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Supreme Court of Texas.
Texas West Oaks Hospital, LP and Texas Hospital Holdings, LLC
v.
Frederick Williams.
No. 10-0603.

November 8, 2011.

Appearances:

Ryan L. Clement of Tribble, Ross & Wagner, for Petitioners.

Charles M. Hessel of Marks Balette and Giessel, PC, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear the first argument 10-0603 Texas West Oaks v. Frederick Williams.

MARSHAL: May it please the Court, Mr. Clement will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF RYAN L. CLEMENT ON BEHALF OF THE PETITIONER

ATTORNEY RYAN L. CLEMENT: Good morning, may it please the Court, if the act or omission complained of is inseparable from the rendition of healthcare services then the claims a healthcare liability claim. In this matter and this is the standard by which the court has addressed the threshold question as to what type or what the essence of a claim is since Diversicare when it was first enunciated that this was the standard and we're moving into now nearly two decades utilizing this standard.

JUSTICE DEBRA H. LEHRMANN: Let me ask you something, if you're correct, if your view is correct then wouldn't that result in anybody who walks into a hospital and was hurt, say a visitor, say a plumber, anyone who walks into the hospital and they were hurt, they would have to file a claim as a healthcare liability claim under your theory, isn't that correct?

ATTORNEY RYAN L. CLEMENT: Not necessarily so.

JUSTICE DEBRA H. LEHRMANN: Well, where's the line?

ATTORNEY RYAN L. CLEMENT: The line is, is that these are cases that are very fact intensive and fact specific and where you draw the line is specifically related to the specific acts or omissions that are being complained of. If those acts or omissions that are being complained of are inseparable from the rendition of healthcare services then, yes, it would be a healthcare liability claim.

JUSTICE DEBRA H. LEHRMANN: And so let's say a visitor who goes into the hospital and is visiting a patient and something happens. Are you saying that, what would happen in that situation?

ATTORNEY RYAN L. CLEMENT: It would depend upon what happened and whether or not that specific whatever is being complained of, that is the act or omission being complained of that is an inseparable part of the rendition of healthcare services, then yes.

JUSTICE DEBRA H. LEHRMANN: Well, let's say if they're in an elevator and the elevator falls. I mean--

ATTORNEY RYAN L. CLEMENT: I don't think that that would necessarily be a healthcare liability claim. There are cases out there and I'm sure the Court is aware for example there is a case involving a visitor out of the Dallas Court of Appeals that came in to visit her husband. Upon exiting the hospital, she was assaulted by a psychiatric patient and filed claims against that hospital for that very act. She complained of they failed to maintain proper security of that dangerous psychiatric patient and the Dallas Court of Appeals determined that was a healthcare liability claim because when you're dealing with patient observation, monitoring or physical restraint in events necessary, that may be an inseparable part of the rendition of healthcare services. In this particular matter, what we're dealing with is we're dealing with a psychiatric hospital. At that psychiatric hospital, patients are admitted obviously for a variety of reasons, but as part of the healthcare that's rendered to those patients, they're placed on an observation level. That observation level can arrange from anything to 15 minutes they have to be observed as to where their location is, what their activities are, to one-to-one observation. In this particular case, it was one-to-one observation, which can only be done through a physician's order. That is a medical determination that this patient potentially poses a risk to himself or others and therefore, requires that someone be with them at arm's length 24/7.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you're saying if this were not in a psychiatric hospital, not a psychiatric patient, then this would not be a healthcare liability claim under these facts?

ATTORNEY RYAN L. CLEMENT: I'm not necessarily saying that because for example, the case I mentioned earlier out of the Dallas Court of Appeals, I don't believe that that was a psychiatric hospital. I believe that they had a psychiatric ward where a patient had gotten loose.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, so let's say it's not a psychiatric patient, no, no history of any kind of mental illness, illness, it's a reverend who's the patient and assaults an employee. Is that a healthcare liability claim or not?

ATTORNEY RYAN L. CLEMENT: It would be healthcare liability claim because what you're talking about is you're talking about patient observation, monitoring, what is done in relation to that patient's care or treatment.

CHIEF JUSTICE WALLACE B. JEFFERSON: So any assault in a hospital is a healthcare liability claim?

ATTORNEY RYAN L. CLEMENT: You're asking if a patient, the patient assaults--

CHIEF JUSTICE WALLACE B. JEFFERSON: If a patient assaults any person in a hospital, that's a healthcare liability claim?

ATTORNEY RYAN L. CLEMENT: It would, once again, go back to when the specific acts or omissions being complained of are and how inseparable those may be from a particular [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, I'm talking about this is not the person with the mental health condition. There's no evaluation. There's no order that says that, they need to be carefully monitored. It's just a patient who's come in and assaults a visitor or an employee.

ATTORNEY RYAN L. CLEMENT: For no apparent cause.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY RYAN L. CLEMENT: And that may not be a healthcare liability claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask you.

ATTORNEY RYAN L. CLEMENT: Because observation is not inseparable necessarily from that particular patient's treatment or care because we are dealing, there is a distinction to be drawn between psychiatric patients, psychiatric facilities and your general medical facilities.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask you this; let's say that this is a case of a physical assault, same general practice, a physical assault and the employee is injured okay, and disregard that there was another plaintiff in this case. It's just the patient assaulting an employee and the employee's injured and then files a workers comp claim for injuries sustained during this course and scope of his employment. Is, when they file that workers comp claim, is it required, under your view of the case, that they file an expert affidavit? Is it a healthcare liability claim in that instance?

ATTORNEY RYAN L. CLEMENT: I think it would depend greatly upon the specific acts or omissions they're complaining of. For example, if they were complaining that there was inadequate security or inadequate policies with regard to how--

CHIEF JUSTICE WALLACE B. JEFFERSON: No, they're just claiming that I was hurt in the course and scope of employment and under the Workers Comp Act, I have a remedy and that is benefits that the labor code provides. And so they file workers comp, a plain vanilla workers comp claim. Is it subject to dismissal if an expert reports not filed?

ATTORNEY RYAN L. CLEMENT: I don't necessarily think that would be the case, but once again, it would be determined upon what the acts or omissions being complained of. They don't complain of any acts or omissions that are inseparable from the rendition of healthcare--

CHIEF JUSTICE WALLACE B. JEFFERSON: So the plain vanilla workers comp case and the act or omission is this very case, in a psychiatric patient and they're filing a worker's comp. claim, then you're saying that that is a healthcare liability claim and if they don't file an expert report in this workers comp context, then the case is dismissed.

ATTORNEY RYAN L. CLEMENT: That's what I would say and that's because workers compensation whether someone is a subscriber to workers compensation or not has never been a test utilized by this Court to determine whether or not a claim is a healthcare liability claim. What has been used by this Court and courts across the state is what are the acts or omissions actually be complained of and whether or not those are inseparable from the rendition of healthcare services.

JUSTICE DAVID M. MEDINA: Well, the act, the complaint here is of the safety. There wasn't any allegation that this person was receiving medical treatment and therefore, caused this injury.

ATTORNEY RYAN L. CLEMENT: Well, the actual complaints in this case were there was a failure to properly train employees, failure to properly supervise them. There was a complaint with regard to the environment of care and whether or not it was a safe environment of care. But when you're talking about, for example, a psychiatric facility all of those are part and parcel of the treatment rendered to these patients.

JUSTICE DAVID M. MEDINA: Isn't there a period, is there a period time where these patients become lucid and become well enough to be released?

ATTORNEY RYAN L. CLEMENT: Yes. Yes, patients are discharged from psychiatric facilities.

JUSTICE DAVID M. MEDINA: So you're essentially saying, as the Chief said, all, and Justice Lehrmann said, all patients involved in this type of treatment if you're going to have a claim that involves him, you must have an expert report.

ATTORNEY RYAN L. CLEMENT: I would say that that's correct because if you're actually alleging that you failed somehow properly supervised either it be staff members or the patient with regard to the observation monitoring of this patient or in the event necessary some kind of behavioral intervention then that's a healthcare liability claim, correct.

JUSTICE EVA M. GUZMAN: What about the source of the duty? The court of appeals had some discussion in their opinion about the source of the duty owed to each Plaintiff here. Can you discuss, is the duty the same?

ATTORNEY RYAN L. CLEMENT: The duty may be distinguishable, it may be different. It may not necessarily be the same, but that, once again, does not--

JUSTICE EVA M. GUZMAN: What is it here?

ATTORNEY RYAN L. CLEMENT: That goes beyond the threshold question of whether or not it's a healthcare liability claim. You know, what? It would be interesting to know what the duty here specifically would be because there's no expert report. It would require an expert report nonetheless.

JUSTICE EVA M. GUZMAN: Is it medical expert testimony that's necessarily required or if we're talking about safety in the workplace, that would be a different type of expert?

ATTORNEY RYAN L. CLEMENT: It would be medical expert testimony and the reason being is because you can't lose sight of the context of this particular circumstance.

JUSTICE EVA M. GUZMAN: There are I guess hospitals employ all sorts of administrative staff and consultants and are there consultants that come in to talk about the safety aspects? And by that I mean security, when a patient, there is an altercation. Does security run over? How, I mean isn't that really a different type of inquiry?

ATTORNEY RYAN L. CLEMENT: It, well, there are consultants that maybe say, for example, from outside the hospital would come in and discuss aspects of safety or security with regard to even patient restraint, but nonetheless, those particular aspects have to be tailored towards what the purpose of this facility is. And so they would, they would end up being, they would fall nonetheless under healthcare liability claims and that's because you can't lose sight of the context in this case.

JUSTICE EVA M. GUZMAN: Well, the, you have a patient who exhibits aggressive behavior in an area that's not monitored, if you will. And so does it take a doctor to say that there should be security guards, that there should be security cameras so that when a patient does exhibit aggressive behavior, someone can come in and at least rescue the employee? Do you need a doctor to say that?

ATTORNEY RYAN L. CLEMENT: I would say yes and that's because of the context in which this occurred. I mean some of these decisions--

JUSTICE EVA M. GUZMAN: Explain that though. What do you mean by context?

ATTORNEY RYAN L. CLEMENT: Let me give you an example. There's been an allegation with regard to the presence or absence of video cameras and whether or not that would have made a difference in this case. At a psychiatric facility, the presence or absence of a video camera takes on an additional significance because the patient population you have there. For example, Mr. Viduarre, the patient in this case, was schizophrenic. So whether or not one is even present, that's actually professional judgment made by the professionals there at the hospitals to whether or not is that appropriate, does it lend towards an improvement of the care of that treatment and furthermore, for example, video cameras, I mean the sole purpose for those video cameras would be for observation, patient observation and to the extent that it would be a safety component, once again that would be wrapped up into the rendition of healthcare services.

JUSTICE EVA M. GUZMAN: Only a medical doctor can talk about the type of security required in an institutional hospital facility. Only a doctor can give that?

ATTORNEY RYAN L. CLEMENT: I wouldn't say only a doctor, but you would definitely need a doctor to offer an opinion on that aspect. You would also need a doctor to offer an opinion as to whether or not this particular patient was on the proper observation level.

JUSTICE EVA M. GUZMAN: What type of doctor would be qualified to talk about the actual security in a building? What type of doctor would that be?

ATTORNEY RYAN L. CLEMENT: Well, psychiatrists would regularly and routinely be engaged in training involved in, for example, this would be classified as behavioral intervention. They would teach others that be it nursing staff in terms of what they're to look for because initially, what they try to do is prevent the crisis from occurring and there are certain cues that they are taught with regard to patient behavior. And so a psychiatrist would be involved in that aspect and they may involve other consultants as well to tailor the situation or tailor the training being provided to a healthcare setting.

JUSTICE DALE WAINWRIGHT: Counsel, in your brief you say that the claims raised by Williams, the gravamen of the claims assert healthcare. What about safety? Do you think they're part of safety as well?

ATTORNEY RYAN L. CLEMENT: They do involve safety as well. Because what we're talking about here, when you're talking about patient observation, the level of observation the monitoring that's conducted as well as any intervention, that's both part of healthcare treatment. A part of that healthcare treatment is maintaining patient safety. So they're really kind of intertwined here.

JUSTICE DALE WAINWRIGHT: When a healthcare provider movant under Chapter 74 for dismissal because of the absence of an expert report, should that movant have to identify the type of healthcare claim that the movant believes is being asserted so that it can be reviewed on appeal? As you know there are different types of healthcare liability claims. There's healthcare, there's medical care, there's safety, there's professional services, there's administrative services. If movant doesn't specify, then the appellate courts are left guessing or having to go through each of those. So the move would have to at least appeal purposes or maybe even at the trial court to identify the type of healthcare claim?

ATTORNEY RYAN L. CLEMENT: Well, I don't know that that's actually been a standard that's been utilized in terms of whether or not the movant needs to identify specifically what claim they believe is being asserted.

JUSTICE DALE WAINWRIGHT: And if the issues were clear, we wouldn't be here for your case or these?

ATTORNEY RYAN L. CLEMENT: That may be correct.

JUSTICE DALE WAINWRIGHT: So what do you think?

ATTORNEY RYAN L. CLEMENT: I think, for example, in this case I know that we asserted that it was a healthcare liability claim, but we specifically identified that aspect of the statute, which encompasses all the aspects that you mentioned, which are healthcare liability claim as well as safety. In terms of what allegations they may make it's, other than what's contained in the petition, it was believed that this is a healthcare liability claim, but because they are so intertwined, that is the rendition of healthcare a psychiatric facility and the safety of patients and for that matter as well as staff members, we contended that they asserted either.

JUSTICE PAUL W. GREEN: Well, what if rather than being injured he was fired because he refused to cooperate with the investigation or refused to go along with the cover-up and so forth and so he sued for his, for being wrongfully fired. It still involves all those safety issues that you just talked about and whether that, what the standards should have been applied and he wouldn't cooperate so they fired him. Is that, is his claim the healthcare claim?

ATTORNEY RYAN L. CLEMENT: I think it would be a healthcare claim. As you know, historically, healthcare claims have also involved hiring so I don't see why it wouldn't also involve termination.

JUSTICE DEBRA H. LEHRMANN: I have a question. I want to get back to this issue or actually ask you about the issue that the lack of a doctor-patient relationship. Now that seems to go against the plain language of the entire statute that was certainly intended to cut down on frivolous lawsuits being filed against medical providers who were providing medical care to a patient and certainly there's certain definitions within a statute that talk about that relationship with the patient. And so what's your authority, how are you extending this to say that it doesn't, that that doctor-patient relationship does not have to exist?

ATTORNEY RYAN L. CLEMENT: Well, what's interesting is that there has been a change or departure from the predecessing statute, which was 4590i where a claim was specifically associated with patient to where now it's, there's a new definition of claimant and a claimant is much more broadly defined. It is not limited solely to patients' claims.

JUSTICE DEBRA H. LEHRMANN: Well, but wasn't that done to make sure that it was clear that not just the patient could file suit, but if the patient had died that also the patient's representatives could file suit. I mean when you look at the definition of healthcare in the Act, it specifically says that, healthcare means any act or treatment performed or furnished or that should have been performed of furnished by any healthcare provider for to or on behalf of a patient. So when you look at this statute as a whole, which we have to, it definitely is looking at that relationship between the doctor and the patient. And so what's your authority that we would extend this beyond that just common sense view of what this statute was meant to do?

ATTORNEY RYAN L. CLEMENT: Well, obviously, the provision of healthcare must necessarily involve patients. This case still falls squarely within the definitions provided in the statute. There was a patient involved in this matter. In the healthcare that was to be rendered to him involved proper supervision, observation, monitoring and in the event necessary behavioral intervention and we happen to have two claimants here. What's interesting is if these were two patients involved, we wouldn't be here today.

JUSTICE DEBRA H. LEHRMANN: Well, but these are two different plaintiffs, who have two completely different claims.

ATTORNEY RYAN L. CLEMENT: I agree with you. They do have, their claims are separate and distinguish-

able because they have individual claims. One obviously had a claim or his estate had a claim for the wrongful death and Mr. Williams had a claim for his personal injuries. And the statute addresses that issue because each claimant is determined by the personal injuries or death suffered. In this case, you've got two of them, but in either case, we've got patient involvement. We've got the rendition of healthcare here and Mr. Williams falls squarely within the definition of the claimant because what he's asserting is our healthcare liability claims.

JUSTICE DEBRA H. LEHRMANN: But you do acknowledge that we have not ruled on this issue up to this point?

ATTORNEY RYAN L. CLEMENT: I don't think there's been a clear decision with regard to that issue is cor rect.

JUSTICE DEBRA H. LEHRMANN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Hessel will present argument for the Respondent.

ORAL ARGUMENT OF CHARLES M. HESSEL ON BEHALF OF THE RESPONDENT

ATTORNEY CHARLES M. HESSEL: May it please the Court, my name's Charles Hessel and I represent the Respondent, Fredrick Williams. In my time before the Court, I'm going to demonstrate why the courts below should be affirmed for two reasons. First, Mr. Williams' claim is not a healthcare liability claim because the gravamen of the claim is not healthcare liability, but rather the gravamen of the claim is workers compensation, a suit filed for failure to maintain a safe workplace. The second is the legislature never intended Chapter 74 to apply to workers compensation claims.

JUSTICE DEBRA H. LEHRMANN: What is your response to his argument that the legislature specifically defined claimant more broadly?

ATTORNEY CHARLES M. HESSEL: The legislature did define claimant more broadly. However, in order to have a claimant, it has to be a healthcare liability claim and this is not a healthcare liability claim because it's not directly related to the rendition of healthcare. The operative statute involved here specifically says, the safety issue has to be directly related to healthcare. In this case, Mr. Williams' allegations in no way implicate any kind of breach of the standard of medical care. More importantly, Mr. Williams' claims are valid and can be maintained regardless of the merits of Mr. Viduarre's suit.

JUSTICE DALE WAINWRIGHT: Counsel, you just said that, Mr. Williams' claims in no way implicate medical standards. One of your, one of Mr. Williams' claims is failing to properly train him to work at West Oaks, including not warning him of the "inherent dangers of working with the conditions and inherent tendencies that Viduarre, a schizophrenic patient possessed." Does that not implicate any medical or psychiatric standards knowing how to work with and treat schizophrenic persons?

ATTORNEY CHARLES M. HESSEL: No, Your Honor, it doesn't.

JUSTICE DALE WAINWRIGHT: Not at all?

ATTORNEY CHARLES M. HESSEL: And the reason why is because the hospital is merely the situs of the incident, it's merely the situs. And Mr. Viduarre was a patient, but the allegations are allegations that can be found across the state in similar fact patterns involving law enforcement, prison guards, private security, the bailiff of this Court.

JUSTICE DAVID M. MEDINA: But the statute doesn't apply to all those other entities, right?

ATTORNEY CHARLES M. HESSEL: No, it doesn't and it doesn't apply to this case either because in this case, his allegations are not directly related to healthcare.

JUSTICE DAVID M. MEDINA: So the fact of the occurrence, does it matter in this situation, the fact where this incident occurred?

ATTORNEY CHARLES M. HESSEL: No it doesn't, Your Honor. There mere situs of the claim does not establish it being a healthcare liability claim.

JUSTICE DEBRA H. LEHRMANN: What if we found that it was a healthcare liability claim, let's just switch gears a little bit. What if the Court were to determine it is a healthcare liability claim, then we get to the issue of claimant. What would your argument be with regard to that issue of how the legislature defined claimant?

ATTORNEY CHARLES M. HESSEL: Actually, it's the same as what your question was earlier and that is that claimant is, its definition is to include the heirs of the estate, the derivative claims. It broadens the person who can be called, a claimant because otherwise an administrator of an estate who wasn't actually the patient could argue that they're outside of Chapter 74. But by broadening it, they included the persons that could be included in a healthcare liability claim. In this case, we don't have that situation.

JUSTICE DAVID M. MEDINA: I'd like to get back to the question here that I asked of why doesn't, where this occurred, why doesn't that matter because it seems to me that the Court is going in a direction that if an incident happens inside of a healthcare facility then it must a healthcare liability claim. So why isn't that the situation here?

ATTORNEY CHARLES M. HESSEL: This Court has repeatedly held that the situs of the claim merely being in a hospital is not enough to make it a hospital liability claim.

JUSTICE DAVID M. MEDINA: Well, a spider's bite a healthcare liability claim and there has been some other cases that seem to indicate that the occurrences, where the occurrence took place is important.

ATTORNEY CHARLES M. HESSEL: That's not, I don't entirely agree with that, your Honor. The spider bite case that this Court decided this last summer, that involved state regulations and a nursing home and a spider bite. In the spider bite case, the state regulations required a nursing home to have adequate pest provisions to keep the spiders away. That regulation created a medical standard of care because it applied directly to nursing homes. This is a different situation. There aren't statutes that require this.

JUSTICE PAUL W. GREEN: What about Marks, the Marks case? The footboard that fell off on a bed.

ATTORNEY CHARLES M. HESSEL: In that case, this Court decided that the medical equipment that failed was directly related to the patient. In this case, it's not directly related to the patient. It's related to Mr. Williams' safety.

JUSTICE EVA M. GUZMAN: Well, I'm going to ask you about one more case, Yamada v. Friend occurred at a water park where the allegation was that there was a failure to provide the adequate tools in the event of an accident. Why isn't this more like that? You know, the allegation is that there was a failure to train.

ATTORNEY CHARLES M. HESSEL: In that case, the medical equipment that was being used was for a medical purpose. In this case, Mr. Williams' claims of them not having a proper security device, as not having a radio, not having a panic button in a smoking area, that doesn't relate to the patient care.

JUSTICE EVA M. GUZMAN: But the claim that they failed to train him to deal with these types of patients in these situations does appear to be closer to the types of allegations by analogy in Yamada, for example.

ATTORNEY CHARLES M. HESSEL: Respectfully, it's not, Your Honor. This type of training is provided to law enforcement and security officers across this state yearly. It's defensive tactics training. It's called, officer safety. In this case, it would be technician safety. It's meant to protect the employee and Mr. Williams wasn't provided any of that training. That's the gravamen of his claim.

JUSTICE DALE WAINWRIGHT: However, police officers are not trained to treat schizophrenically violent persons. They're trained to subdue them, protect them from hurting themselves or protecting the public. At a hospital like this, the training is intended for treatment so it's a different animal here isn't it?

ATTORNEY CHARLES M. HESSEL: Mr. Williams was a technician. His job was to monitor and observe Mr. Viduarre. He wasn't assigned to treat him. He was assigned to monitor and observe him and he was assigned to notify a nurse if he noticed anything unusual, if he started noticing violent behaviors, but he wasn't there to treat him. He was part of the security.

JUSTICE DALE WAINWRIGHT: So a state trooper could just as well have been there instead of Mr. Williams?

ATTORNEY CHARLES M. HESSEL: That's correct. If a state trooper took a job at the hospital as a technician, yes, it's very possible and then you would have had somebody with the proper training.

JUSTICE DALE WAINWRIGHT: Then why does your client allege a failure to train or establish proper protocols in dealing with schizophrenic patients if that's the case?

ATTORNEY CHARLES M. HESSEL: The training that's at question is, whether or not he was provided defensive tactics training, officer safety training. That's the kind of training that's provided to private security outside of the law enforcement context and that's the type of expert that if there's one needed at all in the case that's the type of expert that would be called. Somebody that's former military, somebody that's a former prison guard, somebody that has that kind of experience at observing people that are potentially violent.

JUSTICE DALE WAINWRIGHT: Is there a difference in your mind between a person who sometimes commits violent acts and a person who is chronically violent because of the schizophrenic or mental defect?

ATTORNEY CHARLES M. HESSEL: Of course, there's a difference, Your Honor.

JUSTICE DALE WAINWRIGHT: Do you know how to deal with the former?

ATTORNEY CHARLES M. HESSEL: Actually, yes I do, Your Honor. I am a former law enforcement officer. I have received the training.

JUSTICE DALE WAINWRIGHT: Well, very well, do you know how to deal with the latter?

ATTORNEY CHARLES M. HESSEL: Dealing with the people who are chronic--.

JUSTICE DALE WAINWRIGHT: Chronically violent persons who have a schizophrenic problem.

ATTORNEY CHARLES M. HESSEL: Yes, Your Honor, it's the same way.

JUSTICE DALE WAINWRIGHT: Oh it is? Do you know how to treat the latter?

ATTORNEY CHARLES M. HESSEL: No, Your Honor, I don't.

JUSTICE DALE WAINWRIGHT: Do you know protocols and procedures should be put in place when that type of person comes to a facility for treatment?

ATTORNEY CHARLES M. HESSEL: Yes, Your Honor, and the types of protocols that they're talking about are similar to when an officer responds to a violent call. Some departments have a policy and a procedure that two officers respond. The police departments have policies that say that an officer has to wear a radio so that he can call for help if he needs it. Those are the types of protocols that should have been in place.

CHIEF JUSTICE WALLACE B. JEFFERSON: Opposing counsel says that, as I understood his argument, that in a hospital setting, if there is a physical assault, a patient against an employee, that to sustain a workers compensation claim, there has to be an expert report filed in every case. What is your response to that?

ATTORNEY CHARLES M. HESSEL: I think that that's contrary to a legislative intent and to begin with, when they enacted 4590(i), the reason was to deal with the insurance crisis, the medial professional insurance crisis. In this case, there's no such allegations or there's nothing before the record that says that, those are the same kind of crisis affecting general liability policies or worker's compensation policies. And even more importantly, workers compensation policies, there can't be a crisis because that is provided by the state through the state at reasonable costs. So there is no crisis that would enact Chapter 74. Chapter 74 was never intended to apply to workers compensation claims or claims of injured workers, especially healthcare workers.

JUSTICE PHIL JOHNSON: Actually in worker's compensation, the claim is made against the insurance carrier is it not? It can't be made against the employer.

ATTORNEY CHARLES M. HESSEL: In Texas workers compensation, it can be made against the employer if, as in this case, West Oaks is a nonsubscriber.

JUSTICE PHIL JOHNSON: They don't have worker's comp. If they're a nonsubscriber, they don't have worker's comp.

ATTORNEY CHARLES M. HESSEL: That is correct, Your Honor.

JUSTICE PHIL JOHNSON: If they are a subscriber, they have workers comp unless it's a death, there can be no claim made against the employer can there?

ATTORNEY CHARLES M. HESSEL: Unless it's gross negligence if they have worker's comp.

JUSTICE PHIL JOHNSON: Well, a death with gross negligence. So as long as your client is still alive, if he's covered by comp., he's in the worker's comp. system claiming against the carrier not the employer. And all we're talking about here is since they're not worker's comp. covered, since there is no comp, we have a liability claim and the question is, does it go under the procedures of the Medical Liability Act it seems to be like. It seems like in worker's comp., the question of expert report goes out the window. It's not even there because it's not against the employer. Am I missing something on that?

ATTORNEY CHARLES M. HESSEL: Respectfully, Your Honor, you are. This case was brought under the Labor Code Section 406.033.

JUSTICE PHIL JOHNSON: But that provides where there's no coverage, correct?

ATTORNEY CHARLES M. HESSEL: Correct and West Oaks is a nonsubscriber.

JUSTICE PHIL JOHNSON: Okay, so but if there is coverage, if there is coverage, you don't have to have an expert report do you? You just go and say he's injured on the job and then the carrier is liable for it. That claim is not against the employer.

ATTORNEY CHARLES M. HESSEL: Unfortunately, Your Honor, if this Court finds that worker's compensation claims are covered under Chapter 74, that's an issue that this Court's going to have to hash out because if the employer wants to deny the claim, then--

JUSTICE PHIL JOHNSON: Can the employer deny a claim under workers comp? I thought the carrier; I thought the statute specifically said, the employer cannot control the adjusting of a claim under workers comp, only the carrier can do that.

ATTORNEY CHARLES M. HESSEL: Then in that case, the carrier could require an expert report saying this is a healthcare liability claim.

JUSTICE PHIL JOHNSON: But the carrier is not the employer. The carrier is not a healthcare provider are they?

ATTORNEY CHARLES M. HESSEL: If they're the ones that are involved in the case, it would be a derivative claim where they would be stepping into the shoes of the healthcare provider.

CHIEF JUSTICE WALLACE B. JEFFERSON: But to get it to this case, a nonsubscriber, they don't have the same defenses as a defendant in an ordinary case isn't that correct?

ATTORNEY CHARLES M. HESSEL: That's correct, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the burden on the employee in a nonsubscriber case is not the same as the burden on a plaintiff and a regular negligence case like an auto accident with unrelated parties.

ATTORNEY CHARLES M. HESSEL: That is correct, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: So why would we require in a nonsubscriber case like this one, for an expert report to be required, subject and without the cases dismissed even though the employee establishes that the injury occurred during the course and scope of his or her employment with the nonsubscribers.

ATTORNEY CHARLES M. HESSEL: This Court shouldn't allow this type of claim to fall under the purview of Chapter 74 because it does involve an injured worker. And the defenses that are waived by a nonsubscriber demonstrate the legislature's intent with the workers compensation scheme to encourage employers to have workers to carry workers compensation. And it demonstrates the state's policy of protecting our healthcare workers, of protecting our employees and I can't think of any situation where a healthcare provider, save one absurd exception, I can think of no situation where a healthcare worker should have to follow a Chapter 74 expert report in order to maintain his claim and his rights under protections of the worker's compensation scheme. Now the absurd example would be if you had a professional guinea pig that lended himself out, was hired by hospitals to have experimental surgeries performed and during one of those surgeries, there was a breach of the standard medical care. In that circumstance, perhaps Chapter 74 expert report would be required, but that is an absurd exception. Other than that, I can't think of any situation where a healthcare provider who was injured in the course and scope of his employment should be required to limit his remedies or to have to jump through extra procedural hoops in order to maintain his claims.

JUSTICE DALE WAINWRIGHT: And applying that analogy to a nonsubscriber situation, would it be your argument then that any employee injured at the place of his employer, which is a healthcare liability location,

would be able to then pursue a claim for those damages no matter how the injury occurred to the employee?

ATTORNEY CHARLES M. HESSEL: Yes, Your Honor, unless you can think of a situation that, a fact pattern that has escaped me. Because I can't think of no situation where a healthcare worker should have to file that report. Now--

JUSTICE DALE WAINWRIGHT: So if a nurse is trying to draw blood and accidentally scrapes herself with needle, that's not a healthcare liability claim. In a nonsubscriber case, the nurse should be able to sue the hospital or whichever healthcare provider she believes is liable without complying with Chapter 74?

ATTORNEY CHARLES M. HESSEL: I believe that's true, Your Honor.

JUSTICE DALE WAINWRIGHT: And that goes in your opinion for any claim by an employee against an employer who is a healthcare liability?

ATTORNEY CHARLES M. HESSEL: I don't know that I would go so far as to make it absolute because fact patterns tend to evolve that always question the law. But like I said, I can't think of a fact pattern that where a Texas healthcare employee should have to file an expert report in order to receive his remedies under the Texas workers compensation insurance scheme.

JUSTICE DALE WAINWRIGHT: So essentially your position is that the Chapter 74 excludes employees and healthcare and liability employers?

ATTORNEY CHARLES M. HESSEL: Yes, Your Honor, yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Excludes them all. Is there language here that you think indicates that?

ATTORNEY CHARLES M. HESSEL: In the statute itself, there's no language, but the Texas workers compensation scheme has been in effect for nearly 100 years in one form or another. This is a longstanding policy of the state to protect the workers and it's not a small issue. There are thousands of healthcare workers across the State of Texas and the U.S. Bureau of Labor Statistics says that, each year there's more than 14,000 injuries on the job in hospitals to healthcare workers. This is a major problem. If in enacting Chapter 74, they would have intended to disregard to supplant such a major, well-established statutory protection scheme, clearly they would have said that, and they did not.

JUSTICE NATHAN L. HECHT: It doesn't supplant it as you point out, it just, as you say, has procedural hoops or limitations on remedies. It doesn't supplant the liability scheme. It just as you say requires an expert report.

ATTORNEY CHARLES M. HESSEL: In some aspects, Your Honor, it does supplant it.

JUSTICE NATHAN L. HECHT: In the limitation of remedies.

ATTORNEY CHARLES M. HESSEL: And this is how. Many of the workers compensation claims are claims for healthcare providers who are off of work for one or two days or five days or two weeks, small amounts of money. By requiring an expert report, these people, by being a nonsubscriber and requiring an expert report, these people are left with no remedy because they won't be able to find a lawyer that'll take the case because they're going to have $5,000 in expenses to just file a claim that may be for only a few thousand dollars. And in today's economy, it's very obvious that a few thousand dollars can put somebody on the street and that is not following the Texas policy of protecting our healthcare workers. This is a very important issue that needs to be kept separate.

JUSTICE NATHAN L. HECHT: Is it the expense of the expert report that's the impediment or the difficulty in

getting one?

ATTORNEY CHARLES M. HESSEL: It's the expense of the expert report. It's the attorney's fees and the time that is spent in defending all the appellate challenges and there will be more appellate challenges if this is extended as the workers compensation claims. All of these add up and if a person can't find an attorney that'll file the case for them, then it has impeded their rights and remedies under the worker's compensation scheme.

CHIEF JUSTICE WALLACE B. JEFFERSON: I want to give you a chance to answer one criticism of your position and that is the Petitioner says, there doesn't have to be a doctor-patient relationship, which is sort of prominent in your brief as the source of the duty. There doesn't have to be that sort of relationship for there to be a healthcare liability, for this to be governed by a healthcare liability statute. What's the answer?

ATTORNEY CHARLES M. HESSEL: I see I'm out of time, Your Honor, may I answer?

CHIEF JUSTICE WALLACE B. JEFFERSON: You can briefly answer that, please.

ATTORNEY CHARLES M. HESSEL: This Court has decided that a patient-physician relationship is not necessarily necessary in order to bring a healthcare liability claim, but in this case there is no relation to the rendition of medical services.

JUSTICE DEBRA H. LEHRMANN: When has the Court decided that?

ATTORNEY CHARLES M. HESSEL: In a long line of cases, Your Honor. I believe it started with Marks and Yamada. I mean the source of the duty is always a consideration and the court below acknowledged the source of the duty. In this case, the source of the duty comes from the hospital as an employer and their duty to provide a safe workplace to their employee. Outside of the workers compensation arena, this case does not involve a claim that is directly related to the rendition of medical services and that's the key language in the statute that this Court needs to look at. And it's for these reasons that we ask the court below us to be affirmed.

JUSTICE DALE WAINWRIGHT: If I may, Chief. You talked about the problem of injured employees not being able to pursue claims that may be expensive to pursue in a nonsubscriber context. What about the employee who has a $75 injury? Similarly, you're not going to be able to find a lawyer probably to pursue that claim. That problem would still be out there even if we take your approach in this case.

ATTORNEY CHARLES M. HESSEL: That is correct, Your Honor. That problem is still there, but this problem expands upon that and takes that low-dollar claim and extends it to possibly being that the lawyers won't take any claims that won't have a recovery of more than $20,000 or even higher and so it compounds that problem that Your Honor points out.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counselor.

ATTORNEY CHARLES M. HESSEL: Thank you.

REBUTTAL ARGUMENT OF RYAN L. CLEMENT ON BEHALF OF PETITIONER

ATTORNEY RYAN L. CLEMENT: I'd like to go back and just quickly review what the specific allegations were in this particular matter. Mr. Williams complained that West Oaks failed to properly train him to work with patients with serious conditions and tendencies, such as the patient in this case. Historically, since Diversicare failure to properly train has always been held to be a healthcare liability claim. Failure to adequately supervise is another allegation that he makes in this particular matter.

JUSTICE DALE WAINWRIGHT: Counsel, let me ask you to, we've read the allegations.

ATTORNEY RYAN L. CLEMENT: Yes.

JUSTICE DALE WAINWRIGHT: Let's assume these are healthcare liability claims. Your opposing counsel says, it doesn't matter; this is workers comp. This is not included, intended to be included as part of Chapter 74. That's the pressure point. What's your response?

ATTORNEY RYAN L. CLEMENT: Our response to that is first and foremost, I don't think that this case will have the type of impact that he's expressing to the Court, that will alas eliminate the workers compensation claim. But furthermore, there is a provision in Chapter 74 that indicates that it was clearly the legislature's intent that in the event of a conflict, provisions of Chapter 74 control. I would contend that because of the acts or omissions complained of in this case because they're inseparable from the rendition of healthcare services, this is a healthcare liability claim and to the extent there's any conflict between the workers compensation scheme and Chapter 74, the provisions of Chapter 74 are controlled by virtue of that language in Chapter 74.

JUSTICE PHIL JOHNSON: Let me ask just a moment in regard to that. The Workers Comp Act provides that if you do not have coverage, the employer loses its defenses basically against the employee's negligence claim or claim against the employer. If an expert report is filed that is sufficient, if one is required and filed as sufficient and then the case is tried, would it be your position that the employer somehow has defenses against the employee or has the employer still as the Workers Comp Act says, lost all of its defenses.

ATTORNEY RYAN L. CLEMENT: I would say that the defendant has all of those defenses available and the reason being is because that would be in direct conflict with Chapter 74.

JUSTICE PHIL JOHNSON: Well, that's what I'm wondering. I don't see the conflict actually.

ATTORNEY RYAN L. CLEMENT: I don't necessarily see a conflict either in the event there was one.

JUSTICE PHIL JOHNSON: It seems to me like all Chapter 74 does is say you can sue, but before you proceed, you have to have the expert report, but that's all it says. It doesn't say that you're reinstating these common law defenses. I'm struggling with how it conflicts is where I am on that.

ATTORNEY RYAN L. CLEMENT: I don't know that there's necessarily a conflict and frankly, I think that really where the focus should be for this particular Court is in line with what was pronounced in Diversicare. If the acts or omissions complained of are inseparable from the rendition of healthcare services it's a healthcare liability claim. The status of the defendant as a subscriber to workers compensation or not is never entered into that equation. So this is a healthcare liability claim. You know, if it's determined not to be so then the Court will inadvertently be accomplishing two things. Number one, it will be inadvertently depriving a healthcare provider of the procedure, the carefully crafted procedural provisions in Chapter 74 that determine by a threshold question based on the essence of the claim whether or not it's meritorious or eliminated that. The other thing is it will have inadvertently lowered the applicable standard of care at healthcare facilities with regard to scenarios such as this.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, in every case that we've decided, there was a doctor-patient relationship that existed except for Yamada and we specifically did not deal with that issue in Yamada and said, so specifically in a footnote. And there seems to have been some talk today that we have decided this issue where; what is your response to that?

ATTORNEY RYAN L. CLEMENT: Well, my response to that is I don't believe the statute requires that that relationship exists for a determination to be made and that it's a healthcare liability claim. Now the existence of such a relationship, physician-patient relationship, may go to the duty but that's a question that goes beyond just the threshold question of whether or not what's being asserted is a healthcare liability. Because the acts and

omissions complained of by Williams are inseparable from the rendition of healthcare services and because he's a claimant as defined by the statute, clear and plain language of the statute, we would ask that this Court reverse and remand with instructions to dismiss the matter accordance with the statute.

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

MARSHAL: All rise.

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