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Supreme Court of Texas.  
TEXAS HOME MANAGEMENT, INC., Petitioner,  
v.  
Edith Carol PEAVY and O.L. Peavy, individually and on behalf of The  
Estate of  
Elizabeth Ann Peavy, deceased, Respondents.  
No. 00-0889.

April 18, 2001.

Appearances:  
Jay Hirsch, Hirsch & Robinson, Houston, Texas, for Petitioner.  
Karl B. Brock, Brock & Brock, P.C., San Antonio, Texas, for  
Respondents.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen,  
Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan  
L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice  
Craig T. Enoch, Justice Xavier Rodriguez.

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CHIEF JUSTICE PHILLIPS: Thank you. Please be seated.  
Court is ready to hear argument from petitioner in Texas Home  
Management v. Peavy.

SPEAKER: May it please the Court. Mr. Jay Hirsch to present  
arguments for the petitioner and has reserved five minutes for  
rebuttal.

ORAL ARGUMENT OF JAY HIRSCH ON BEHALF OF THE PETITIONER

MR. HIRSCH: May it please this Honorable Court. At the public  
policy of this State has and always has been to promote equal justice  
for all, including the mentally retarded. And our health and safety  
code has been to develop to their fullest extent the potential for all  
those who are mentally retarded to become productive members of this  
society. This is a very important case. For the reason that the issue  
arises in this case, does an intermediate care facility with level 1  
training and services have a duty to keep the mentally retarded  
juvenile from harming an unidentified third person while that juvenile  
is visiting his mother off the premises of the facility at home on a  
pass and goes to a convenience store --

JUSTICE O'NEILL: Well, Mr. Hirsch --

MR. HIRSCH: -- and, in fact --

JUSTICE O'NEILL: It sort of depends on the -- the issue you posed, doesn't it? Do we have the -- the documents in front of us that would tell us what the facility's duties are vis-à-vis MHMR?

MR. HIRSCH: Yes you do.

JUSTICE O'NEILL: And does that include evaluation -- What if someone is committed to your care and becomes violent? Is there some obligation to report that to MHMR?

MR. HIRSCH: The obligation under the contract doesn't provide that the, as a matter of fact, the services contract as entered into between the facility and between the Texas Department of Human Services which acts as the contracting agency for Mental Health, Mental Retardation Authority, in this case, doesn't provide that but the Code, the Health and Safety Code, would say that the obligation would be that if they're too removed, it goes from a report to Mental Health, Mental Retardation, who would then go back to make a report to the District Court and the District Court could then change the level of health care.

JUSTICE O'NEILL: Well, I get that the issue we're talking about is control and I'm trying to get to the control piece. Who controls the decision of where to place this child? I presume you're arguing its MHMR.

MR. HIRSCH: It's -- it's clear the District Court's order and their acceptance of it.

JUSTICE O'NEILL: Well, ultimately -- ultimately. But I believe the court's order to MHMR says "control," doesn't it?

MR. HIRSCH: Yes. Yes it does.

JUSTICE O'NEILL: So -- so let's presume that MHMR has the duty to assess this patient to determine where it should be placed. And if this patient then becomes dangerous, has an obligation to recommend placing the child somewhere else, if you'll presume that with me. Then doesn't it become relevant what was reported back to MHMR about this particular patient? In other words, doesn't the facility have some obligation to -- If -- if it becomes obvious that the patient is dangerous, isn't there some obligation for the facility to at least report that back? I understand your argument is they have no discretion under Federal regulations to keep them from home visits, but isn't there some duty to then report back dangerous tendencies and recommend that they be placed elsewhere that --

MR. HIRSCH: Actually, its the other way around, Justice O'Neill. The -- What happens is the Mental Health, Mental Retardation Authority actually periodically gets its information and they make the decision if they're gonna replace --

JUSTICE O'NEILL: Where do they get that information from?

MR. HIRSCH: That -- what -- that information would come from review of the information that they could get from the facility.

JUSTICE O'NEILL: So, again, the -- the responsibility to see what's going on with this kid is with the facility, maybe not to control it, but to at least assess it?

MR. HIRSCH: Certainly the -- the individual there is what she -- what they're doing is they're going to school. In this case, they went to school, actually public school, then went to an alternative school. And really, what you have is a place to live. It's -- it's closer to being a boarding house.

JUSTICE O'NEILL: So where you're living is gonna be the best person to assess this --

MR. HIRSCH: That information would be -- I would -- Yes, I believe that would be appropriate.

JUSTICE HANKINSON: Mr. Hirsch, this student was attending [inaudible] public school, is that right?

MR. HIRSCH: Yes, yes.

JUSTICE HANKINSON: And so there was -- so there was an educate --

MR. HIRSCH: And then change to the alternative school.

JUSTICE HANKINSON: -- and there was an educational plan in accordance to what law requires for a -- a child of mental retardation in a special education program.

MR. HIRSCH: Yes.

JUSTICE HANKINSON: Is that correct?

MR. HIRSCH: Yes it is.

JUSTICE HANKINSON: And after the court order, turned the child's care over to MHMR and then MHMR can decide that an intermediate care facility was the appropriate residential placement for the child. Was there a treatment plan that was done in connection with the residential placement with respect to the parameters for that placement?

MR. HIRSCH: Yes, there was. Yes.

JUSTICE HANKINSON: For example, how much visitation, what kind of independence the -- this -- the client would have and so on and so forth.

MR. HIRSCH: Actually, that plan is not that specific. What happens is in the Code, the sections in the Code deal with that to promote visitation, you'd have to have a different level to keep them from actually attending, you know, going home to their mother in visitation.

JUSTICE HANKINSON: But there is a specific plan in place --

MR. HIRSCH: There is a treatment plan.

JUSTICE HANKINSON: -- for this client with respect to what type -- how much independence this particular client is going to have.

MR. HIRSCH: There is a specific treatment plan.

JUSTICE HANKINSON: All right. Who does the treatment plan, the facility or MHMR?

MR. HIRSCH: A combination of both.

JUSTICE HANKINSON: But -- You mentioned to Justice O'Neill that there were documents that showed the relationship between MHMR.

MR. HIRSCH: Yeah, the -- the only [inaudible] --

JUSTICE HANKINSON: I have the -- I have the contract [inaudible] -

-

MR. HIRSCH: You have the contract, right.

JUSTICE HANKINSON: -- the contract to provide intermediate care services to the mentally retarded in the Texas Medical Assistance Program. Is that the document you're referring to?

MR. HIRSCH: That's the document I'm referring to.

JUSTICE HANKINSON: Is there in any [inaudible]

MR. HIRSCH: The only -- the only other document I'm referring to -- the only -- the only other document would be the preadmission evaluation. In this case, this was a -- was an IQ -- verbal IQ of 40 and a 60 performance IQ individual and they made him level 1 by the by the court.

JUSTICE HANKINSON: What was the -- what was the adaptive behavior score?

MR. HIRSCH: The adaptive behavior score. I don't recall, but I believe it -- it was probably about 54. It was 54.

JUSTICE HANKINSON: All right. Well, this -- this contract provides that the facility agrees to provide room and board, institutional services and medical and active treatment in accordance with the

Department's standards. So it was the facility's obligation to have a treatment plan in place with respect to the residential care aspect of his program?

MR. HIRSCH: There was -- there were two things. There was a -- Yes, there was a treatment plan, the answer to that question.

JUSTICE HANKINSON: And that treatment plan included information about visitations and how much he could leave and under what circumstances he could leave and what kind of transportation he could use and so on and so forth?

MR. HIRSCH: Actually -- Yes, I don't believe, as I recall seeing the plan in this case, that it's -- it spells out what kind of transportation or that -- that kind of detail. The -- the -- Actually -

JUSTICE HANKINSON: But did he --

MR. HIRSCH: -- the Code says he has to go home on weekends.

JUSTICE HANKINSON: Pardon me?

MR. HIRSCH: The Code says that he shall be the least restrictive -

JUSTICE HANKINSON: Right.

MR. HIRSCH: -- available under -- under, number one -- facility number one for that level.

JUSTICE HANKINSON: And if the decision -- if the decision were made that he, because he was violent, that he should not be allowed the visitation, then it would've been incumbent to change the treatment plan so that, perhaps, he went to a different level care facility. Is that what would've been required?

MR. HIRSCH: He -- he would have -- No, he would have to go back. He couldn't do that. He would have to go back to Mental Health then go back to the court.

JUSTICE HANKINSON: And the [inaudible]

MR. HIRSCH: It's spelled out and have to go back to the District Court.

JUSTICE HANKINSON: I understand. But -- I know. But ultimately, you used that procedure and then he would have a different placement where the environment would be more restrictive because then that would be the least restrictive environment that was appropriate to him.

MR. HIRSCH: If the court determined that.

JUSTICE HANKINSON: All right.

MR. HIRSCH: As for that, the court --

JUSTICE HANKINSON: So it was -- it was the facility's duty then to make MHMR -- to follow through on the treatment plan and to make MHMR available if, in fact, the plan became inappropriate so MHMR could do -- go back to court and do something else.

MR. HIRSCH: It would be the facility's duty to give information to Mental Health, Mental Retardation who would then have to go back to court if they want to make a judge --

JUSTICE HANKINSON: Does the record, in any way, reflect the communications between the facility and MHMR with respect to this particular client and the development that occurred in his life during the three years that he was in the facility?

MR. HIRSCH: No. The only thing this record reflects is portions of the criminal trial and specific pieces of some -- there's some affidavits that are given, very few depositions in support to where --

JUSTICE HANKINSON: Well, if we're going to determine whether or not the facility had immediate control, how are we going to do that without a record that reflects that relationship, specifically between MHMR and the facility with respect to this particular client's

treatment?

MR. HIRSCH: Well, I guess the -- the best answer I could give is that I don't -- what -- what difference would it make if, in fact, the burden that you'd be placing is you'd either have the person out of facility, locked up somewhere, or the patient with, obviously, the -- the individual, the resident would have to be supervised, which is what the plaintiff has said the underlying lawsuit and that would be contrary to what the Code says and that they're supposed to have the least intrusive basis of doing it.

JUSTICE HANKINSON: But least -- least restrictive environment may mean institutionalization, if that's what's appropriate for the particular client. Least restrictive environment is a continuum under the law, isn't it?

MR. HIRSCH: No, I don't read it that way. I read that, in fact, that it's very well set out. The least restrictive alternative and you do have this 591.05 is, in fact, one, that service and treatment that is provided in the least intrusive manner reasonably and humanely appropriate --

JUSTICE HANKINSON: Exactly.

MR. HIRSCH: -- to the patient's needs.

JUSTICE HANKINSON: And so that -- that relates to patient's needs. So what may be least restrictive for one particular client is not the same thing as what's least restrictive for another client. One client may be able to live at home [inaudible] restricted, another may require an intermediate care facility because that's a requirement, another may require a more confined level of care because that is required. So it is a continuum.

MR. HIRSCH: It -- it's a continuing program. Yeah.

JUSTICE HANKINSON: Tie -- tied to the patient -- Tied to the client's needs.

MR. HIRSCH: Tied to the client's needs and likes. In our case, of what -- We're not Mental Health, Mental Retardation Authority. What we are is basically -- If they were imposed with a burden, in this case, of trying to send somebody home to supervise the visits, it would be contrary to what, actually, the Code says.

JUSTICE HANKINSON: Well -- But the problem that I'm having in understanding without the complete record here, Mr. Hirsch, is that they did, under the contract, assumed the duty to provide active treatment. And that included monitoring the client so that if there were some sort of a change or something that would require MHMR to reconsider the placement and go back to court, then, in fact, that could be done. Why didn't, under the contract, the facility assume that duty as a matter of law?

MR. HIRSCH: I don't know. What -- what -- what I -- believe you're asking me is, is this a non-delegable duty because I don't read the "providing the education, room, board, institutional services and medical --

JUSTICE HANKINSON: Medical and active treatment.

MR. HIRSCH: -- and active treatment," as being taking on the responsibility at making decisions what Mental Health and Mental Retardation would do with the information they were being provided. They were being provided information. And it was going -- That would flow back to the court --

JUSTICE HECHT: How often --

MR. HIRSCH: -- if they thought was necessary

JUSTICE HECHT: -- how often did they make a report on the individual patients?

MR. HIRSCH: Quarterly.

JUSTICE HECHT: So that -- So each quarter, they would report these incidents. He pulled a gun on somebody but they didn't seem concerned with that.

MR. HIRSCH: Well, I will have a discussion whether this was -- if he pulled a gun on someone or not. The record that they're talking about was he never pulled a gun on anyone. The record shows he had a gun in his --

JUSTICE HECHT: Well, let me not get off on that --

MR. HIRSCH: Okay.

JUSTICE HECHT: -- let me not get off on that.

MR. HIRSCH: All right.

JUSTICE HECHT: Just -- they would report these kinds of incidents that we've seen in the brief.

MR. HIRSCH: Yes sir.

JUSTICE HECHT: How much discretion did the home have to change or alter his lifestyle? In other words, could they decide whether he went home to see mama one weekend a month or four weekends a month?

MR. HIRSCH: They could -- they could have kept him from going home but it is contrary to the regulation that says that he's supposed to go home and see his mother. And in fact, she is supposed to be his -- in charge of him although the court order says that, "It's the responsibility of Harris County for an indefinite period of time." But if you look at the Mental Health Code, the section says that they "encourage visitation on a regular basis" but that's --

JUSTICE HECHT: They have enough discretion to say what regular basis was.

MR. HIRSCH: They could -- they could keep him from going home. How often could be every weekend or he could go home once every quarter. That's a decision that the -- that the facility could make.

JUSTICE HECHT: But continue -- continues actively a danger to himself or others. This is not the right facility for him.

MR. HIRSCH: In -- in -- That's correct. He would have gone in to, obviously, anywhere from Vernon's to a different County facility because of the specific finding by the court with its evaluation, psychological testing, physical testing, the mental testing they made was that he was not a danger to himself and others when he was admitted to the facility.

JUSTICE: I take it you've already -- you've already acknowledged that they don't have to send him home even though that's what the Code requires, you've got some discretion. And let's assume that it takes a while to get placements changed when there's a change of circumstances. If this kid is violent at school on Thursday and they send him home to the home. Does the home have the authority to keep him from going to school the next day to avoid violent conduct?

MR. HIRSCH: I don't believe there's anything that specifically addresses that --

JUSTICE: Well, what would the home do?

MR. HIRSCH: -- in any other contract or any legal issue on that.

JUSTICE: He's violent, he's becoming agitated, he's -- it's obvious he walks to the front door of the home and there's a real problem here and it -- the next morning there's a real problem with the home. Just send him back to public school, that day.

MR. HIRSCH: Now, they -- what they would do, obviously, as a school, number one, they'll probably send him back to the facility.

JUSTICE: No. The question is would this facility seeing this conduct --

MR. HIRSCH: Send him to school.

JUSTICE: Send -- send him to school.

MR. HIRSCH: Obviously, he wouldn't think so.

JUSTICE HANKINSON: Let me work the same question.

JUSTICE: So the -- It is unclear to me, under the briefing, what actually was happening here. You -- the -- you rely heavily on the court order that he's not a danger to somebody else, but if the evidence was that there was a marked increase of violent tendency on this person's behalf within just a matter of a few days. Would the home have some sort of obligation to say, "Whoops, better not send him home today because we don't know what's going on here but he's becoming more violent." Wouldn't the home have an obligation to hold him at least until somebody makes a determination of, "What's gonna happen to this kid?"

MR. HIRSCH: It would seem to me that, obviously, that the home could hold him until they had an emergency evaluation by a physician and that responsibility would clearly be a physician's responsibility as it would be under any [inaudible] Mental Health Code. Whether its dealing with a retarded, or any other emergency facility decisions made by -- by a doctor. And -- and frankly, I don't know how you could compose a greater duty. This Court, I think correctly in '98, when it decided the Gage Van Horn's case against the Chambers, clearly decided that to work and extend the duty because it wasn't controlled the doctor his patient. This case deals with, "Are we gonna place the duty of a facility that is basically given someone a place to live subject to the regulations that are [inaudible]?" That's the regulations it deals with. The Medicaid is a Medicaid contract. Its what it is. And it is regulated by the surveys and when Medicaid comes in -- In fact, one of the cases that they --

JUSTICE HANKINSON: Is that -- are you -- are you take -- are you taking the position, though, Mr. Hirsch that as a residential intermediate-care facility, that they had no obligation to monitor the well-being and behavior of the clients who resided there and that they were merely providing a roof over their heads and meals?

MR. HIRSCH: No, I -- I don't -- that -- that would not be an accurate statement. I wouldn't any way mislead the Court. I think they had an obligation with the information they had to pass the information on periodically in concordance with the plan that was placed and for Mental Health who comes to get the information, to deal with it.

JUSTICE HANKINSON: Do they also have the duty to ask Mental Health, Mental Retardation to intervene if in fact they saw a problem developing with a client?

MR. HIRSCH: Do they have the duty to do that?

JUSTICE HANKINSON: Yes sir.

MR. HIRSCH: I don't believe -- I don't believe the way this is set up they do. I believe the duty goes the other way.

JUSTICE HANKINSON: Okay. Do we -- Do we have the -- in the record, the quarterly reports that were being made by the facility to MHMR for this client?

MR. HIRSCH: No.

JUSTICE HANKINSON: Do we have any of the records relating to the -- other than the contract, relating to the relationship between MHMR and the facility vis-à-vis this client or the legal relationship between MHMR and the facility?

MR. HIRSCH: The only -- the documents we have are the preadmission and evaluation, we do have that. We have the evaluation that's made with all the testing -- the battery testing. We have the court ruling

on that, the language on that. We have the contract which you've been referring to. I don't believe there's another document in that regard. [inaudible] another question --

JUSTICE HANKINSON: Well, I was gonna take the scenario one step further --

MR. HIRSCH: Okay.

JUSTICE HANKINSON: -- and make sure I understand the parameters of this -- this duty we're talking about. Do I understand that -- Lets take for example this child. What if he had told the facility, "I'm going home this weekend and I'm gonna kill my mother." Would the facility have any obligation there under your scenario? You're under -- What I hear you arguing is that -- that the facility would merely have to report that to MHMR but -- but let them go.

MR. HIRSCH: Well, I think they would. If they have that information, I don't know how their duty would be greater than -- than the physician's duties which are only if there's a really --

JUSTICE HANKINSON: Well, that's a duty to warn the potential victim.

MR. HIRSCH: And they're not arguing [inaudible]

JUSTICE HANKINSON: And we're not talking --

MR. HIRSCH: They think they cant get you those cases.

JUSTICE HANKINSON: Right.

MR. HIRSCH: They're right.

JUSTICE HANKINSON: We're talking about duty to warn. We're talking about just the facility's duty to step in and if -- if the child had said, "I'm -- I dislike my mother. I'm gonna kill her this weekend." And is there some obligation or duty for them to then step in and -- and where would we -- is that a court or recognized duty through the courts or is there something in the contract that would -- you could base that duty on but there's a duty to monitor or treat or something like that.

MR. HIRSCH: I think Judge Hecht hit it pretty well. Its just the broad language as the contract is what you operate under, there is nothing that says what they would do if they had an emergency situation other than I'm sure calling a doctor --

JUSTICE HANKINSON: Well, okay.

MR. HIRSCH: -- you know, get it to Dr. --

JUSTICE HANKINSON: But -- but what would their duty be? How would you define their duty under the -- the scenario that I've just posited to you? Would there be any obligation on the facility to do anything in that circumstance?

MR. HIRSCH: Report. Report and let somebody make a decision. What do they do at that point or to a physician or someone that would be able to make a decision, do something that could be done with him. Can he leave and go home? Can he -- does he need to be [inaudible] stuff like that?

JUSTICE HANKINSON: Why should the -- Okay, so what -- what is the difference then, if he has exhibited violent tendencies? Then should there be a duty to send him to the physician to make that same assessment?

MR. HIRSCH: Well, they have the physician -- they have a physician that comes and makes an evaluation based on the records, periodically. That's part of Mental Health, Mental Retardation. Its a responsibility. They have somebody who comes to the facility and goes over the records, makes evaluations on a quarterly basis and more often, I guess, it misses.

JUSTICE HANKINSON: But -- I -- It will be the facility's



obligation to determine when would be more often than that than routine. There would be a duty if there was something --

MR. HIRSCH: If something came up [inaudible] an emergency and they had some knowledge that the patient was going to harm someone, I believe that it would be -- that their judgment would be in question if they didn't --

JUSTICE HANKINSON: Would you -- can you --

MR. HIRSCH: -- do something to report it.

JUSTICE HANKINSON: And there -- wouldn't that be a fact question?

MR. HIRSCH: Well, I don't know how it can be a fact question under this case because the kind of control that I see that the -- the Court, the 14th Court, has used, is they'd referred to 3-19 and the case they quote, the McClain case, was the 3- 20 restatement where you have, in a locked facility, two individuals, one harms another. Younger man, 50, hurts a 90-year-old and he brings the case under the Tort Claims Act, trying to get around the question on immunity --

JUSTICE HANKINSON: [inaudible] such a question.

MR. HIRSCH: -- but I'm -- what I'm trying to get at is here, what he can apply that would make us have a burden and talking about the facility, under control. It just isn't enough to make them controlling a party with that degree of control that would make him responsible for a harm of another identified party. Like it would be -- would be unsure. What a burden. How would -- how -- What a tremendous burden to face to have somebody have to go and -- Where would we get the people? It would be -- the most intrusive play would be to send somebody home. Are we [inaudible] I guess --

JUSTICE HANKINSON: I guess what I'm saying, though, is under your scenario, no situation would trigger their duty to come in and -- it seems to be there's some sort of discretion here with the facility.

MR. HIRSCH: Well, it seems to me like they -- that, frankly, they should've sued Mental Health, Mental Retardation over these facts. I've never seen another case where they would say, "Well, we're just gonna sue the place where they placed him to live." and --

JUSTICE HANKINSON: Who watches him everyday.

MR. HIRSCH: Well, watches him everyday. When the term "watches him" he goes to school, you know. He's off the premises. They don't watch him all the time. But yeah, observes his behavior from time to time as anyone else would do in a situation where they had an opportunity to observe just as he was there.

JUSTICE OWEN: In your briefing, you cited chapter 574 of the Health and Safety Code. It seems to me your -- I've looked at that chapter, I'm not finding the specific provisions that apply here and you're talking about some other provisions. Can you tell me what provisions you say gave the Trial Court the authority to commit this child and what -- what governed the 111 and where he ended when he gets out and all of that? What section is the Health Code you're talking about?

MR. HIRSCH: Well, let -- let me start with -- in looking at the judgment -- Have you seen -- Do you have the judgment?

JUSTICE OWEN: I've looked at the judgment.

MR. HIRSCH: Okay.

JUSTICE OWEN: Your brief -- the brief only cites the check for 574, that's why I'm asking you your -- your [inaudible] Code today. What Code sections are you talking about?

MR. HIRSCH: Well I'm looking at -- I'll start with sections 591 and go through -- 591 goes that all the definitions as to who the parties are, adaptive behavior. It gives you all the definitions.

591.05 goes through the care of which we talked about least restrictive alternative, the 591.05. 591.011 deals with the responsibilities of the Department and they're referring to the Mental Health, Mental Retardation Authority. This said sets out their Department's responsibilities in its 591.011 and it sets out exactly, including that they're responsible for their custody and sets it out in language "custody and control." It goes through and talks about education, [inaudible] care, treatment, training, rehabilitation. It sets it all out.

JUSTICE OWEN: But, I have a question. You cited chapters 5 -- chapter 574 in your brief, but he was not committed under any of the procedures under 574.

MR. HIRSCH: You know in 574, would be more -- more restrictive. As I recall, that may be under a commitment where there's danger to others, as I recall, for his family --

JUSTICE OWEN: [inaudible] or one year of care [inaudible]

MR. HIRSCH: Correct.

JUSTICE OWEN: That's not what he was confined under.

MR. HIRSCH: No.

JUSTICE OWEN: He was confined under a whole different chapter.

MR. HIRSCH: That's correct.

JUSTICE OWEN: And that's -- You're saying its chapter 5 [inaudible].

MR. HIRSCH: Right.

CHIEF JUSTICE PHILLIPS: Any other questions?

Thank you, Counsel.

MR. HIRSCH: Thank you very much.

JUSTICE PHILLIPS: The Court is ready to hear arguments from the respondents.

SPEAKER: May it please the Court, Mr. Karl Brock to represent arguments for the respondents.

ORAL ARGUMENT OF KARL B. BROCK ON BEHALF OF THE RESPONDENT

MR. BROCK: Good morning. May it please the Court. My name is Karl Brock and I'm here along with my father representing the respondents in this particular case, that being the Peavy's, as a result of the death of their daughter, Elizabeth Ann Peavy.

This particular case, I think, deals with an issue that this Court has dealt with for a long number of years. And that is duty.

JUSTICE OWEN: What duty does a parent of a mentally retarded child who's violent owe to the public?

MR. BROCK: Basically what I think, if you're specifically referring to this particular case, Justice Owen, I think what we're talking about is a situation where control was turned over to [inaudible] --

JUSTICE OWEN: I'm saying there -- there's no commitment order. The -- the parent had a mentally retarded, violent child living at home with them. What does the parents do?

MR. BROCK: I think the parents lose control.

JUSTICE OWEN: In -- in what way?

MR. BROCK: Do you -- To control and/or confine, supervise. If that requires that they be placed into a facility to protect others, as the case law sets out, then I think that's their duty. In fact --

JUSTICE: Lets suppose that the parents has had the child treated and there's a court order that tells the parent, "This child is not a danger to others." And the parent allows the child to go up the grocery store and generally tries to steal a car and kills somebody.

MR. BROCK: I think that's the parents' liability.

JUSTICE: What's -- And how does a parent -- What is it that the parent should have known that should have kept the child from going to the grocery store -- that the parent should have kept the child from going to the grocery store?

MR. BROCK: It would be based upon history, [inaudible], predictability and harm.

JUSTICE: But if there's a court order that says, "This child is not a danger to others"?

MR. BROCK: I understand, but that parent is in a situation much like the home was where they're in proximity to the child on a daily basis and understand his actions, understand who he hangs out with, understands what his propensities are and dangerous tendencies are. And under the Pauls Graff situation, if I remember correctly, the risk perceived determines the duty to be obeyed. And so if their perception of their own child, based upon their daily contact with the child, is that he could pose a danger to others, then their duty is increased to the extent where they have to do something to see to it that that child does not act on his tendencies.

JUSTICE HANKINSON: It seems that the Code -- there's sort of a balancing here going on between the child's rights, the child's freedoms and the child's right not to be put up, locked up in the basement or locked up in the attic --

MR. BROCK: Yes ma'am.

JUSTICE HANKINSON: -- versus the parents' real responsibility to keep home the child. It seems that, if a parent, as you suggest, takes this [inaudible], I cant control my child, I want my child confined. There's an arbitrary proceeding in court with the parent saying, "Lock them up." And the court finds, "Well, we don't have [inaudible] cause to lock them up. They're not dangerous to someone. They -- they could go to school. They can stay [inaudible]." How do you, then, impose a duty over the parent who's done all they can do under the law?

MR. BROCK: I understand. And its a very difficult situation to -- to deal with, but once again, I'll go back to the risk. If there is, in fact, a high risk and the parent knows that, for instance in the Rodriguez case, I believe.

The court goes in -- Houston Court of Appeals goes in and looks at perceivability factor to determine whether or not, based upon the general characteristics of the child, who he's hanging around with --

JUSTICE HANKINSON: So does the court or the parent go back into Court every few minutes and say, "You blew it the first time," and "My child really is dangerous, and keep asking for a more restrictive commitment order?"

MR. BROCK: I think they would have to. I think they would have to protect others, as the cases say. And maybe that'd be burdensome on a parent but the danger perceived, that is, going out and committing a murder. There's a larger danger there for society in general. There's a larger danger there for society in general, as a result, they would have to see to it that the got the child help, whether it be commitment or otherwise. And I think that if they took the child for psychiatric care or something of that nature, that the doctors themselves could find a way to see to it that a writ commitment was entered and that he was placed in some type of psychiatric facility.

JUSTICE HANKINSON: Mr. Brock --

JUSTICE: Using that test, how can we tell in this case there was a danger perceived in killing somebody?

MR. BROCK: What I think is, If you get to a situation where you're nitpicking over a factual scenario, then I think that you're then in turn putting yourself in the position that -- of a jury in this particular case. What I think you do or you need to do --

JUSTICE: We do that all the time when it comes to determining the concept of duty.

MR. BROCK: [inaudible]

JUSTICE: [inaudible]. Exactly, with criminal acts of third parties all the time and that is -- all that happens is you have people committing crimes of the nature of car theft. It doesn't mean that a landowner is on notice or can perceive that somebody's going to commit murder. And I don't see how, in this particular situation, this kind of conduct was perceivable.

MR. BROCK: From our perspective, I think that you have a situation where there were 19 instances of aggravated assault, you have seven, if I remember correctly, instances involving a situation where he was arrested for different things and then you have, of course, nine other instances, I believe, where he exhibited aggressive tendencies and violent behaviors. I think what you can do from that in a perceivability analysis is make a determination of some things. Some things being, number one, he had a tendency to hang out with unfavorable-type peers. Peers that were capable of influencing him to do certain things. I think you see a situation where he is remorseless in the things that he does, criminally, the aggravated assaults, things of that nature. I think you see that he's been very influenced by peer pressure. I see a situation where he has a penchant for stealing cars and property. I think you have a situation that shows he has a disregard for the rights, welfare and safety to others on a regular, not daily, basis.

JUSTICE: Now, this developed after he was assigned to this residential placement. This was after the court order that determined he was not a danger to others.

MR. BROCK: That's correct. But I think as Judge Hankinson said, its a continuum. That is, just because of the time that he was admitted, he didn't have all these priors. He only had, I think, two burglaries and maybe a couple of other things. It does not mean that you can then look away and not hold him or look at him at those time that his -- for those three years and say, "Oh, well, look originally he was not a danger to others, "because obviously, the school, if you look in the record, the school determined, based upon the number of assaults and the problems that they have had at school, determined and told the home he has become a danger to self and others. I think that was the whole reason for the placement in the alternative home.

JUSTICE HANKINSON: Mr. Brock, Mr. Hirsch seems to paint the picture that there was -- that the facility had very little discretion or responsibility to make decisions about his client on a day to day basis. What does the record reflect with respect to the amount of responsibility that the facility had for the residents who were assigned to live in this facility?

MR. BROCK: I think that is shows that they maintained the same type of responsibilities and duties to their clients as we as parents maintain to our own children. That is the duty to clothe, the duty to provide food and shelter. They were teaching him living skills, brushing teeth, putting on your clothes, getting up in a certain time.

They're seeing to it that he got to and from school. They were seeing to it that when he got in trouble from stealing whatever he stole from Wal-Mart, a CD or whatever, that he performed his community service and saw to it that he got a ride to the dog pound and from the dog pound everyday. They saw to it that they had his interdisciplinary team type meetings where they examined how he was progressing in the home and what efforts they needed to take to see to it that he was getting the care and treatment that he needed.

JUSTICE HANKINSON: What -- what --

CHIEF JUSTICE PHILLIPS: Did they report that all these incidents to the MHMR. Is this on the record, one way or another?

MR. BROCK: I cant tell you for sure that its in the record, Justice Phillips, and the reason I cant is because the summary judgment was filed within six months, maybe or so nine months after the suit was originally filed and so the amount of discovery we have -- the large amount of it came from the criminal trial which we were able to get on a certified record. We did get some records from them. And some of those records and I don't recall whether they're in the record or not, deal with monthly reports. And those monthly reports would go through a list of criteria that they were looking at to determine whether or not he was on a certain path --

CHIEF JUSTICE PHILLIPS: Did the home have the right to -- whatever you want to call it. Could the home reject a student, send them back to MHMR and say, "We cant handle this person," or "We don't choose to handle this person"?

MR. BROCK: I think they could. And the reason I say that, Justice Phillips, is because, initially, if you remember or recall, recommitment was done at January of '91. They sought placement for him from that time all the way up until the time Texas Home Management, or what became Texas Home management, accepted him in July of '91. And if I remember correctly, they went through an assessment at that period of time to determine whether or not their facility and what they had there could meet his needs.

CHIEF JUSTICE PHILLIPS: They as in MHMR or they as in Texas Home Management?

MR. BROCK: They, I think, being THM, Texas Home Management.

CHIEF JUSTICE PHILLIPS: Okay.

MR. BROCK: Because they had this interdisciplinary team that would meet on a regular basis.

CHIEF JUSTICE PHILLIPS: But could -- could they -- We just don't know if they could -- How much -- how much discretion they had to bring to take a kid totally out of their system as opposed to their discretion to just let them go home and less often keep them home from school.

MR. BROCK: I couldn't answer that for you under the record.

JUSTICE: Mr. -- Mr. Brock, lets assume that the -- the home did report all the incidents to MHMR and called them up on the telephone everyday and said, "Its getting worse and worse. You need to do something about this." Would that satisfy the -- the duty that we're talking about today, the need to report and have -- to -- to a body, an official body who has the authority to remove the -- the child from the home and place him elsewhere?

MR. BROCK: Assuming they did so and the reporting was adequate and it was -- and it was made timely -- in a timely manner, I think yes. I think that would be correct. We don't know that from this particular instance, what we do know is that they had an ability to release him back to Houston. They had an ability to say no.

JUSTICE OWEN: Do they also have the ability to say, "You cant go home this weekend?"

MR. BROCK: Yes ma'am. And that's what I'm referring to as far as -

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JUSTICE OWEN: Oh, okay.

MR. BROCK: -- Pam Harrison in her testimony under oath who was at the home for a period of time, stated under oath that, in fact, she had made recommendations that they not send him home anymore. But the interdisciplinary team there made up of people from Texas Home Management. It said, "Well, you know, we don't wanna do that." And I don't know what their reasons are for that but obviously, she had a concern because he continued to come back from Houston with very violent tendencies, very aggressive.

JUSTICE OWEN: Well, they had the ability then to really manage his time on a day to day basis so they could [inaudible] if -- if he was allowed to go out on a Saturday afternoon or in the evening they wouldn't say what time he had to be back or who he could associate with or when he could go to Houston. They had the ability to -- to manage, as you said, as a parent would the child's time and how he spent his time and where he went and what he did so long as he was a resident of the facility.

MR. BROCK: Yes ma'am. And I think the way the record sets it out is most of the functions that the children attended were in a group setting. They didn't allow these children to say, "Okay, you know, you can go visit Johnny down the street. You come home as soon as the street lights come on." They didn't have the ability to do that. What they did was they handled them as a group.

JUSTICE OWEN: This is an -- this is an intermediate care facility. That's the level of care that's being provided.

MR. BROCK: That's correct.

JUSTICE: Could they place restrictions on what he did when he had to visit outside -- outside of this facility? At home for example, could they say, "Yes, you can go home this weekend but you need to be in by 9 0'clock and you -- and you're not to see certain of your peers"?

MR. BROCK: No sir. What they had was even a larger and ultimate -- ultimately larger responsibility. And that is the responsibility to determine whether he went home at all. And that becomes a larger responsibility when they know of all the actions before and they know that, in fact, he does not have the structure of the environment that he needs home and that he's hanging out with undesirable peers.

JUSTICE OWEN: How long could they keep him from going home, indefinitely? years?

MR. BROCK: I think they could as long as his condition showed that he was an endangerment to others. In other words, if I remember correctly, according to the affidavit Dr. Edwin Johnstone which was uncontroverted and had been presented to this Court as part of the record.

According to his testimony, they could, in fact, arrange for different types of visitation. That is, they told him that, "Hey you could up here. You can see me at these times or that time, in fact." According to him, he had, if I remember correctly, his affidavit set forth that he had dealt with this types of facilities before.

JUSTICE OWEN: So you're basically complaining about the -- the way the treatment center treated. In other words, professionally, their professional services [inaudible]. They didn't adequately discharge their professional responsibility to this child.

MR. BROCK: That would be correct. And the reason I say that is because when you had a writ of commitment, you're taking away an individual's right to free will. He no longer has the ability to make decisions for himself because if you look at the writ of commitment, the writ of commitment goes through a litany of items.

It states, "MHMRA will have the duty of care, custody and control that goes those items." What ends up happening is MHMRA then finds a facility for him and I think that duty passes to -- to them as well. And they carry out that duty on a daily basis. I think its very synonymous with situations where you have general contractors, a sub and someone who's injured.

This Court has always held that you cant necessarily hold the general contractor responsible for the actions of the subs for what happened unless you could show active control.

JUSTICE OWEN: But we've also --

JUSTICE HANKINSON: But how old was he when -- when this occurred?

MR. BROCK: Sixteen, I believe.

JUSTICE HANKINSON: Do you know -- did the record reflect what his academic level of functioning was? what level he -- what level of reading skill he had?

MR. BROCK: It may, JUSTICE HANKINSON:.

JUSTICE HANKINSON: Have you -- Do you recall what level he was functioning at?

MR. BROCK: I don't recall offhand.

JUSTICE HANKINSON: What -- what type of educational program was he in?

MR. BROCK: If I remember correctly, it was one for -- it was a special education type program for the mentally retarded. I don't know whether or not, when he went to the alternative school, whether the alternative school was focused in on that or whether it was an alternative school for problem with -- people with -- or kids with old disabilities or old problems.

JUSTICE HANKINSON: Did this -- does the record reflect what his educational program was?

MR. BROCK: I believe it reflects that he was in a special education type program.

JUSTICE HANKINSON: But it doesn't really reflect what kinds of things he was doing and what the goals were for his educational program.

MR. BROCK: No ma'am. The only things we have available --

JUSTICE HANKINSON: I guess what I'm trying to get is the record reflects -- we -- we've heard what his test scores are in terms of that what level of functioning he was at so that we can determine at -- at what level of dependence he operated at obviously affects the level of control that those who had responsibility for his care would give him.

MR. BROCK: Yes ma'am. And if I remember correctly, the special education program that he was in was not age-specific for high school age. In other words, everybody that fit this particular mold was put in this particular class. And so I don't think it accurately reflects that. Not at this point in time.

JUSTICE HECHT: So as I understand your position in our Court [inaudible] based on the number and on top of the problems he has had, it was foreseeable, that's a legal question, that he will be a danger to other people if he were allowed to do what the other students at this -- or a lot of other students do with control on an unsupervised way for --

MR. BROCK: That -- that he would cause harm to others.

JUSTICE HECHT: [inaudible] that he would cause harm to others. And two burglaries that he had at the time he was assigned here clearly weren't enough. Meaning that wasn't enough or he wouldn't have been placed in this facility.

MR. BROCK: That's correct.

JUSTICE HECHT: So it -- but up to whatever this point was, 19 assaults, seven arrests, nine other incidents, that is enough. And so at some point -- and this is a legal question, not a fact question. At some point in that continuum, he agreed [inaudible] if he should not have been sent home.

MR. BROCK: I believe that's correct. And I think what you can see if you look at the records and you look at the date, is that his activities of violence and aggressive behavior begin to escalate and the reason it began to escalate was because there was a change in the ownership of the home.

I don't know if the -- the brief made that reasonably clear. But what ended up happening is before we all know that there's a way of dealing with young adults where you penalize them for the bad behavior and you reward them for the good behavior. Well, once the THM took over the home. That changed. There was no longer that type of punishment/reward system because, if I remember correctly, the testimony was that they could no longer punish the child or the children that lived in the home. What happened was, they could no longer put them in time out. They could no longer take away things from them and say, "Until you exhibit better behavior or better judgment, then you don't get these things back."

And as a result, based upon that, you see a continuum where his aggressive tendencies of behavior begin to increase to such an extent until I think he was outside their control, outside the homes control. And if you look at it from that situation, in the incident where he went back to Houston, he was hanging out with undesirable peers, peers that were able to influence that he ends up at a construction site with a weapon. Obviously, he started climbing up the ladder.

You end up with a situation where he takes the wrong bus to school with another individual. While he's there at another school that's not even his own, there was some talk about him having broken a glass or broken a window and using the glass as a weapon and cutting the other child to where they needed stitches. It was that escalation which the school was able to see but which Texas Home Management was not. And its that escalation which required their care and control and supervision -

JUSTICE PHILLIPS: How long have you been at this alternative school out of the [inaudible]

MR. BROCK: Right off hand, Justice Philips I couldn't tell you.

JUSTICE: To what extent were these escalating incidents of bad conduct reported to anybody else?

MR. BROCK: When you say report -- anybody, you mean MHMRA or --

JUSTICE: Or carrying positions. Anybody in any category or law enforcement or his own parents.

MR. BROCK: I can tell you that the criminal violations were reported to law enforcement because we know that the -- he had to go back to Houston to visit his probation officer as result of the -- the gun in the waste band at the construction site. We also know that he had to undergo community service for the -- the theft. They had an interdisciplinary team there at the facility that met -- imagine the disciplinary team, as I understand it, was made up of psychologists which developed a treatment plan on a monthly basis to try to --



JUSTICE: So, they were aware of this?

MR. BROCK: Yes sir. And I -- I think that the record is replete with references.

JUSTICE: MHMRA was aware of it?

MR. BROCK: I can't tell you whether MHMRA was there.

JUSTICE: But -- but the truth is MHMRA was aware of it and concluded that there needed to be no further restraints placed upon his ability to go home.

MR. BROCK: In -- in their opinion and contrary to the advise of others within the home, that recommended that he no be allowed to go back home anymore.

JUSTICE HANKINSON: The psychiatrists, were they employed by the home? Are they not?

MR. BROCK: I -- I believe that the psychologists were employed by the home and one of those is in the record in that [inaudible]. I think that he was a psychologist or working on a psychology degree, social worker, somewhere in there, is now associate professor of something at [inaudible] except he was part of the home, he was hired by the home.

JUSTICE PHILLIPS: Any other questions?

Thank you, Counsel.

MR. BROCK: Thank you for your time and consideration.

JUSTICE: Let me get you to follow up on that last part. Apparently THM was fully aware of his escalating dangerous conduct.

#### REBUTTAL ARGUMENT OF JAY HIRSCH ON BEHALF OF THE PETITIONER

MR. HIRSCH: Well, I'd -- I'd like to address that because you're right on target with what I'd like to say. How could anybody not recognize, that if you look at Appendix 3, please look at what he pretends to be. The kind of conduct that would be foreseeable that he would wind up, basically, in a timeframe some six years later, winding up taking a gun and gets in an argument with a female dentist then shooting her with all the conduct you referred to if you looked to the Appendix 3. These are all fights described while at the facility with his fellow children and it's the nature of anybody who is -- as any information in this area knows, these are aggressive people. These fights are not unusual. These are all, if you look at them everyone of them are in the custody and --

JUSTICE OWEN: Excuse me. Excuse me. Excuse me. What do you mean these are aggressive people?

MR. HIRSCH: They're -- People that are mainly retarded are by nature will assert themselves. This is -- this is not unusual.

JUSTICE OWEN: I beg -- I beg to differ with that.

MR. HIRSCH: Well, I'm sorry but this is -- Statistics on information show and -- and I -- I'm not saying that every individual, by any means, is that way. But it's not unusual for them to ever fight --

JUSTICE OWEN: It was -- apparently, he had enough -- enough of a problem with his behavior that the [inaudible] public school's put him in an alternative program which is specifically designed for those who have behavioral problems.

MR. HIRSCH: No question about that. At some point it's not -- absolutely.

JUSTICE OWEN: Do you know when that is?

MR. HIRSCH: Because he was -- do you wanna know when it was? It was sometime in 1994, I don't remember the exact date. What I did know if I look at this is that the incidents that are referred to are fights with other students under a controlled situation.

JUSTICE HECHT: But -- at the school and broken glass --

MR. HIRSCH: I'm sorry I didn't understand.

JUSTICE HECHT: The gun -- the -- the things he got in trouble with the law for --

MR. HIRSCH: I was gonna address that separately.

JUSTICE HECHT: Okay, well --

MR. HIRSCH: Okay.

JUSTICE HECHT: All right.

MR. HIRSCH: So the first group, if you look at what's in Appendix 3 that he refers to all of these items are matters of him having a combative relationship under a controlled environment at the school. Whether it's on -- whether it's at the playground or right at the facility. This is not --

JUSTICE O'NEILL: Well, if he's -- if he was combative --

MR. HIRSCH: -- that kind of foreseeability that [inaudible] will offer --

JUSTICE O'NEILL: -- if he was combative in a controlled environment, then what happens in an uncontrolled environment?

MR. HIRSCH: Well -- I --

JUSTICE O'NEILL: But I'm not I understand --

MR. HIRSCH: I would assume that it's not the kind of thing that's gonna lead to a murder. This is not foreseeable. If -- What you do, take these kids and fight, put them, lock them up in [inaudible] --

JUSTICE O'NEILL: Well, at what point -- at what point in this continuum does this fact question a question of law? I mean it sounds like your making a jury argument to me, and we have to determine at some point that it's a legal question. That's --

MR. HIRSCH: Events I think on foreseeability, I don't know how you take and say if a kid is having a fight with another kid under a controlled environment, that's the kind of foreseeability that meets Temper Walk Test or Mellon case, the Hover case v. Mellon Mortgage --

JUSTICE O'NEILL: No, I don't think --

MR. HIRSCH: -- [inaudible] it's not the kind of foreseeability. It doesn't meet relevancy, proximity or similarity.

JUSTICE: What about -- what about these two incidences. One is --

MR. HIRSCH: I was gonna go to them. Okay

JUSTICE: Yeah. Let me pinpoint a couple. The incident occurred on what day?

MR. HIRSCH: This incident occurred on --

JUSTICE: May 15 of 1994?

MR. HIRSCH: I believe that's right.

JUSTICE: So, less than a month before that, he threatened to kill somebody. And then, a year before that, while out on break, he pulled a gun on somebody at a construction site outside of the premises. Pulled out a gun then threatened to kill somebody.

MR. HIRSCH: He -- he didn't pull a gun, that's not what the testimony -- if you read the transcript he had -- he did have a gun in his possession. There was a -- apparently a security guard which confronted him and then he said, "Who are you?" And there was an argument according to the -- to the record but he never pulled the gun. He never pointed the gun. He never pulled the gun. He did have a gun in his possession. He never pulled the gun.

The first -- if you look at their criminal acts to address that

seven violations are criminal, three of them are before he was ever, you know, in fact, before Juvenile Court. The first three or the three that were presented to Judge Baum in the 314th court on January the 30th of 1991. These three: the '88, '89 and '90 which were burglary and theft, they had nothing to do with it. Then he comes in and he's at the same conduct again --

JUSTICE O'NEILL: Well, let me kind of interrupt you here.

MR. HIRSCH: Sure.

JUSTICE O'NEILL: Let me make sure I understand your argument. Are you -- are you claiming that if we -- if it doesn't meet the temper walk test, then foreseeability would be a fact question?

MR. HIRSCH: My feeling is this kind of foreseeability under these circumstances would impose strict liability. I mean --

JUSTICE O'NEILL: But that's not my question.

MR. HIRSCH: I'm sorry.

JUSTICE O'NEILL: My question is -- my understanding is that you're claiming under temper walk as -- as a matter of law, there's no foreseeability. If we were to conclude that this doesn't meet the temper walk standard, then it would be a question of fact, correct?

MR. HIRSCH: It would have to, yes.

CHIEF JUSTICE PHILLIPS: Any other questions?

Thank you, Counsel. This concludes the argument in the Second Court. We'll take another brief recess.

SPEAKER: All rise.

2001 WL 36160903 (Tex.)