ORAL ARGUMENT - 4/18/96
95-0939
EDINBURG V. TREVINO

DAVIS: I am pleased to represent the Edinburg Hospital Authority this morning in a petition to you from an adverse decision from the 13th court. This is a medical malpractice case against a doctor and a hospital. The doctor settled, the case went to trial against the hospital - torts claims hospital - the jury awarded $250,000 to the plaintiff's wife, $250,000 to the bystander, plaintiff husband. This matter was appealed to the 13th court, the court took this case and affirmed the TC's decision. We filed an application for writ of error - 11 points of error. You have granted our application for writ on 6 of those points.

I have represented hospitals for 37 years and I have not had an occasion to read the CCA's opinion that was more damaging to the Texas tort's claims act in general, and to the hospitals of this state in particular _____. It is our judgment that in this case the CA has created a new cause of action for mental anguish because of a still birth contrary to your decision in Patilla v. Crites. The 13th court has permitted recovery for only mental anguish damages for the still birth of a fetus without any injury to the mother contrary to this court's decision in Crestman v. Supleveda, and this court's decision interpreting Suplaveda in Cathy v. Booth. The 13th court has permitted Shirley and Oscar Trevino to be awarded damages for mental anguish against a tort's claims hospital whose only liability exposure is for bodily injury, death and property damage and has permitted each of these individuals to recover statutory maximums when the tort claims acts _____ a single maximum to an injured person only against the advice of this court in the City of Austin v. Cooksey. The CA has permitted a bystander claim to be pursued without requiring each prong of a 3 point test to be met by the proposed bystander contrary to your decision in Freeman v. City of Pasadena.

The 13th court has ignored specific legislative directives that a municipal hospital authority under the appropriate sections of the Health and Safety Code are specifically directed to be units of local government and not municipalities. And yet the CA has held that the Edinburg Hospital Authority is a municipality. In doing so it has ignored the limit for a local unit of government $100,000 and has imposed a $250,000 limit that is the limit for a city. And this is not a city. It is a municipal hospital district.

The 3rd court has ignored at least 4 CA's decisions that have held there is no cause of action for a bystander in recovery in a malpractice case involving treatment, or a misdiagnosis. The Robinson case writ denied out of Ft. Worth, the Cavenaugh case writ denied out of Austin, the Estrada case writ denied out of Houston, the _____ case writ denied out of Dallas. The CA has ignored and found that the limitations for a municipal hospital authority is not $100,000 but $250,000, and has ignored the only analysis done by any CA, the Huxbee(?) court with no mention of any distinguishing characteristics whatsoever in this case. Simply that Huxbee(?) was contract.

And finally that this court has gone against 2 different courts with respect to the way it applies some credits in the determination of what is to be reduced from a judgment. And in fact did a reduction from a jury verdict not a judgment. And the judgment in this court entered by Judge Barnes, the trial judge, shows exactly the mistake that he made.

ABBOTT: Two questions concerning the physical injury: 1) Were there any pleadings claiming physical injury as apart from mental anguish; and 2, was there a jury issue submitted to the jury on physical injury apart from mental anguish?

DAVIS: During the course of this trial it is my belief that at the time the case went to trial there were not active pleadings asking for a judgment for damages for physical injury for either Shirley

Trevino or Oscar Trevino.

ABBOTT: I'm really referring right now only to Shirley.

DAVIS: Yes, with respect to Shirley. With respect to the issues found by the court there was only 1 issue submitted with respect to Shirley. And that issue reads as follows: What sum of money if paid now in cash would fairly and reasonably compensate Shirley Trevino for the mental anguish, if any, that resulted from the loss of the fetus on the occasion in question? The only question your honor that was submitted with respect to damages.

ENOCH: Why is it your belief that there was no claim for physical injury to Ms. Trevino? You said it's your belief...

DAVIS: There was none.

ENOCH: So the pleadings didn't have that?

DAVIS: No sir the jury did not have that. The jury was not asked: Was there injury to Shirley Trevino? The jury was only asked: Did Shirley Trevino have mental anguish as a result of the loss of the fetus? This takes us to a discussion of this court's incredibly important decision to hospitals and to the citizens of this state in Supleveda. In Supleveda this court decided that it was not contra(?) to Crites wherein you held there was no cause of action for the death or injury of a fetus. But in Supleveda you held that if in fact there was injury and in Cathy you held per curium, if there was in fact an injury to the mother occasioned by negligence and there was a still birth, that the mother was entitled to collect damages for mental anguish including the loss of the child, or the fetus. Vitally important case. And it's important in this case because what I believe happened these cases were from a similar area of the state and Sulpeveda went up through the judicial system with Trevino right behind it. And the jury wasn't asked about injury to the mother at the trial level. But my colleagues argued _____ for injury at the CA level with Sulpeveda up ahead and the CCA already having decided the same court that there was bodily injury to Ms. Sulpeveda.

GONZALEZ: Even though it was not pled in that case either?

DAVIS: Well your honor it was not pled in that case.

GONZALEZ: The CA made it up, and this court affirmed it?

DAVIS: I think there was more reference to injury to the mother at least in the court's opinion - it referenced injury to the mother. And I have read your honors _____ and important the dissent in that case. But I do not think...

GONZALEZ: Do you agree with me that we ought to recognize a duty to the mother, the child and the father?

DAVIS: I do not sir. I believe that that is an issue that most appropriately is before another forum, and that's the legislature.

ABBOTT: Do you agree here that there was physical injury to the mother, just that it wasn't pled and there was no issue submitted on it?

DAVIS: Your honor the mother testified there was no injury. The mother testified that her

only grievance was a mental anguish grievance for the loss of the fetus. She didn't say there was injury. I don't think there was injury.

ABBOTT: Well you concede that there was injury to the placenta in the placenta wall and hemorrhaging as a result of that?

DAVIS: There's no question there was a placenta abruption in this case. And this what Oscar Trevino saw.

ABBOTT: And you would not classify that as a physical injury?

DAVIS: I would not classify it as a physical injury that these plaintiffs wanted any damages for.

ABBOTT: Okay I can see that. But you will concede there was a physical injury - just no pleadings or jury questions submitted concerning that?

DAVIS: I concede your honor that there was a placenta abruption. There was testimony from expert witnesses on both sides as to what caused that or whether it was caused by the hospital. The jury chose to go with the experts for the plaintiff. I do not believe that if in fact it was an injury that it was either pled, or proved, or asked about, or found by the jury. And that suggests to me that nobody thought it was an injury. Certainly Shirley Trevino did not.

ABBOTT: I want to ask you a question in a different area before we run out of time. It concerns the credit issue. If we were to apply the credit the way you want it applied, would that not mean then in an extreme majority of cases where there are defendants who are found liable other than a governmental unit, it would basically _____ liability for the governmental unit?

DAVIS: And it would your honor. That is not a function though of the statutes that provide for the way in which some credits are awarded. It is certainly nothing within the purview or control of the defendant hospital. It's in the total control of the plaintiff as to whether or not they want to settle or not. There is no question that if they do settle and they go against a tort's claims hospital, and the amount is large for the settling defendant, then the chances of the torts claims hospital having a judgment are not very good. And that's exactly the way the legislature wrote it. That's the way two of your CAs have interpreted it. And your honor all three courts, including the one cited by my colleagues, have done a reduction of similar credits from a judgment. In this case it wasn't done from a judgment. The judgement in this case was for $250,000. The settlement credit was taken from the verdict. No case says that's the way you do it. Two cases say that the way you do it and it's illustrated, is that you go to the maximum liability limit that the governmental entity has. If it's a city - $250,000; if it's a county - $100,000. And then you make your deductions from that particular maximum liability finding.

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RESPONDENT

HENDERSON: May it please the court. I am here to respond to the arguments of counsel for the hospital. My good friend, Dean Davis and I didn't apparently read the same opinion below. I want you to know that I represented Oscar Trevino, the husband in the court below. Shirley Trevino is represented today and in the court below by Mr. Rick Shell and John David Franz. In our argument today I'm going to discuss issues 1, 7, and 8, the threshold issues of duty, and the evidence.

I would like to respond first of all to the issue of pleading. I disagree vehemently.

At page 8 of my brief in response to the application for writ of error in this case, I set out portions of the live pleadings of Shirley Trevino in which he pled that the hospital acting through its agents and employees were negligent in care and treatment of Shirley that resulted in the death of a full-term baby constituted negligent infliction and mental anguish to her. And then in paragraph 4 says the untimely administration of anesthesia, use of equipment, all of which was owned by the hospital was a proximate cause of damages to plaintiff. The generality of that allegation is not accepted to. In the case this issue was tried by consent. The injuries to plaintiff I guess historically it would be useful to say that this case was tried in January, 1993. Your case Boyle v. Kerr came out, the first version of that opinion came out in Dec. and we looked at it very carefully. We also had seen the Supleveda. In the CA's opinion which affirmed the right of the mom to recover for the mental anguish injuries to her and we tried the case specifically on those points. The presentation, the argument which is in the record, the opening argument, the evidence and the final argument all was focused on the issue of injuries to the mom, and the mental anguish that resulted from that. And that issue, issue No. 2, says what amount of money should be paid for damages to Shirley Trevino for the loss of the fetus, which we say is a portion of her body at that time, which is an injury to her at that time. We also agree that there was an injury to her when the placenta abrupted.

ABBOTT: It seems like that injury exists, but looking at any of these paragraphs I still don't see any pleadings claiming physical injury as opposed to mental anguish?

HENDERSON: I agree your honor in Shirley Trevino's pleadings there is no direct allegation of physical injury to her. The understanding and the intention of the plaintiff Shirley Trevino's counsel was to allege and the case was tried I think by consent, that the injury to the fetus was an injury to her. And that statement occurs throughout the record during the trial. I think if you look at my pleadings on behalf of Oscar Trevino in the transcript you will see that I specifically pled an injury to Shirley Trevino, which my client was a bystander and of which my client was owed a duty - separate duty - and I believe that the...

GONZALEZ: What court in Texas has recognized a duty to the father in these circumstances?

HENDERSON: I believe that there are a number of cases in which...if as I understand the Boyles decision and I read it very carefully before we tried this case, that if there is an independent source of duty to anyone, then you can proceed for a breach of that duty and damages for mental anguish. In this case we have specific duties which are assumed by the hospital in the nursing standards set out in pages 148 through 150 in the record at trial which say: patients and/or significant others can expect nursing units to have emergency equipment; can expect nurses to develop plans for nursing care; can expect nurses to provide appropriate quality of care with respect for patient and individuality. And by assuming...

GONZALEZ: A short answer is there is no case?

HENDERSON: Judge under these circumstances in a medical negligence circumstance no. But I think there are many cases which show that a direct duty applies to the husband. And there are certainly some California cases in this area that do establish that a direct duty is also another manner in which the husband can recover. And in this case we have a bystander which is a classic bystander, which meets all the tests of the Dillon Freeman test.

GONZALEZ: Again there is no...can you cite to me a case that has allowed bystander recovery under these types of circumstances?

HENDERSON: No your honor I cannot. Although there's absolutely nothing in the bystander doctrine which would justify carving out an exception under these circumstances. And in fact in every case that's cited by the appellant where it says that it disallows a recovery for a bystander, it says: but that's under these facts. And it does not prohibit or say, any of those cases say that a bystander cannot recover.

It just says under those facts a bystander cannot recover. And we would say that we distinguish those cases. There is no case that says a bystander cannot recover in Texas.

GONZALEZ: This would be a case of first impression?

HENDERSON: In that respect, yes. And I would suggest it's really a very narrow case because in this situation we have a situation where the nurses failed to monitor the fetal heart monitor properly, the hospital equipment. The doctor testified that the nurses set the potoson(?) levels too high to induce labor. They also failed to discontinue the potoson(?) levels early enough. And all those things caused the placenta abruption, which occurred in the presence of my client. He was in the labor room during the time that occurred. He was aware there was a controversy going on between the doctor and the hospital about the potoson(?) levels. He was concerned about that, and he then saw this bleeding event and was present when it happened and we've set out some of the testimony about his impressions, the shock that occurred. He was in the room when this accident occurred. He witnessed and saw and felt the injury to his wife - meeting all 3 of those tests very clearly. It was then the next thing occurred. The hospital failed to use the paging system. They failed to use the communication's equipment properly to assemble the surgical team. And he waited with the doctor and the nurses watching this emergency situation and experienced the concern over this undo delay. It took 1 hour and 13 minutes from the time of the call for the team until the anesthesia took place, and the standard of care is 30 minutes. The doctor got so upset that he actually wheeled her down to the operating room in the gurney by himself. My client was present at all events except for the actual delivery of the fetus and he received the dead fetus from the doctor. He experienced the whole thing. The only thing he did not physically see or hear himself was the actual delivery of the fetus. That's simply the outcome. None of the bystander cases require him to be present when the outcome occurs, only present when the injury occurs. The initial injury is the bleeding.

GONZALEZ: And where the courts has allowed bystander recovery ordinarily there's been a sudden brief event causing injury - like a car accident. And what's the sudden brief event causing injury here?

HENDERSON: The placenta abruption, which occurred and immediately resulted in the bleeding. That all occurred as a result of the use of this hospital potoson(?) equipment and the potoson(?) drug, and the failure to monitor the heart _____ carefully and to monitor the mother carefully, and as a result boom this amniotic sac tore away from the uterus and caused this hemorrhaging, which is an injury to her body.

PHILLIPS: Would you explain what this equipment is again and how that qualifies as a tangible personal property under the Tort Claims Act?

HENDERSON: The potoson(?) is a labor inducing drug which is set up on an intravenous drip. The doctor told the nurse to start it according to protocol. By her own admission she started it at a higher level than it was supposed to be started. And Dr. Barnes our expert testified it was started at too high a level, and it was not discontinued when it should have been discontinued.

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SHELL: May it please the court. I will move directly to point of error No. 9, which is the issue regarding whether or not the Edinburg Hospital Authority is a local governmental unit or a part or extension of a municipality?

GONZALEZ: What board of directors governs the policies of that hospital

SHELL: There is a board of directors that is appointed by the City of Edinburg.

GONZALEZ: So it's part of the municipality?

SHELL: That's true.

GONZALEZ: That is an agency of the municipality?

SHELL: Exactly.

GONZALEZ: Or is a municipality in and of itself?

SHELL: The City of Edinburg has the authority to appoint the board, to replace the board, to replace particular members of the board, etc. What I think is particularly interesting here and which I find to be a _____ claim is the argument that has been presented by the petitioner and by the amicus curiae regarding the application of §262.035d, which is the section of the Health and Safety Code which says: that a municipal hospital authority is considered to be a local unit of government, not a municipality for purposes of the tort claims act. And that's cited heavily in the petitioner's writ application. It's cited heavily in the amicus.

GONZALEZ: How is that wrong?

SHELL: If you look at it it looks very persuasive. In fact controlling. But if you read the fine print at the end of that statute what you will discover is that that particular section did not exist, had not been passed, was not effective when the cause of action accrued, when the case was tried, and when the judgment was rendered. That particular section, that statute which these folks are relying upon did not become effective until June 11, 1993, over 4 years after the cause of action accrued, 5 months after the trial, 5 months after a judgment was rendered. And it's fundamental in Texas that a statute operates perspectively. The government code provides that it's presumed that there is perspective application unless the statute specifically says that it's retrospective. But here in this court the petitioner and the amicus have come in and pretended that §262.035 has always existed and were completely silent about the enactment date of that statute.

HECHT: Was that statute just to clarify the earlier law, or do you view it as being a changed law?

SHELL: It's a complete change in the law. And let's say that the statute did exist at that point in time. Even if it did it doesn't avail the defense here anything because that particular statute if the court will read the operative language says that: a municipal hospital authority subject to this section is a local unit of government and not a municipality. Subject to this section is the key phrase within that subsection (d) of that statute. So what is subject to this section? Section 262.035 relates to the lease of hospital facilities by hospital authorities. And that's all that section relates to, the lease of hospital facilities. Not only that, but in (a) of that section, it's very clear that the section applies and I quote the statute: "applies only to an authority created in a county with a population of at least 350,000 persons, in which a hospital district is not located." And so what the petitioner has done here is fail to tell the court about the enactment date, failed to tell the court that the statute relates only to a section on leasing hospital facilities, and failed to tell the court that the statute relates to hospital authorities and counties with a population in excess of 350,000. And there is simply nothing at all in the record, no evidence which would allow this court to reach a conclusion as a matter of law, that the Edinburg Hospital Authority was subject to §263.035, even if it existed then, which it didn't.

And I think it's really interesting that the legislature passed that subsection (d), and spelled out that a municipal hospital authority is a local unit of government in that particular limited situation

of leases. The obvious implication of that is that the legislature was carving out an exception to the general rule that municipal hospital authorities are not units of local government.

GONZALEZ: How about the plain meaning of the word municipality? When you hear the word municipality you envision a local unit of government that has a mayor, councilman, and city manager, police functions, parks, garbage collection and that type of thing. To me that's what I envision when I hear the word municipality. Do you have any cases that have construed municipality in the sense that _____ municipality can include a library, or a hospital?

SHELL: Well that's a very interesting point because the word municipality is not defined in the tort claims act. It's just not defined.

GONZALEZ: How about the plain meaning of the word?

SHELL: And that's where the court would go then to the common usage under the code construction act. The code construction act also requires that in construing a statute it's presumed that the intention is that the statute would reach a fair and reasonable result. So what is a fair and reasonable result in this circumstance? Municipality has to include what a municipality does. And in that laundry list that procures in the tort claims act the governmental functions of a municipality are set out which includes hospitals. And says: specifically recognized by the Texas legislature and the laundry list and the tort claims list as governmental functions of a municipality is the operation of hospitals.

GONZALEZ: So then you're agreeing that a hospital is a unit of local government?

SHELL: No. I am saying that a hospital is a governmental function of a municipality. So it is part and parcel of the municipality and subject to the caps applicable to municipalities.

GONZALEZ: A separate municipality?

SHELL: It's separate in form, but not in substance. And I think the concept that substance controls over form is very well recognized in Texas, and by this court in particular. In fact I believe this court has been particularly apt in viewing the reality of situations as opposed to the form of situations, and in looking past the types of tricks and manipulations that lawyers can come up with in order to reach results which are not based at all on reality. Here what the defense is suggesting is a distinction between the hospital authority and a municipality where the municipality created the hospital authority has the ability to appoint directors, has the ability to dissolve the authority and dispose of the assets. The reality is that there is just no difference. The substance is that there's no difference. And the distinction which is being promoted by the defense in this case is completely and wholly arbitrary. It's not supportable by any type of compelling policy argument and I believe is proffered for the sole purpose of saving money.

The reality is a municipality like the City of Edinburg has the authority and as part of the services it provides to its citizens, to create hospitals, run hospitals, provide the medical care for the citizens of the city. And ch. 262 is the mechanism that was employed to do that.

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REBUTTAL

DAVIS: I share with counsel the astonishment of what lawyers can do as he has just demonstrated. To tell this court that there is no substantive difference between a municipal hospital authority and a city ignores an entire section of Texas legislative enactment entitled Municipal Hospital Authority, that has existed substantially before this case was tried. A hospital authority as it relates to a city

in that same statute allows a city to do basically two things: 1) appoint the board of directors; and 2) to be involved if the hospital authority is to be eliminated - a disbanding. That's all. The day-to-day running of that facility is under the authority's board. Has always been. That has never changed. And to suggest that a municipal hospital authority should be treated differently than a county hospital authority, which is likewise entitled to the designation of local unit of government.

ABBOTT: When was the authority created?

DAVIS: I don't have that...

ABBOTT: Was it created after §262 was created?

DAVIS: I would have to look at the creation. That's in the record. But §262 does not, and this is the other point I wanted to make, does not change the way in which a municipal hospital authority has been treated since municipal authorities were permitted. They were initially permitted so that a local unit of government could have a hospital that did not have taxing authority. That was the major motivation for the creation of this particular entity.

OWEN: Was there anything comparable to §262.03d prior to June, 1993?

DAVIS: Probably the nearest that I can get to that is the Huckabee case that was totally ignored by the 13th court in this case, that went through an excellent analysis of why it is that a municipal hospital authority should be considered a unit of local government and thus required only to have $100,000 limit instead of $250,000. That case from Dallas is well reasoned, a case that has not been challenged up until this point suggested a total analysis of what all a hospital authority board does totally and separately different and apart from the municipality.

PHILLIPS: Let me ask you the same question I asked opposing counsel about the tort claims act. Why isn't the alleged misuse of this drug too much of it going on for too long a use of tangible personal property?

DAVIS: My response to that is that the torts claims act says that use or misuse of tangible personal property that does 3 things is actionable under the torts claims act: bodily injury; death; or property injury. If there was any injury in this case I suggest to you it was to the fetus. And as difficult as that is to have to discuss, you have held that injury or death to a fetus is not actionable in this state from the standpoint of damages. It is obviously not in the wrongful death act, survivors act. The legislature has put it nowhere. You have held that is not a cause of action.

CORNYN: You're not arguing for a blanket exemption from bystander recovery in medical malpractice cases are you?

DAVIS: In this particular case no your honor we are not.

CORNYN: You're merely arguing that the facts of this case don't meet the Freeman standard?

DAVIS: And we have discussed that in our brief, the facts of this case, and our judgment do not at least on points 1 and 2 come within the Freeman requirements.