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Supreme Court of Texas.
Harris County Hospital District
v.
Tomball Regional Hospital.
No. 05-0986.

December 4, 2007

Appearances:

Sandra D. Hachem, Assistant County Attorney for Harris County, Houston, TX, for petitioner.

Randal L. Payne, Sullins Johnston Rohrbach & Magers, Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Scott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 05- 0986, Harris County Hospital District versus Tomball Regional Hospital.

COURT MARSHALL: May it please the Court. Ms. Hachem will present argument for the petitioner. Petitioner has reserved five minutes.

ORAL ARGUMENT OF SANDRA D. HACHEM ON BEHALF OF THE PETITIONER

MS. HACHEM: May it please the Court. My name is Sandra Hachem. I represent the Harris County Hospital District. This case concerns immunity from suit and the question before this Court is whether the district's immunity from suit has been waived for claims of medical expenses a provider incurred in treating patients it alleges the hospital district had a duty to provide. There are three reasons why immunity from suit has not been waived. First, there is no unambiguous waiver in the law providing for immunity from suit. Second, the remedy of money damages that Tomball seeks is not authorized on its allegation that it would be authorized because the hospital district did not perform its duty. As indicated by this Court in federal sign an equitable suit from mandamus can be used to compel performance of a duty but that does not mean you have the right for suit for damages.

Third, there are detrimental statewide implications depending on how this Court rules in this case and it will result if this Court accepts a reading of the act that infringes on the ability of the County Hospital District to control proper allocation of indigent health care. At a time, when the legislative bodies of this State as well as in this country struggle on how to provide properly and allocate properly health care in our society. In this connection, it should be noted that there are no procedures or CAVs in the act that would provide for the reimbursements that Tomball alleges it's afforded. And this [inaudible] scheme ...

JUSTICE HECHT: Ms. Hachem, preliminary question. Is the trial court's judgment a final judgment and this is an appeal for a final judgment?

MS. HACHEM: Yes it is.

JUSTICE HECHT: Why did the Court of Appeals think it was interlocutory?

MS. HACHEM: I'm really not sure. I think that they just looked at 5101 for Civil Practice in the Administrative Code and go-- went-- it must be an appeal under that.

JUSTICE WAINWRIGHT: Counsel, do you believe that there's any party in this type of a situation that could sue the district for money damages?

MS. HACHEM: Any party? If there was a contract with the hospital district. As you know 271 of the Local Government Code was added to provide for immunity from suit for contracts and of course, that is one of the things that we mentioned is that you can contract for health care services under the act that creates the hospital district as well as the act-- the Health Care and Indigent Act.

JUSTICE WAINWRIGHT: Absence of contract, your answer is no.

MS. HACHEM: I'm sorry?

JUSTICE WAINWRIGHT: Absence of contract, your answer is no.

MS. HACHEM: Well, I guess, the results of tort, you know that we have the Tort Claims Act 101 and I guess, there's a few at like Section 1983, I guess it's a federal cause of action but ...

JUSTICE WAINWRIGHT: But under the circumstances of this type of case.

MS. HACHEM: Of this case, no.

JUSTICE WAINWRIGHT: And which entities or individuals do you think would have the ability to sue for injunctive relief?

MS. HACHEM: Well, I guess that's a good question. You know, obviously this Court has struggled with that in different contexts. You know, the one problem we have here is without some kind of statutory scheme that provides for a third party to collect against the hospital district, it's kind of indirect. The person who actually has the right is the patient. So the patient would be the one that-- who would normally have standing. Now, we have tax cases, I guess this Court can look to, to try to evaluate that question.

JUSTICE BRISTER: So how does that, how does that work, the indigent person goes to Tomball Hospital, gets treated, then the indigent person pays them \$10,000 and sues you?

MS. HACHEM: Well, I suppose they could bring a suit or-- you know, actually right now, there is also that scheme in the Health Care Act where you can go to the department when there's a question about eligibility with respect to the hospital district.

JUSTICE BRISTER: So that indigent people could sue you as soon as they could get eligibility?

MS. HACHEM: Well, it's-- I mean, it's-- if, if you're talking

about mandamus relief or going to the Department of Health, that-- it appears under the Indigent Healthcare Act there is ability to-- when there's a dispute about residency or whether you're entitled to coverage under the act.

JUSTICE BRISTER: I'm just confused if it, if it was child that was treated and the indigent parent couldn't pay, however, I suppose, you know, if they did but they should have been reimbursed and that they could sue on behalf of the child.

MS. HACHEM: Correct, as Next Friend?

JUSTICE BRISTER: So if the hospital, Tomball Hospital, aren't they suing on behalf of the indigents? What's the difference?

MS. HACHEM: Well, I think that they have to be given the right to act in their stead, and I don't know that they have that right under the act. There is no statute that gives them that ability. So they-- the, the person that has the right is the patient since, of course, it's the-- them that has the right under the act.

JUSTICE HECHT: So should the-- should Tomball have taken the assignment from the patients, you say, then they could sue the district?

MS. HACHEM: Well, if they had taken assignment, but then, then the question is, 'What remedy do they have available?' And that is the question before this Court. Because in this case, we're talking about money damages and this act that they say provides for that, does not afford that remedy. That's the only remedy they've asked for in their suit.

JUSTICE HECHT: So even if the indigent sued, couldn't get money damages from you?

MS. HACHEM: No, not unto the end.

CHIEF JUSTICE JEFFERSON: So what does it mean to the district to assume sole financial responsibility then?

MS. HACHEM: That means that they are the ones that are responsible for doing that just as the legislature has the responsibility to provide education for the state.

JUSTICE HECHT: Well, but it's wonderful, wonderful kind of responsibility that you don't have to do anything to discharge.

MS. HACHEM: I suppose mandamus is the remedy this Court has indicated is available when a, a governmental body doesn't perform its functions. And this Court has -

JUSTICE HECHT: Well, surely, surely the district is going to stand to its constitutional obligation.

MS. HACHEM: I'm sorry?

JUSTICE HECHT: Surely the district will stand to its constitutional obligation and not just say, 'Well, that's what the constitutional organic law says but we're not going to pay.'

MS. HACHEM: Well, if the hospital district was to fail on its functions, this Court has indicated that you can sue to compel it and there's the Declaratory Judgment Act as well to make sure that it performs its functions, just like this Court has assigned functions. Different bodies are, are accorded functions. I recall in the Neeley case (49 Tex. Sup. Ct. J. 119), which was this Court decided concerning education, the provision of education by a legisl they said you know, this Court has always told them when they weren't doing it extra requirements on us and it's of course ...

JUSTICE HECHT: What does a-- what does 'drive by status' mean?

MS. HACHEM: Well, a 'drive by status,' I guess, we get that terminology from our state law in Chapter 773 of the Health and Safety Code which is, when there is not a facility adequate to provide for

that patient and so when the EMS calls ahead to see if they can bring the patient there, they let them know that are no beds available and so they have to go to the next available facility.

JUSTICE WILLETT: Do you have a copy of 281.056 in front of you?

MS. HACHEM: I do.

JUSTICE WILLETT: Looking at the, at the second sentence, I'm sure you've studied it yourself, and the first sentence, of course, the board may sue and be sued. The second sentence a health care liability claim may be brought against the district only in the county in which the district is established. Now it doesn't specifically say that districts may be sued, but it talks about where they may be sued, which then presupposes they can be sued and how does that statement not imply waiver?

MS. HACHEM: Well, you know, we do have the Tort Claims Act, Chapter 101 of this Civil Practice and Remedies Code and 74.001 of the Civil Practice and Remedies Code provides the definition of health care liability claim. It means the cause of action against a health care provider and goes on say, which approximately results in injury or death of a claimant. And it's obviously referring then to those personal injury actions that would be afforded under the Tort Claims Act and I think that they added that section to clarify the venue from-- for where you would have to sue that kind of cause of action. You know, one thing I, I guess I want to talk about, which wasn't talked a lot about in our briefs was a little bit more about the scheme of all the different health care that's being provided by the different entities. You know, five years before Tomball was created, the People of the State added Article 9 Section 13 to the Texas Constitution. And that's really an important provision because in that provision, it was made clear that the legislature in providing for the operation of a hospital district is not required to provide that it assume full responsibility for the establishment, maintenance, support, or operation, and it mentions mental health facilities as well as public health department units and other public health activities and it says, 'The legislature shall not be required to restrict the power of any municipality or other political subdivision from leveraging taxes.' And it also made clear that unless a statute creating a hospital district shall expressly prohibit participation by an entity, then it can be done. And this is important because you need to know that when this was enacted in '67 and since then we have other people that-- or units rather that provide health care help in Harris County, not just the hospital district, for indigents. For example, MD Anderson is a major facility in our district that provides-- it's a unit that provides for charity care. Now, under Tomball's argument, anybody that provides any care to a resident who's indigent is entitled to reimbursement under 61.0045 of the Health and Safety Code. But clearly the legislature intended other actors. And why is that? The reason that that is there is because we need to have an ability to have many resources available especially in a very large county.

JUSTICE HECHT: Well, but, but how do you square that with Article 9 Section 4? It says, 'The district shall assume full responsibility for providing care to needy inhabitants.'

MS. HACHEM: I think it does. Well, but the thing that you need to understand is that that was enacted before Article 9 Section 13. So I guess we have to read them together to try to understand what the People of the State determined would be necessary ...

CHIEF JUSTICE JEFFERSON: Then in what respect does Article 9 Section 13 limit the full responsibility that Section 4 provides.

MS. HACHEM: It's not that it limits. It adds to the structure because it allows other entities to participate in a very important aspect of our society, which is to have other participants providing resources. And where would we be if we didn't allow that? Think about the fact of MD Anderson. It is number one in the nation for what it provides for cancer research and assistance and it's an entity that provides indigent care through its charitable work. In the Tomball Hospital, of course, also as a created municipality, has some responsibility to provide emergency care. Entity-- any entity that provides a hospital assumes all the obligations under the law that would be required of it.

CHIEF JUSTICE JEFFERSON: We're talking about policy though if the policy is that someone in Tomball's position can't seek reimbursement, then why would they accept indigent care? Why wouldn't the patients be driven by until, you know, and, and never find medical care?

MS. HACHEM: Well, of course, they can't do that because there's federal requirements and there's state requirements about accepting emergency care. When you have a hospital and EMTALA is the federal scheme that is-- applies and then under Chapters 773 of the Health and Safety Code, we have a state scheme that applies and every hospital that's created knows that it is subject to these requirements.

JUSTICE HECHT: This-- but as I was reading the briefs, it struck me that this is, kind of, like a game of chicken, you know, one hospital's going say, 'No we don't have any availability.' Another hospital's going to say, 'We don't have any availability.' None of them are getting paid and so it's just kind of like, who's going to be the last guy that has to take the poor devil?

MS. HACHEM: Well, you know, there are some consequences if you don't take a patient and you should've under both the federal and state scheme. So they can't just play chicken. They actually have to do their jobs.

JUSTICE MEDINA: The, the consequences when you take somebody you don't get paid?

MS. HACHEM: I'm sorry?

JUSTICE MEDINA: There are also consequences if you take a patient. It's not [inaudible] ...

MS. HACHEM: No, you can have somebody that's not indigent that doesn't pay and whose judgment [inaudible].

JUSTICE JOHNSON: Aren't we really going to talk about that? We're talking about the liability, not suit. I mean we have, we have immunity and we have a liability and we have suit that we have to talk about in the government. Seems to me like we're, we're talking about liability not whether or not they can be sued, which is what I thought we were here on.

MS. HACHEM: That's, that's correct and you know, that's, that's important to state because we're not, we're not talking just about if there's immunity from liability here. We're talking about immunity from suit and there is nothing that I can find that would provide that waiver. I see that my time has expired.

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you, Counsel. The Court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Payne will present argument for the respondent.

JUSTICE JOHNSON: Mr. Payne, assuming that, assuming that the hospital district owes the money to-- for, for just a moment, how do you get to sue them since we've held in Tooke (197 S.W.3d 325) that, that language soon be sued doesn't authorize s against them to go and

get the money that they owe you.

ORAL ARGUMENT OF RANDAL L. PAYNE ON BEHALF OF THE RESPONDENT

MR. PAYNE: Thank you, Justice Johnson, that that-- I'm, I'm glad you asked that question because this case affords the Court an important opportunity to set forth in those situations when the court will find a legislative intent to have waived immunity to sue. In *Tooke*, the court set forth what does not get there and what does not get there is merely sue and be sued type language in an organic statute standing alone. That's clear and I do not disagree with that proposition. But this case is distinguished from that in several important ways. In *Tooke*, that case was a contract claim. This case is a statutory claim, cause of action set forth by the Texas Legislature consistent with a constitutional mandate and scheme for the provision of and funding of indigent health care in the State of Texas.

JUSTICE HECHT: What is the basis of the action? Not the waiver but the action.

MR. PAYNE: The actions?

JUSTICE HECHT: What, what statute is the basis?

MR. PAYNE: It, it, it, it is a combination of Article 9 Section 4 of the Texas Constitution, which provides that in counties with populations in excess of 190,000, the voters may elect to create a hospital district, which has exclusive taxing authority for the provision of indigent health care in the-- for the residents-- indigent residents of that county, exclusive and it provides that ...

JUSTICE JOHNSON: That they get money. That they got the money.

MR. PAYNE: Correct. That it's ...

JUSTICE JOHNSON: The state has the money also and we can't-- we do not let people sue the state.

MR. PAYNE: It, it, it-- the, the answer to Justice Hecht's question and, and to, to your question goes beyond just Article 9 Section 4 which I was citing, the provisions, which says that once taxes are collected, it shall assume full responsibility to the-- and, and that, that, kind of, sets the limits beyond which the people hadn't spoken the Constitution beyond which the legislature can't come in and limit it.

JUSTICE HECHT: And that's reflected in 281.046 and then is there any other statute?

MR. PAYNE: Yes, yes, there is. The other, the other statutory enactment, which the Tomball Hospital authority itself a body politic, however, an important distinction, without authority to tax for those purposes, which we've said in our brief. Once, once the, the, the taxes have been collected by the hospital district for that purpose, all other entities are excluded from being able to tax. That, that's important. That, that speaks to the legislative scheme, the people's intent. The, the funding of an indigent health care in the State of Texas is to follow this scheme and it's important because I believe the Indigent Health Care and Treatment Act is a pretty good piece of legislation when you look at it.

CHIEF JUSTICE JEFFERSON: Just for a clarification on Justice Hecht's questions, your answers are Article 9 Section 4, 281.046. Any other -

MR. PAYNE: Yes.

CHIEF JUSTICE JEFFERSON: - specific statutory provision?

MR. PAYNE: Yes.

CHIEF JUSTICE JEFFERSON: Just the, just the numbers first ...

MR. PAYNE: Yes. The Section 61.004 of the Indigent Health Care and Treatment Act in the Health and Safety code, which sets up a residency dispute procedure unlike the one cited by the Court in Tooke, which in that provision, Chapter 2001 of the Government Code provided that this alternative dispute scheme would not be construed to be a waiver of immunity and suit. But in this section, this Section 61.004 subsection (g) says, a governmental entity, a hospital district or provider of assistance, it doesn't say the patient as was-- what was the hospital district's position earlier that the patient would have stance or the provider of assistance, that's Tomball Hospital Authority may appeal the final order of the department under Chapter 2001 of the Government Code.

JUSTICE HECHT: But that doesn't give you, that doesn't give you cause of action and this just sets it as an administrative ...

MR. PAYNE: I think the question was what waives the immunity?

JUSTICE HECHT: No, the question is: On what statutory provisions do you base the cause of action? That's the question. You just give me

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MR. PAYNE: It, it is -

JUSTICE HECHT: - the numbers first and you've given me Article 9 Section 4, 281.046. Then you've given me 61.004(g) and what else? On which you based a cause of action, assuming that immunity's been waived.

MR. PAYNE: Section 61.0045(b). A hospital district that receives information obtained under subsection (a) shall use the information to determine whether the patient to whom services were provided is an eligible resident of the service area of the county hospital district or public hospital, and if so shall pay the claim made by the provider in accordance with this chapter. Now the chapter goes on and I take issue with the statement there were no limitations on the payment obligation, there are. The chapter actually addresses those limitations by providing that the department may set the payment standards consistent with the needy families health program. I forget the exact acronym, but it's in the Indigent Health Care and Treatment Act. The legislature set that limit said, 'The department would have the right to set those limits on responsibility.' And so it's clear that the statute itself, in answering the questions, both sets forth the cause of action and says how, I mean, there's only one way to appeal under the Substantial Evidence Rule from a final decision of a state agency. And when the Court here cited the judiciary and knows the practice in this area to Chapter 2001 of the Government Code, setting up this administrative process, they knew just like they did back in '99 when they passed Section 2260 of the Government Code that set up the dispute resolution protocol for contract disputes between counties or governmental entities and private persons. In that statute, and the Court cited this in the Tooke decision, the Court pointed out in the opinion, and rightfully so that the legislature there said, this provision does not waive immunity to sue or liability. They knew how to do that, if they wanted to do that. In, in this provision of the, of the Indigent Health Care and Treatment Act, that it sets forth this administrative procedure ...

JUSTICE HECHT: How does a, how does an administrative procedure give you a cause of action? I don't, I don't ...

MR. PAYNE: Good question. And here's how it does it: Under

subsection (g) of Section 61.004 of the general provisions that apply to all entities, it talks about if a provider of assistance, it doesn't talk about the patient, an indigent patient, Judge Brister's got it right-- Justice Brister's, pardon me, got it right. The indigent patient is not going to be doing this. He, he-- the person if he's, if he's capable, he sometimes he's, you know, living under a bridge, for heaven's sake. He can't retain counsel and go up against the hospital district. It says, 'The provider of assistance may appeal a decision or any-- either party who doesn't agree on eligibility or residency can ask the department to make the decision.' If they don't like the decision of the department they can appeal that. Then they can have a final appeal. If the final appeal under subsection (g), a government entity, hospital district or provider of assistance may appeal the final order of the department under Chapter 2001, Government Code using the Substantial Evidence Rule of Appeal, period. It doesn't say, however, this doesn't waive immunity to suit or liability. The only way to appeal an agency decision, a final decision under 2001 of the Government Code is to file a lawsuit in Travis County District Court ...

JUSTICE WILLETT: What about this issue of the exact phrasing of the sue and be sued language? What do you make of that? That is directed at the Board. The Board may sue and be sued no the district itself. Is that legally significant in your view?

MR. PAYNE: I, I think not. I think that's, that's the-- that's this kind of language-- we see that kind of language in hospital district enabling statutes. We see that kind of language in navigation district type statutes. And the courts never made a distinction there. But I think the, the important distinction here is our cause of action, our statutory cause of action is not a tort claim. Tort Claims Act doesn't apply to us. That's, that's, that's how waiver occurs in tort claims.

JUSTICE WILLETT: So you're agreeing that that second sentence, which I asked your opposing counsel about, doesn't help you, because that talks about healthcare liability claims.

MR. PAYNE: It doesn't, it doesn't help us or hurt us. It's-- our position is we don't need it. In this case we have a very broad comprehensive scheme envisioned originally by the, by the people under the constitutional provisions that said, once they-- if they, if they vote to create themselves like the hospital district did in 1966, they knew going in that we-- if they did that, they were going to be fully responsible and that they were going to be solely able to tax, no one else would be able to.

JUSTICE HECHT: So your view is, as the petitioner puts it, that the district is responsible ultimately for paying for the indigent care rendered in any hospital for a patient who resides in the district?

MR. PAYNE: No, if, if they're indigent only and if they meet their eligibility determinations.

JUSTICE HECHT: But I mean wherever else they're treated, your hospital or any other hospital, if the person-- if the patient is a resident of the district, then that treating facility provider should be able to recover against the district?

MR. PAYNE: Yeah, I, I see no reason, they should. However, I would like to address this question put to, to the petitioner's counsel. This is not a widespread problem where this Court's going to be opening the floodgates. The truth of the matter is, that I, I've represented hospitals in Harris County, yeah I represented Hermann Hospital in the Hermann versus Harris County or Harris County v. Hermann Hospital case

(943 S.W.2d 547) Judge Brister pr over back in the 90s at the trial court level that dealt with this prisoner health care. For years they-- the Harris County would not pay for prisoner care. Even though there was a Code of Criminal Procedure section right on point said, Harris County-- the county shall be liable for prisoner care-- for prisoners in their care, they wouldn't pay it. Now, other counties would, and, and the truth of the matter is, other hospital districts pay my clients without being forced to, as Judge Hecht pointed out, surely the hospital district will, will, will step up and abide by its constitutional mandate. Most do. I've, I've gotten checks from the government county hospital district just across the line. And as long as everybody plays by the rules and follows this constitutional legislatively mandated scheme for funding and providing the care, it will work just fine. But when a individual hospital district chooses to disregard that, the legislature has spoken. The legislature has said in this statute unlike in the Tooke case, in this, in this statute right off the bat under Section 61.002 Definitions, paragraph 6, governmental entity includes a county, municipality or other political sub divisional state, but does not include a hospital district.

JUSTICE JOHNSON: Let me ask you a question about that. That's under the statute, but immunity does not arise under the statute.

MR. PAYNE: This evidence is, I say, good question. I say this evidence is the legislature's intent for this limited statutory cause of action only. Not tort claims. Not contract claims. We haven't brought one of those. But for this cause of action that's founded upon those sections that I cited earlier. The section says is liable, shall be liable, shall pay and the section that says, If you don't-- if they disagree with us we can appeal it by filing a lawsuit against them in Travis County. But for this pur ...

JUSTICE JOHNSON: Okay now let me ask-- now let me ask you about that also, because you covered that a while ago. If you appeal that in Travis County under this statute, what is your judgment going to say? That-- isn't that a determination of whether or not the indigent care, that they owe for the indigent care?

MR. PAYNE: Good question. The answer is found in Texas Government Code Section 2001.174, Review Under the Substantial Evidence Rule.

JUSTICE JOHNSON: That's a review of what?

MR. PAYNE: Review of a, of a final decision by the department that somebody, either the hospital district wants to disagree with, the provider of the assistance wants to disagree with-- disagree with or a governmental entity.

JUSTICE HECHT: But you don't have one of those.

MR. PAYNE: We don't have one of those importantly and I'll address that in a moment. The, the, the, because they gained the statute. Now, I'll talk about that in a minute. They never said he's not eligible. They never said he's not a resident. They said, 'We're just exempt.' It doesn't apply to us. They never, they never contested it. There was never a dispute raised until the appeal. Then they said, well how could we-- how-- the lawyer set down said-- now let's see here.

JUSTICE HECHT: But a, a statute that says you can appeal an administrative ruling doesn't help you if you don't have an administrative ruling. Does it, or do you think it does?

MR. PAYNE: Well, the question was, what would the-- what would, what would-- what was does the Chapter 2001 authorize the district court to do in a Substantial Evidence Rule. The court may affirm the agency decision in whole or in part, say he is eligible, say he is, he is a resident. It may reverse or remand the case for further

proceedings. If substantial rights of the applicant, excuse me, the appellant had been prejudiced because the administrative findings, inferences, conclusions or decisions are a violation of the constitutional or statutory provisions. The court could say you're, you're, you're holding here is contrary to the constitutional and statutory provisions. You've got to pony up to your responsibilities.

JUSTICE JOHNSON: Wait, wait, wait, wait, wait, that's what I was trying to get to. That appeal is on the eligibility isn't it?

MR. PAYNE: No, not just the eligibility.

JUSTICE JOHNSON: Or-- but it's not on the-- it doesn't waive their immunity and you can't get a judgment on that appeal saying hospital district pay, can you?

MR. PAYNE: Yes.

JUSTICE JOHNSON: Oh, then, why didn't you do that in this case?

MR. PAYNE: We never-- they never-- in this case, the Tomball-- and I can speak of this 'cause I was the trial court lawyer on this case also. When, when these claims came up they all had gold cards, most of them. Already been determined eligible for free care at Harris County Hospital facilities by their own procedure. Had the card, were eligible. We sent notice letters. We telephoned said, look, your patient wants to come in over here, where-- you want us, you want us to transfer him somewhere, what do you want? Well, no beds available. Well, he's here. If you, if you get a bed available let us know where you want us to send him. Then we followed up with a written notice within five business days, even though technically in the statute we didn't have to. We made it-- the, the telephone call within 72 hours, then we sent a written notice within five business days, even though we didn't have to. They responded back said, not-- in our written notice and in our telephone notice we said, He's got a gold card, he's a resident, indigent person of your county. In their response back they didn't say we disagree. He is not a resident. They didn't say, We disagree he is not eligible. They said the Indigent Health Care Treatment Act does not apply to us. We're exempt from its provision and that's in the record that's in-- that was in our pleadings originally, which is presumed to be true for purpose of this proceeding. When never disputed that. The only time in the Court of Appeals correctly pointed this out in its opinion, the only time we have a heard that was in downtown, Houston, in front of the Court of Appeals.

JUSTICE HECHT: How is the authority funded?

MR. PAYNE: The hospital authority, the, the hospital-- Harris County Hospital District or the Tomball Hospital Authority?

JUSTICE HECHT: Tomball.

MR. PAYNE: Through bonded indebtedness and the payment of healthcare claims by us, by our healthcare plans, by, by, by individuals. It's also-- when it finds itself treating Harris County Hospital District indigent residents, it's suppose to be paid by the Harris County Hospital District revenues that it raises through taxing exclusively for that purpose. Now, when we treat a Montgomery County because Tomball Hospital ...

JUSTICE BRISTER: So there's no, no tax money that funds the Tomball Hospital. It's just the payment for services.

MR. PAYNE: Correct, they may issue bonds. It, it is ...

JUSTICE BRISTER: I'm not asking, but what pays the bonds? The answer is you, you, you can't under the Constitution since this is a hospital district to raise any taxes for Tomball people to -

MR. PAYNE: That's right.

JUSTICE BRISTER: - is that all come from services.

MR. PAYNE: Correct. It, it cannot tax, tax. Now ...

JUSTICE HECHT: But is it funded by public funds? Other than from the district payments for services?

MR. PAYNE: Yes, to some extent. It, it's a medic-- it, it participates in the Medicare program to some extent.

JUSTICE HECHT: Is the City of Tomball health fund [inaudible] ...

MR. PAYNE: Not through taxes, no. It cannot do so. And, and that's the, the-- that's why I said early on in my presentation that the scheme is actually pretty well thought out. Some statutory schemes you look at and it's like watching sausage be made. Not this. This was well done. This was well thought out and you can see the legislature and the Indigent Healthcare and Treatment Act back-- and the original one, back in 1986 when it first came out. I early on did an opinion letter in that one and all the morphs that have gone on since then and amendments and modification of it. It's well thought out. It touches upon who has standing. Providers of assistance have standing. How did they-- what can they do if they don't get paid. They can sue. Hospital district is not a governmental entity for purposes of this statute. For purposes of this limited cause of action that the legislature created in 1986.

CHIEF JUSTICE JEFFERSON: Are there any other questions? Thank you Mr. Payne.

MR. PAYNE: Thank you.

REBUTTAL ARGUMENT OF SANDRA D. HACHEM ON BEHALF OF PETITIONER

MS. HACHEM: Few very important words are used by this Court in talking about to be from sued and Justice Brister's opinions City of Galveston v. State (217 S.W.3d 466), tho words were unmistakable in clarity. These are words that have also has been stated by other members to this Court and the Court ...

JUSTICE BRISTER: So, so how is this supposed to work? How is Tomball supposed to pay for indigent care?

MS. HACHEM: Well, Tomball Hospital is able to charge fees, it's able to access ...

JUSTICE BRISTER: When I go to Tomball Hospital, I'm going to pay for indigent care?

MS. HACHEM: Correct.

JUSTICE BRISTER: Even though if I live in Tomball I've been paying money to your client for indigent care which -

MS HACHEM: You know, ...

JUSTICE BRISTER: - you won't pay to them.

MS. HACHEM: Right. Tomball, just like ...

JUSTICE BRISTER: Is that-- should it work that way? That seems like I'm paying twice if I'm in their, if I go to their hospital.

MS. HACHEM: You know, there is a lot of different schemes available from the state and federal government that help with indigent care issues. For example when the FEMA, when FEMA helped, in some the instances, people when we get extra in connection with that.

JUSTICE BRISTER: Sure, federal grants -

MS. HACHEM: There's also Medicaid. There's also in, in with the federal scheme of FMTALA for the emergency care and under our state scheme. And so there's different ...

JUSTICE BRISTER: But if those covered everything we wouldn't need a hospital district.

MS. HACHEM: But you know we know we need a hospital district because somebody has to decide how-- what resources need to be created, where hospitals need to be, where do you need to have specialist. You know, this is a problem we have across the entire state.

CHIEF JUSTICE JEFFERSON: And across the entire state are other districts refusing payment along the same lines and the same grounds as [inaudible] ...

MS. HACHEM: You know, I'm not aware of a single case where this issue has come up, so I think that it's just not an issue that anyone has creatively attempted. We do have that happening in this case. So the fact that we don't have a case doesn't really tell us when anything other than maybe it's just not something that's being ...

JUSTICE MEDINA: What distinguishes Harris County from Montgomery County, in what Mr. Payne said that his client Tomball Regional Hospital was able to collect from Montgomery County, but not Harris County.

MS. HACHEM: Well, I really can't tell you that answer to that. I don't have a record to ...

JUSTICE MEDINA: Are the statutes different? Don't they apply equally?

MS. HACHEM: Well, you know, sometimes people decide to pay claims for different reasons. Certainly the hospital district is ...

JUSTICE MEDINA: By following the statute, that'd be a good reason.

MS. HACHEM: The hospital district believes it is following the statute and it also believes that it's making sure that its resources are available to take care of the many needs that our county has. Now we have to do it in the way we believe the law provides and you know the law provides under Article 9 Section 13, that municipalities may participate in providing public health services. The legislature currently provides that they can operate a hospital to provide, among other things emergency services just as they did in this case. And in addition to that the legislature could, give them the right to levy taxes if they wanted to go and ask for that. They haven't asked for that so apparently they haven't found it necessary, but if they wanted to, they could, because Article 9 Section 13 provides they could.

JUSTICE MEDINA: If there were enough taxes around.

MS. HACHEM: And I guess that is another big issue, if-- right now we have indigent care in Harris County being provided by a number of charitable sources. And if we were to-- accept the position of my opponent, all of those charitable sources could say, hey we don't have to do this. You can just get money from your hospital district. We don't have to do this as an additional resource. I don't think the legislature would like that because see, that does affect the tax revenue that has to be raised for the hospital ...

JUSTICE BRISTER: Well, but Methodist Hospitals a little different from the Tomball Regional Hospital. Methodist Hospital is a charitable institution.

MS. HACHEM: Correct.

JUSTICE BRISTER: As a lot of hospitals are. I take it Tomball Regional Hospital is not. So there might be a reason why their taxpayers want them to be paid back where the Methodists feel like they're providing service to community and they might not ask.

MS. HACHEM: Well, you know they may feel that they want to be paid back, but you know there's a lot of situations where you don't get money back when you provide a statutory obligation. In this case Tomball provided one.

JUSTICE BRISTER: Anything in the statute that prevents the-- we've

been focusing mostly on, mostly on whether they can sue you, because that's the question before us. Is there anything that prevents you from paying Tomball?

MS. HACHEM: Actually we could set up a contract and that is provided for in the statute, if we wanted to do that.

JUSTICE BRISTER: So there's nothing-- So it wouldn't be illegal you couldn't-- there would be nothing that prevents you paying it, if you want?

MS. HACHEM: No. If we wanted to do that because we felt it would encourage more participation by them in the indigent healthcare of the county, we certainly could do that and those will be one of the resource issues that we would have to consider and as you know in our Act it would have to be something that's approved by the Commissioner's Court. So it has to go through a lot of policy deliberation. In conclusion ...

JUSTICE JOHNSON: And so you're-- you're time's up, but I would like, if you don't mind, have you participated in one of the appeals on substantial evidence in regard to eligibility that's been referenced here?

MS. HACHEM: Substantial evidence is not an issue at all because ...

JUSTICE JOHNSON: No, no it's not here but have you participated in one of those and what I'm wondering is ...

MS. HACHEM: No, there has never been any type of review involving that.

JUSTICE JOHNSON: Okay. So then you, you've not. That process just has not ...

MS. HACHEM: That process does not occur. In conclusion I just would like to urge the Court to consider that this case will have statewide implications on the ability of hospital districts across the state to adequately use its resources to provide indigent care and because there is no unambiguous waiver with unmistakable clarity waiving its immunity from suit. We would request that the Court affirm the trial court and reverse the Court of Appeals.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

COURT MARSHALL: All rise.

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