ORAL ARGUMENT – 10/25/00
00-0338
TEXAS DEPT. OF CRIMINAL JUSTICE V. MILLER

LAWYER: In *Jones,* this court recently held that the state cannot be denied immunity from suit under the Tort Claims Act without first deciding whether or not the petition states a claim under the act.

In this case without any consideration of the facts alleged, the CA held that the state's immunity from suit was necessarily waived for claims brought under the act. The issue for the court in this case is whether the court's *Jones* opinion has any teeth.

This is a wrongful death case arising out of the medical treatment given to an inmate at a TDC Jade facility.

ABBOTT: Assuming *Jones* does have teeth, how much should we look into the facts of the case?

LAWYER: Several courts since *Jones* have looked at what's required in a plea to jurisdiction. And what they all say is, We must look at the petition to determine whether or not jurisdictional facts are alleged. We take the facts as they are alleged as true to determine whether or not that states a claim under the act. That includes the *Hernandez* and *Sullivan* cases out of El Paso. The *White* and *Howard* cases out of Ft. Worth. The *Trussel* case out of Waco. And the *Lira(?)* case out of Corpus Christi. What each of these courts did was assume they are true as we must in plea to jurisdiction as we do today, and then ask the question: If they prove these facts does that state a waiver?

What the CA did here, of course the court's aware this is another question for the court: Is this a use of property? And the department filed a plea to the jurisdiction alleging among other things that there was no stated use of property sufficient to waive immunity from suit. Without considering the merits of the plea, the CA relied upon the Corpus Christi CA's opinion in *Jones*, which this court has reversed, and held that under the tort claims act immunity from suit is necessarily waived; immunity from liability is all that's left.

Now the main argument they have made here is sort of two-fold is that this is really an appeal from a summary judgment, or that the court actually did decide the merits of the plea. There are three possible interpretations that have been given to the court of what the CA did here. The first two are what I just mentioned by Miller. The first interpretation was that this was the dept's summary judgment we were considering. The CA specifically rejected this argument. They argued below that the CA didn't have jurisdiction under 51.014(a)(8) because they said what we're really talking about is the summary judgment. The CA said, No, we're talking about the plea to the jurisdiction on immunity from suit. In fact, the court said, Not only do we have jurisdiction,

but we're going to send it back for you to consider this on summary judgment. There's no question this is not the summary judgment we're talking about.

OWEN: Let's talk about the merits for a moment. Let's suppose that there had been another doctor or physician was involved and the allegation being made was that the prison doctor by giving the drugs that he did masked the symptoms to such a degree that no physician, this third-party physician or any other physician would be able to diagnose the meningitis in time. Would that be a use of personal property?

LAWYER: I think this case is controlled by two opinions the court has handed out. And it comes down as there is no use and there is no causation.

OWEN: But under my hypothetical, would that be a use?

LAWYER: I think the answer is no.

OWEN: And why is that?

LAWYER: If the allegation is that property was used and that that actually caused the harm, then that might be sufficient. But the allegation in this petition, that's not the case in this case, is that the harm that has to occur is the death.

OWEN: Aren't they alleging that this physician might have diagnosed the meningitis in a more timely fashion if he had not misused the medication?

LAWYER: I think what they are alleging is, and we have to assume it's true, that the use of the property, the use of the medication in some way masked the symptoms. But I don't think that gets us passed *Kerrville*, which is the use of property claim case.

What happened in this case was they filed this case as a pure medical negligence case. There is no allegation of any use of property. We filed a motion to dismiss and then they came up with these uses of property.

HANKINSON: If we do take the pleadings as true, as you said we need to in reviewing a TC's ruling on a plea to the jurisdiction, and if the pleadings allege that given the various medications that were given in fact resulted in masking the symptoms of meningitis, which is I believe the allegation in the pleading, and therefore, inhibited the doctor's ability to diagnose the meningitis, isn't that on the face of the pleadings a misuse?

LAWYER: It could be said that that gets you past the use of property requirement, the *Kerrville* requirement.

HANKINSON: Does it in this case?

LAWYER: I don't believe it does in this case.

HANKINSON: Why not?

LAWYER: Because I think the claim in this case is exactly the claim that was made in *Kerrville*, exactly the argument that was put forward by the dissent in Kerrville, which is, can't we allege that what was actually done here was a misuse of a certain type of property that has certain deficiencies and related to this harm? And the court rejected that argument. They said, when the essence of the claim is that you should have used some other form of treatment, then that's not going to be a use of property.

HANKINSON: Well that's a little bit different. And I understand that for purposes of the summary judgment motion that was filed, which is not on review, there was summary judgment evidence offered that in fact no harm came to the patient for having administered the medications that were administered. But if we're only looking at the face of the pleadings and the allegation is, that by treating in the way that you treated this patient symptoms were masked and a diagnosis was delayed on the face of the pleadings. Whether or not that ultimately proves to be the case, for purposes of the plea to the jurisdiction, why doesn't that amount to the misuse?

LAWYER: Because I don't believe it - well even if this court found that it was a misuse, I don't believe it gives you the causation.

HANKINSON: Before you get to causation, I'm just trying to understand in reviewing a plea to the jurisdiction why this case does not constitute as misuse on the face of the pleadings?

LAWYER: In Kerrville, the court recognized that there's always going to be or almost always going to be some use of property in a case where a doctor treats a patient. What they said there, though, was the question is, is the actual use that caused the injury? There's been several CA's opinion, which I think sort of flush this out, and they are in the brief, but it's *Hernandez*, the *Lira(?)* case and the *City of Orange* case. And what those cases all said was, where the essence of the complaint is that the state _____ made an improper medical decision incorrectly believing that the patient did not have some life threatening illness, and in response did not take certain actions, then the complaint is one for nonuse of property. Even though they've alleged this masking requirement, if this medication had been given, and of course the treatment here was both before and after the medication was given, regardless of whether or not the medication was given the real allegation is that you did not take steps, you did not give other medication that would have cured.

ENOCH: Whether it masked or not, let's just assume they don't even allege that it masked the symptoms. The doctor is presented: here's the patient that comes into the hospital and is sick, and the doctor engages in the course of treatment; and the doctor gives him lots of medicine,

gives him lots of fluids using lots of intravenous treatment, gives him lots of tests and all that sort of stuff, and none of that solves the problem, and the patient dies. Can the doctor or the state assert that that's not the use of property because they didn't use any property that caused the harm? All it was was simply a failure to use the right property.

LAWYER: I think that's right. I mean the issue is...

ENOCH: What about Kerrville or any of those other cases give the impression that the doctor can give the wrong property, but as long as the wrong property isn't the actual causation of death, that that's not the use of property for the purpose of waiving the...

LAWYER: That's exactly the issue in Kerrville. And I don't mean to say that this isn't the case of *Casson*. Now in Casson, the court said that the doctor could be liable as a regular physician for medical negligence. That's not the issue in this case. The doctor is not before you. The issue is, Can they go after the state? And that's a different question. And the question we have to ask there is does it fit within the narrow limited waiver that was intended by the legislature? And Kerrville tells us it doesn't. If this case is wrong, if this was a use of property, if your scenario is a use of property, then Kerrville was a use of property. In fact, Kerrville was even a closer use of property because in that case they gave medication. The claim was the medication was deficient for what it was supposed to do.

In your scenario, the individual just comes in, maybe gets a CAT Scan, maybe gets an x-ray, and they ultimately don't determine it. But make no mistakte, that's exactly what this case will do. If the court finds that this case waives immunity, then immunity will be waived in every misdiagnosis case. Because the doctor is always going to do something. And that gets us to the causation issue, which I think is an important issue in this case. In *Bosley* this court said that property does not cause the injury that does no more than furnish the condition that makes it possible. Even if we assume a masking in this case, it's not a causation issue. And the way that we can tell that, and I think it's helpful, is to look at other cases where there is causation from the use of drugs. And I understand that's where the court is focusing on. I think that's an important place to focus because it's the most artful of the pleading. It's a well pleaded case. That's about the only way that they are going to get it in here. I would point the court to *Quinn*, 764 S.W.2d 915, Corpus Christi, and that was the use of a drug to perform an abortion on a woman. And the drug caused the woman to hemorrhage. Obviously, there's a causal link. There's a use of the drug. That's what was meant under the act.

Another case, the _____, 876 S.W.2d 402 (El Paso). That was the use of Valium. They gave a stroke victim Valium while he was suffering seizures and then left him unattended. The Valium caused him to become disoriented, confused, and he fell out of bed. There was a direct causal link from the use of the property. That's not this case. They are not arguing here that Miller had an allergic reaction to the medication. They are not alleging the medication caused him some harm. What they are really alleging is, that there was a failed diagnosis here. And

Kerrville tells us that's not enough. *York* tells us that's not enough. In *York,* the question was, they missed the diagnosis of a broken hip. Now they came , and they didn't artfully plead as well as Miller does in this case, and they said, Well it was a use of medical records; it was a use of the chart. Well they took x-rays in that case. They met the hypothetical test that was just made. They just missed the diagnosis. This court said in *York*, Misdiagnosis isn't enough.

HECHT: Aren't some of these distinctions a little metaphysical?

LAWYER: I'm not sure I understand the question.

HECHT: Hard to understand. Drawn on fine points.

LAWYER: Which is why I think this case is important. In Bosley this court said, when the essence of the claim is really for negligent supervision, we're not going to allow that claim to proceed. And several CA's have latched on to that to understand where the tort claims act is.

O'NEILL: Can you envision a case though where the question is not determinative in the pleadings and you do have to look at proof or evidence? Isn't that what the TC did in this case? The TC looked at the summary judgment evidence to make its determination.

LAWYER: We don't really know what the TC did because there is no opinion that goes with it. Obviously, it was a plea and a motion for judgment combined. Whether or not the evidence was considered, it shouldn't have been considered for the plea, and that's not what we argued to the CA. It's not what we want to argue here. We believe, and we have filed a general denial, that the facts below will not support the allegations.

PHILLIPS: It's your position that the state proceeds to buy a plea to the jurisdiction to immunity from suit, and is it your position that a governmental official has to proceed by summary judgment and for both of there is specific statutory interlocutory relief _____ denied?

LAWYER: That seems to be the way the statue has been created.

PHILLIPS: That summary judgment of course is use it or lose it once you've been through the trial. The fact that you may have had a right to move for summary judgment on appeal if you lost the motion is irrelevant. How about your claim of jurisdictional challenge: how late can the state raise that?

LAWYER: That issue was raised here by the waiver claim. They claimed that we had waived this issue. In *Jones* this court held that immunity from suit is subject matter jurisdiction. As the court's well aware, subject matter jurisdiction is essential for a court to consider a dispute. In *Texas Association of Business* and in numerous other cases, this court has held that subject matter jurisdiction can never be waived and can be raised for the first time on appeal even sua sponte.

PHILLIPS: If you've lost a case - generally when we think of immunity from suit it's a determination that's either made at the outset from - for instance the court can only hear cases up to $50,000 or it's apparent from the pleadings. But I think what you're saying is you can go all the way through trial and if it turns out that the plaintiff didn't have a claim, that then there's no jurisdiction. The court never had jurisdiction in the first place, but they had to ask a jury some questions to determine _____.

LAWYER: That's exactly what happened in *York*. York was a jury verdict.

PHILLIPS: Nobody said when they got to this court there never was jurisdiction. This is sort of a new twist on this case isn't it?

LAWYER: Well Jones tell us it's subject matter jurisdiction. Until Jones, there was this fuzziness between immunity suit...

PHILLIPS: At the time of York, the interlocutory appeal statute or interlocutory challenge was not on the books either.

LAWYER: Right. And Miller criticizes us for this. But that's why we are here. We're trying to avoid the expense to the state and to the plaintiff when it's clear that there is no waiver of immunity from suit.

PHILLIPS: If this were a well-pleaded case that you felt made out a claim for misuse of property, and you went through the trial, then you would just take this up as a regular case whatever your appellant points are? We wouldn't be talking about jurisdiction the whole way up would we?

LAWYER: That's absolutely right.

PHILLIPS: But you could talk about jurisdiction the whole way up. You could couch this in jurisdictional terms?

LAWYER: If at some point down the line it became obvious because of another ruling of the court, jurisdiction was not waived in a particular case, then it would be incumbent on the parties and on the court to bring it up at that point.

PHILLIPS: If they plead a case that alleges misuse of property, if there had been another paragraph here that said, and incidently they gave this drug which caused the meningitis, then do you have a jurisdictional claim based on what the jury does or does that pleading alone if it's a good pleading get the plaintiff - does that establish the TC has jurisdiction over the plaintiff's claim?

LAWYER: It establishes jurisdiction absent the idea of a fraudulent pleading they could confer jurisdiction.

PHILLIPS: The CA here was actually right in your opinion when they said the pleading got jurisdiction. They were just wrong about this specific pleading. I mean they were right that a pleading could confer jurisdiction under Jones. They were just in your opinion wrong about this pleading alleging the right types of facts..

LAWYER: That's right. If they had done the analysis, if they had said under these facts there are jurisdictional facts, then we would just dispute whether or not that was true. But if there are jurisdictional facts, take for instance the _____ case, and the Quinn case, if they've said the drug caused this problem, it's not a jurisdictional question. The issue here is that that's not the allegation.

Lack of subject matter jurisdiction this court has said, Causes a judgment to be void. So if it's found that subject matter jurisdiction was lacking it does raise this issue.

OWEN: But you would have lost on the merits. In other words, you couldn't raise a jurisdictional issue till you got the merit's determination that was adverse to you reversed. So it's kind of a moot point.

LAWYER: I'm assuming by the question that there was a finding of that jurisdictional act, there was a finding that there was no use of property, then that would raise this issue of whether or not the action was actually void. And realistically that finding would probably never accompany a finding against the state.

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RESPONDENT

GREEN: With all due respect this court lacks jurisdiction to hear this case. They are trying to base jurisdiction on a conflict on the CA below with the Jones opinion. What they are trying to do is say that the court below in Miller agreed with the court below in Jones. And that's simply just not the case.

The standard for looking at that whether or not there is a conflict is found by this court's opinion in Coastal. For this court to have jurisdiction it must appear that the rulings in the two cases are so far upon the same state of facts that the decision of one is necessarily conclusive of the other. The conflict must be on the very question of law actually involved. Cases do not conflict if a material factual difference legitimately distinguishes their holding. And then in Gonzales, an apparent inconsistency in the principle announced or in the application of recognized principles is not sufficient. This court has to take that standard and apply it to the appellate court below here verses this court's opinion in Jones. And it will not meet that standard.

HANKINSON: Why not?

GREEN: The SC case in Jones overruled the underlying case in Jones because it said that - the underlying case in Jones took the position that simply by citing the statute you automatically had jurisdiction.

HANKINSON: And isn't that what the CA did here?

GREEN: No it is not what the CA did here. If you look at the opinion from the CA, what this court in Jones said was wrong with the lower court was that all you had to do was cite the opinion, and you did not have to do the analysis. But the court below here said, When a lawsuit is brought against the state without legislative intent a plea to the jurisdiction is the proper vehicle to assert immunity. The court below in Jones said, that was not the case, that all you had to do was cite it. A plea to the jurisdiction would not work. The court below here recognized the fact that sovereign immunity has two component parts: immunity against suit; and immunity against liability. Then it also recognized that we had pled a case under the immunity for suit. It first quoted "appellee's filed this lawsuit alleging the lawsuit was brought pursuant to tort claims act; appellant had actual notice of the claim; appellant misused equipment, intangible property, medication fluids, fever detecting equipment and clinical facilities and equipment, Dr. Cheney was an agent, etc etc.

HANKINSON: But the CA in this case says that because appellee's claim is made pursuant to the Texas Tort Claims Act is a claim for which the legislature has granted consent to sue the state without ever analyzing the allegations in the pleading to determine whether or not the allegations brought the case within the waiver of immunity in the Tort Claims Act, which is what Jones specifically says the court must do. So why isn't that a conflict?

GREEN: If you take just that sentence out of context, I agree with you, but it has to be read...

HANKINSON: I don't know what else I am supposed to look at since that's the extent of the court's analysis.

GREEN: It also says that the plaintiff bears a burden of alleging facts and _____ showing that the TC has subject matter jurisdiction. They realize that they have to look at the pleadings. They state what the pleadings were and then they find that the claim comes within the act. Now it goes on to say that, therefore, the claim of immunity by the TDC must necessarily be a claim of immunity from liability. And it refers it back to the claim...

HANKINSON: Where in the case does the CA analyze the pleadings in this case to determine whether or not the factual allegations meet the requirements for a waiver of immunity under the tort claims act?

GREEN: It does not state its analysis. It says that it has to do the analysis. It recognizes that it has to do the analysis. It says what the pleadings were and then it concludes that those

pleadings meet the test that it has to go through.

PHILLIPS: But it says, any claim of immunity must necessarily be a claim from immunity from liability. I admit it talks about the facts at the first, but...

GREEN: Just above that it says, TDC's plea to the jurisdiction was based on its claim that TDC asserts on appeal that the TC erred in denying a plea to the jurisdiction because appellant did not establish the facts. That's what it's referring to when it talks about the claim above. It's talking about the claim that we did not establish the facts, which goes to immunity from liability, because we don't have to establish facts to respond to a claim of immunity from suit. All we have to do is allege the facts.

HANKINSON: Assuming that there is a conflict between Jones and the CA's decision in this case, why do the pleadings in this case rise to the level of a waiver of immunity under the statute?

GREEN: Because we show a use of tangible property. The pleadings talk about the fact that the use of the medications caused this man's problem to be masked.

O'NEILL: How do you respond to petitioner's argument that if we take that argument, if we go your way on that argument that every misdiagnosis case is waiver of immunity?

GREEN: If the claim of malpractice as it is in this case is that it violated the standard of care by using medications simply to mask symptoms rather than to diagnose and find out, then all the cases involved that rather than just normal medications, then that would be the case. But in this case, the medications themselves caused the delay. The question was asked about another doctor. There was another doctor waiting and that was UTNB, one of the best medical facilities in this state.

O'NEILL: But this was still a misdiagnosis.

GREEN: Not only misdiagnosis but a failure to realize that it was a bad enough problem to get this man out of custody where Dr. Cheney did not handle this situation.

O'NEILL: But isn't that going to happen in almost every misdiagnosis case? Don't we open the door to all misdiagnosis cases?

GREEN: Not when what it is doing is keeping them from finding out really what's wrong. The use of tangible property is masking the problem while the delay is _____.

O'NEILL: It's hard for me to envision a scenario of misdiagnosis where some sort of medical treatment isn't brought to bear on the patients. It's just the wrong treatment. So again, I don't see why it doesn't open the door,and why every case wouldn't have that element in it.

GREEN: If it's the wrong treatment, but does not cause a problem with the symptoms, it doesn't mask the symptoms, then it would not reach the causation level.

ENOCH: This doctor treated this patient didn't he?

GREEN: He never treated him. All he did was give him the - well he treated him for the symptoms. He gave him treatment for the symptoms themselves.

ENOCH: He gave medicine and ordered treatment to be done, and that person didn't get better, the person got worse, and he used tangible property in doing that. This isn't a case where the patient didn't take the medication. The doctor took affirmative steps to treat and used tangible property to do so. And the patient didn't get better, and the patient ultimately died. I guess it is a misdiagnosis case to a certain extent, but it is also treatment - he undertook treatment that was not indicated by the symptoms he was seeing.

GREEN: In this case, the misdiagnosis could not have occurred but for masking his symptoms. Because the symptoms are excruciating - excruciating headaches and vomiting. If you don't mask those symptoms people around you are going to know this is a serious problem and you need to get out of Dr. Cheney's hands and into UTMB.

HANKINSON: But every one of your allegations of negligence in your pleading is a complaint that the doctor failed to do something: failed to do proper diagnostic test; failed to administer proper medication; failed to do the things that would have caused him to get better. Your paragraph 7.3 of your amended pleading: in failing to properly evaluate, failing to practice medicine in an acceptable manner, failing to order appropriate lab tests, failing to properly test, and failing to properly treat. Why isn't that again a claim of misdiagnosis as opposed to affirmative actions that were taken that were mistreatment that caused injury?

GREEN: Those are part of our allegations.

HANKINSON: Those are your allegations of negligence.

GREEN: Those go mostly towards the doctor and towards UTMB. That's part of our allegation against the state as well. But we have jurisdiction against the state because of the use of the tangible property.

OWEN: You don't cite the Kerrville decision in your brief. Could you distinguish that case for us?

GREEN: In the Kerrville decision it wasn't a delay that was causing the problem. They just simply gave the wrong medicine. In this case, he could not have gotten away with his misdiagnosis for 2 weeks if he had not been giving this man treatment for his symptoms.

OWEN: But in Kerrville they gave him the drug, which is tangible personal property. It just wasn't the right drug was the allegation.

GREEN: Correct.

OWEN: So what's the difference?

GREEN: It didn't harm the patient.

OWEN: But the allegation was it caused the patient to murder his wife.

GREEN: The allegation here is that it harmed - the drug itself actually harmed the patient because of the delay of the progressive meningitis disease. In that case, it was the failure to get him the other drug is what caused...

OWEN: They said that he should have been given an injection as to opposed to oral medication.

GREEN: Okay. It was the failure to give him the injection. In this case it is the actual use of the tangible property of the systematic drugs instead of getting him where he needs to be - UTMB.

HANKINSON: But that's again a failure to act. If what you're saying is they should have gotten him to the medical center and out of the prison environment, then that again is a failure to act. Your specific factual allegations do not allege that the pain medication that was administered and the IV fluids actually caused harm. There's no allegation in the pleading that giving those IV fluids caused him harm. They weren't bad for him were they?

GREEN: Well they were bad for him. They caused him harm in this situation because his body was screaming that it needed treatment for a serious disease.

HANKINSON: No, that's a failure to treat the other. I'm asking specifically if giving IV fluids to a patient actually caused him harm? That's not alleged in the pleading.

GREEN: In this case it did. And if it's not alleged in the pleading, the standard of care requires first of all that there be a special exception below, and we would be given the opportunity to replea that if that's what necessary.

PHILLIPS: If you have to specially except before you can claim that there is no jurisdiction?

GREEN: Before you can claim that the pleadings do not give rise to jurisdiction, you've

got to specially except...

PHILLIPS: Have we ever said that in a case?

GREEN: No, you've said it with regard to summary judgment and I think it's analogous.

OWEN: Why doesn't the plea of jurisdiction put you on notice that your factual allegations may be deficient? Why isn't that your burden to amend at that point? You're facing a plea to the jurisdiction that specifically says, This doesn't get you there. Why isn't there some obligation on you at that point to replead if you think you can?

GREEN: In this case we did replead. After the first plea to the jurisdiction.

OWEN: So if you got the chance to replead why are complaining that there weren't special exceptions filed?

GREEN: Because they continued to have a problem with the way we replied.

OWEN: You could replead again and what was to keep you from repleading until you finally got to where the TC or somebody says that's enough.

GREEN: I suppose nothing at all. I suppose we could have filed another petition.

HANKINSON: Would you respond to Mr. Koon's argument that even if get over the misuse requirements that you still can't get over the sufficient pleading on the issue of causation?

GREEN: Under Bosley this court pointed out it cannot be too distant as to time. It cannot be too distant as to geography, and it cannot be too distant as to causation. It was clear here, because the use of a tangible property was simultaneous with progression of the disease. The disease was even the _____. They were misusing the property and hiding that from the guards, hiding that from his fellow inmates.

BAKER: I get this impression that you're arguing that Dr. Cheney purposely prescribed this medication to mask what the real disease is. Is that what you're saying?

GREEN: No...

BAKER: You used the words to hide it from the guards and other people.

GREEN: He was hiding it. I didn't mean to suggest he intentionally did it, although, he has admitted in court pleadings that he was negligent with regard to the failure.

BAKER: Negligent for the failure to diagnose meningitis?

GREEN: Correct. And then our expert below has testified that the standard of care is that you do not treat symptoms. You've got to briefly diagnose it. With regard to geographical step in that analysis, it's all happening in the same place. You don't have the same problem as you did in Bosley.

ABBOTT: Is there testimony below showing that the doctor gave something to the patient that the doctor should not have given to the patient?

GREEN: There's testimony from Dr. _____, our expert, which he says that the giving of systematic drugs like was given in this case caused harm to this patient. Because it masked the symptoms that his body was trying to tell everybody something was wrong. There is that testimony below, which raises a point though with regard to...

HANKINSON: Once meningitis is diagnosed is it inappropriate to give IV fluids to a meningitis patient?

GREEN: I don't know that.

HANKINSON: Is it inappropriate to give pain medication to a meningitis patient once it's diagnosed?

GREEN: I don't know that either. Probably not, but we haven't had a chance to depose the people who actually treated the patient because this case is upon appeal.

With regard to the causation element, again it is clear that the drugs that he was given to treat his symptoms contributed to. Alright. It's not required to be direct cause. We're talking about proximate cause. But for cause. Once his symptoms got so bad even despite the symptomatic treatment, he was taken to UTMB where they immediately diagnosed meningitis, which has an 80% survival rate if caught in time. They caught it too late. They didn't get him soon enough. Had the drugs not maxed the problem the way it did, UTMB would have gotten him sooner, he would have gotten the diagnosis sooner, and therefore, he would have been in the 80% hopefully.

OWEN: That's where I have a problem with the evidence or the allegations. Are there specific allegations that this doctor who already missed the diagnosis would not have kept on missing it but for his direction that the patient be medicated? That's where it seems circular to me.

GREEN: I think it just gets to the point where frankly the problem was out of this doctor's capacity to handle. He saw a patient that had a problem, so he gave the patient _____. And didn't really try to ever then do what he should have done from the very beginning is sent the patient...

OWEN: And to me that sounds like the allegations are, he was going to misdiagnose his come what may. And it wasn't really the drugs that masked it from him. Because he wasn't going to pick up on it.

GREEN: He wouldn't be allowed the time to make it as bad as it was if he weren't using the drugs to cover up the symptoms.

BAKER: As I understand it, when Mr. Miller was taken to the clinic, he was complaining of nausea, severe headaches and was vomiting. If I understand your argument, all three are symptoms of meningitis. And so, can you make the argument that Dr. Cheney should have been able to recognize that at the very first time that Mr. Miller appeared at the clinic and make that diagnosis correctly then?

GREEN: No.

BAKER: Why not?

GREEN: Our expert says, for the first two or three days, you don't know whether or not that is something like meningitis or that's something like flu. And it might well be appropriate for the first 2-3 days to treat just those symptoms. But once the 2-3 days pass, you need to find a diagnosis. And he did not do that. He continued to mask the problems.

BAKER: Well then, you've moved the failure to diagnose from the initial contact to 3 days later. But it's still the same argument isn't it?

GREEN: No. He continued to move in much more than 3 days. Arguably his use of tangible property was not a misuse for the first 2-3 days. After the first 2-3 days, clearly it is and misuse.

HANKINSON: Because he didn't get better and he still had a fever and he still had all the symptoms?

GREEN: And he never sent him anywhere, and he didn't diagnose him and didn't send him anywhere, and he couldn't have done but for the misuse of the medicine.

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REBUTTAL

PHILLIPS: If given a drug that made the meningitis in any sense worse would you have a fact issue in this case?

LAWYER: I think you might. If the claim here was that it caused in any way his death,

then that might be an issue for the jury to determine. That's not the issue.

PHILLIPS: No, I mean this clearly if their allegation is correct caused his death by masking what would have been otherwise a probably treatable...

LAWYER: I don't believe it does under the tort claims act. Under what we consider causation of the tort claims act. I think what caused his death was failure to diagnose.

ABBOTT: But your opposing counsel contended in oral argument the evidence that was shown below by an expert said that the injury was caused because the patient was given medication that he shouldn't have been given.

LAWYER: I don't want to get too much into the evidence because it's just a plea to the jurisdiction. But I think what the evidence was was at some point if he's not getting better, you should have realized this is not the flu, this is not something else. And you should have taken other actions. In the deposition he said, you should have taken a cat scan. He says specifically a blood test that would have shown whether or not this is meningitis. That's what his expert said, which is really just not that you should have not given him this ice pack, not that you shouldn't have given this tylenol. It's that, you should have realized and at some point given him some other form of treatment.

HANKINSON: And that's because even though he was getting the pain medication and the IV fluids he wasn't getting any better and he still had the symptoms?

LAWYER: That's right.

ENOCH: The argument in Kerrville was it was the right medicine. The question should have been intravenous or oral? And because the doctor chose to do oral as opposed to intravenous, the patient didn't take the medication and became depressive again and then went out and committed a murder. And so what happened is you didn't use the drug at all as opposed to using the wrong drug. What is the causation element in the tort claims act with the misuse of tangible property? Is there a causation element in the statute that it has to cause the injury?

LAWYER: Yes. The statute clearly says personal injury or death caused by a condition or use of tangible personal property. And that's what this court looked at in Bosley. And that's why this case can't be right. You could have decided Kerrville on a causation...

ENOCH: So if the doctor misdiagnosis a condition of a patient, and the doctor - let's say I think you've got a blood clot and so the doctor goes in and _____ the body and there's no blood clot there. But the doctor does not misuse the property at all. And he comes out and the patient suffers no harm from that except the patient dies because it was some other condition that the patient had that the doctor didn't see, then there is no waiver of tort claim liability even though there was

a treatment, there was a use of tangible property. But because the doctor just goofed on the original diagnosis, then this was a failure to use the property for the thing that it was supposed to be used for. The hospital can use a lot of property in treating the patient as long as whatever they treat the patient for is not the thing that ultimately harms the patient, then there is no waiver of tort liability because they never used the property for the right thing?

LAWYER: That's absolutely right. I think the case law is clear and that's why we're here on this case, because this case threatens to really confuse this area. In *Herring*, in 1974, this court said that a claim by a prisoner of inadequate medical care without a use of property that causes the harm is not enough. This court said it in 1974.

BAKER: The way this discussion is going back and forth almost leads to the conclusion that both sides are arguing, We have to prove the whole case one way or the other, or disprove the whole case to determine the jurisdictional issue. Now is that consistent with our jurisprudence in this area or not?

LAWYER: This court has repeatedly held that it is the burden of the plaintiff to plead jurisdictional facts. They have to plead facts sufficient to establish...

BAKER: But we've been talking about causation, who did what, when and why, and how it occurred, and we get down to the bottom line, Well these drugs or this treatment didn't cause the meningitis or the death. And the ultimate thing that they have to prove is inadequate medical treatment.

LAWYER: We're not even trying to argue about whether or not it actually caused it. What we're trying to argue about is whether or not they pled it caused it. And that's proper for a plea to jurisdiction. In several of the cases that I recognized, the Hernandez case...

BAKER: Well so in other words it's your argument that without going any further than the plaintiff's live pleading that a court is capable of determining there is no causation from misuse of tangible property?

LAWYER: Yes. We believe if all the court had was Herring, Kerrville and Bosley, it could read the face of this pleading and say, there is no use of property that caused the injury.

BAKER: And then the problem with special exceptions or not is still not one that involves the plea to the jurisdiction. That goes to summary judgment process. Is that your argument?

LAWYER: I hope to touch on the special exception issue. This court said in Peak v. Equipment Services Co., special exceptions are only appropriate when there is a defect on the face of the pleadings that can be cured by amendment. It's not appropriate when there is a jurisdictional defect on the pleading that can't be cured. And that's why this is a plea to jurisdiction summary

judgment issue and not a special exception issue.

ABBOTT: Applying your _____ can create quite an odd situation because what you're just saying now and what you said in response to my last question to you, is that we look only to the pleadings and not to the evidence below. Correct?

LAWYER: That's right.

ABBOTT: So what we could have then would be a situation where the pleadings on their face clearly do not establish a tort claims act violation, but the governmental entity for whatever reason does not challenge it in the pleadings stage. You go to trial. You have a full-blown trial, and after a full-blown trial it's clear that when it does establish a tort claims act claim. But according to what you're saying is that even if the plaintiff does establish by all of the evidence clearly that a tort claims act violation has occurred because you look only to the pleadings that you are capable then on appeal of raising for the first time the jurisdictional issue saying, Look their pleadings don't establish a cause of action so we win based upon their pleadings for lack of jurisdiction.

LAWYER: That would never happen.

ABBOTT: Because the government lawyers will always assert jurisdiction?

LAWYER: No. You're saying, not that when we go through trial they will establish jurisdictional facts, but there won't be jurisdictional facts from the beginning and will go up on that beginning pleading...

PHILLIPS: No, you're saying all you can look at is the pleadings in establishing jurisdiction.

ABBOTT: And what I'm saying is that if all you look at is the pleadings, and if the lawyers for some governmental entity in whatever locale around the state of Texas fell to raise a jurisdictional issue based upon the pleadings, you go to trial and at trial it's clearly and unequivocally established a tort claims act violation. Because you say you look only to the pleadings, what the government lawyer would then be able to do is to assert for the first time on appeal like a jurisdiction based solely upon the pleadings. So either one of two things. Either that odd situation would arise, or 2), you have to change your opinion that we look solely to the pleadings.

LAWYER: In the context of this case, they would have the opportunity to amend.

ABBOTT: What we're trying to do is to resolve Jones, or _____ and everything.

LAWYER: I assume that what the situation you raise, and it's a good point, is that it be too late to amend the pleadings at this point.

BAKER: Why?

LAWYER: I don't know.

BAKER: Don't we have rules that say that the TC in its discretion can allow amendments of pleadings even after the case has been tried so that pleadings conform to the evidence and you can get a judgment that you could enter?

LAWYER: I think it's true.

BAKER: So why is it too late?

LAWYER: I don't know. I don't believe there is anything to stop you from amending the pleadings, which is what I was trying to get to. And in Peak, this court recognized if it could be amended, then it's not proper to dispose of it jurisdictionally. And that's not the issue here. That's what we're saying. Here we're saying, They've done the best they can do. They've alleged the most clever pleadings they can handle. And there is nothing else they can come up with. And we're saying, that doesn't make it.

BAKER: But have you ever told them that by a special exception?

LAWYER: Yes.

BAKER: You tried hard, but you hadn't made it.

LAWYER: We filed a special exception. It's in the record.

BAKER: But he argues all that is just kind of laying out there and there's been no ruling on those. Is that correct?

LAWYER: It's true that the special exception was never actually ruled upon because they amended...

BAKER: Well don't you have to have a ruling before he is required to replead?

LAWYER: He actually did replead. And that's why the special exceptions were never actually set.

BAKER: Can he then say, Well you didn't say it one more time, that what I repleaded is still not good enough so they are okay?

LAWYER: No. That's why in Peak you recognized it's not even proper to use a special

exception for a jurisdictional pleading. It goes back to the footnote in Cassen. It's footnote No. 10. And that's where this issue arises from. The court dropped it in footnote 10, that you shouldn't use a summary judgment. You should use a special exception.

OWEN: Wouldn't it be a better rule just to say at the end of the day, like we do in a venue statute, to look at the entire record to see if there was jurisdiction?

LAWYER: It may be that in a - if we were post-trial that you're not going to look strictly at the pleadings. But this court has repeatedly said on a plea to jurisdiction that we look solely at the pleadings...

HECHT: No, we haven't. Cite me a case.

LAWYER: Actually, I don't have one in front of me.

HECHT: I don't think you are going to find one.

LAWYER: That we look at the four-corners of a document in a plea to jurisdiction, I believe is the appropriate way to handle plea to the jurisdiction. And that the jurisdictional facts have to be alleged on the face of the petition.