jurisprudence.

LAWYER: As I said, I think that applies to such things as where a medication is prescribed for epilepsy, that sort of thing, and the doctor is supposed to keep monitoring the effect of that medication on the patient and see the patient at some interval. It would apply if we had post-surgical complications. It would apply if we had a post-surgical infection. We don't have any of those things here. We have a patient with good vision for a period of time and no detached retina.

HANKINSON: Looking at the summary judgment posture of the case, how are the scenarios that you just explained different, as I know you disagree with the allegations and whether or not they are factually true or not from the factual allegations in this case that if a person who has a history of retinal detachments has a scleral buckle removed that what is required is appropriate follow-up in

terms of frequent follow-up because the patient is at greater risk? How is that distinguishable from the follow-up to make sure the medication doesn't cause some complication? What's the distinction?

LAWYER: To me the distinction is that what they were saying in their initial report, and they are also saying it in the second, the affidavit, that taking that scleral buckle off shouldn't have been done at all. And at the end of their first report, he talks about removing that buckle started a process.

HANKINSON: You gave me some examples of what you think would be continuing treatment cases that involve surgery. I just explained to you why I'm having a hard time understanding the distinction between what the allegations are in this case and what Dr. Moore has in his affidavit, and the examples you just gave me. They claim increased risk from doing this surgery that mandated in order to meet the standard of care ongoing and continuing follow-up care, because of the increased risk. Why is that any different than following up with a patient who you prescribe medication to because they are at risk for complications from the medication, or they've had an infection and they are at risk for the infection coming back? You've explained that those are continuing treatment cases. How are those cases distinguishable from the allegations that are made in this case?

LAWYER: What I'm saying is that as long as you have ascertainable dates of alleged negligent acts, breaches or torts, it doesn't make any difference 1) whether it's continuing course of treatment (that's what this court has said is if you can come up with the ascertainable dates, and what we're saying is those ascertainable dates are in this record and the last date that this doctor whether you want to lump the surgery together with those post-of checkups or not, but the last date was Oct. 21, 1993, and no suit was filed within 2 years and 75 days of that date.

ABBOTT: Why do you consider that Oct. 21 date to be the last date?

LAWYER: Because the retina detachment was diagnosed at the very next visit on Nov. 22, 1994.

ABBOTT: You said Oct 21 was the last date. What were you referring to?

LAWYER: That's the last date that he made a medical decision how often to see this patient prior to the injury.

ABBOTT: Why do you consider it to be the Oct. date instead of the May date?

LAWYER: It is true that the patient had started having vision problems in May or June 1993, and in fact his vision going from something like 20/30 to 20/80 by Feb. 1994. But then he doesn't go back in to see Dr. Shah until Nov. 22, 1994, and Dr. Shah finds that same 20/80 vision. So the detached retina probably occurred sometime before Feb. 1994, because that's when his vision

dropped off.