ORAL ARGUMENT — 11/5/97
96-0945
SANTA ROSA HEALTH CARE V. GARCIA

SHEEHAN: We believe this case is one of first impression before this court, and also perhaps before any court in the US. The issue is whether a health care provider owes a direct duty to a third-party, non-patient to tell that non-patient that a patient might be HIV positive.

Ms. Garcia pled in the TC, and has argued at every level of this appeal that we owed a duty to directly inform her that her fiancee and later her spouse might be HIV positive. We believe the inquiry into this issue begins and ends in the health & safety code in the confidentiality provisions provided therein.

The legislature has taken the responsibility to protect the public health when it comes to communicable diseases, and particularly HIV. They made a policy decision that information regarding a patient's HIV status is confidential and cannot be disclosed except for unlimited circumstances.

The first provision that is important is §81.101, which defines a "test result". And the legislature has defined a "test result" quite broadly in a manner that one might not suspect a "test result" would be defined as. And they defined it as "any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection." But they also included in the definition that a "test result" means a statement or assertion that an individual is positive, negative, or at-risk for HIV or a certain level of antigen or antibody for the AIDS virus.

The information that Ms. Garcia says that Santa Rosa should have provided for her falls squarely within this definition. She pled in her petition that we should have told her that Mr. Balderas might be HIV positive, that he was at-risk for HIV.

The second important provision is §81.103, the confidential provision. And in that provision, the statute states: That a "test result" is confidential. As discussed, a "test result" means a statement that someone is at-risk. And they said that no one may disclose that information except as provided by the statute. There are some exceptions. And one of the exceptions is that you may disclose this information to a spouse, but they limit what they meant by "test result" in this regard, and stated that you could only release this information once there has been a "test result" that the individual is positive for AIDS or HIV. The evidence in this case is that Santa Rosa never tested Mr. Balderas, we never knew that he was HIV positive or had AIDS until after he was diagnosed by his family physician, and either Mr. Balderas, it's not clear that either he or his mother informed us that he was actually HIV positive.

The bottom line is, the legislature has taken this responsibility on to deal with

the issue of confidentiality and when information regarding a patient's HIV status should be released. And they didn't just stop at the confidentiality provisions in determining when it should be disclosed, they enacted in §81.051 a Partner Notification provision. All premised on first, there has to be a finding that a patient is HIV positive. They even went one step further to protect the public. And they enacted subchapter G of the Health & Safety Code, which involves situations where an individual who is known to be HIV positive, and who is a threat to the public safety, that there are procedures that DA's and public health officials can take to actually have a patient committed so that they will be under care and no longer be a threat to the public at large.

So when enacting this legislation they didn't just come out with this statement that certain information is confidential. They looked at all of the issues: the rights of privacy, obviously with the confidentiality; and the need for protecting the public at-large. And that's what they did with these provisions, and that's why this case is controlled by the legislature's statutes and the Health & Safety Codes. Santa Rosa was precluded by these statutes from releasing any information regarding Mr. Balderas being at-risk for HIV.

And that's the bottom line, I think in this case, that we begin and end with the statutory provisions. But even if the court should find, and as the plaintiff argues, that this was really not a "test result", and I think when they do that they've ignored the full context of the definition given to a "test result" by the legislature.

HANKINSON: When the legislature amended this statute in 1989, did it drop the phrase that was earlier in the statute that you could not pursue a cause of action based on a failure to disclose?

SHEEHAN: They dropped a part of the exception in part 7, which stated: this does not create a duty to tell the spouse, and that you could not sue for failure to tell a spouse. But it was specifically related to that subpart 7, and after there's a positive "test result".

HANKINSON: Is that amendment of any significance to your argument that the statute controls whether a cause of action exist in this case?

SHEEHAN: No, it does not. I think that we need to keep the context of the facts very clear in our mind, that 1) Mr. Balderas was a hemophiliac who was seen at the Hemophiliac Clinic in the late 70s and early 80s. He was last seen at the center in 1981. The time period in which Ms. Garcia says we should have informed her was in 1988 and 1989 - 7 years since he had been seen at the clinic.

BAKER: Is there anything in the record that shows why Santa Rosa continued to send notices for him to come back if they had discontinued treatment in 1982?

SHEEHAN: Yes, there is. There is experts' affidavits stating that as of the Summer of 1986, it was the standard of care in the industry for a hemophilia to attempt notification to the patient

to himself to let him know that he may have been exposed to tainted products and that he should be tested. And the notices also included a statement that you should bring a spouse or steady girlfriend with you for testing.

BAKER: So under those guidelines even though this particular person never went back they had the duty to give those notices of returning to treatment?

SHEEHAN: Yes, and we admitted in the TC that we had a duty to him to inform him of that.

BAKER: There's a dispute about that, is that right?

SHEEHAN: The dispute in the CA was that they felt that there was a fact issue of whether or not we had fulfilled that duty. And the expert testimony provided, and it was uncontroverted, that the standard of care was to attempt notification, that since this was a look back program of a former patient, that there was no duty to hire private detectives to search out and find these individuals, but the duty was to attempt notification. And in fact, Mr. Balderas himself admitted in his deposition testimony that the address that we had sent those notifications to was his correct mailing address. Now he stated in his deposition, he didn't receive them. But we think that's beside the point, because the duty was to attempt notification to a former patient that we did not have an on-going relationship with.

HECHT: But you only notified him that he should be tested?

SHEEHAN: Yes.

HECHT: You didn't notify him that it might not be a good idea to have sexual relations with anybody else? If you have a duty to someone who might have seizures to tell them not to drive, do you have a duty to the public to tell someone who might have AIDS not to have sex?

SHEEHAN: No. Our position is is that until there has been a diagnosis that you actually have AIDS, that you are actually HIV positive, that you have no duty. And the basis of that is the foreseeability, that when this court looks at creating a new duty, the thing you look at first usually is whether there's a foreseeable harm, whether there is a substantial risk of injury to an individual. And it is our position that until and up until the point that a health care provider knows that a patient has a communicable disease, that they are actually HIV Positive, that there is not a legally foreseeable risk of injury. Not up until that very point in time.

And we must keep in mind that they're not saying that this is a derivative cause of action in which Ms. Garcia could have a claim based on a duty to inform Mr. Balderas himself that he was at-risk. She's saying that we should have sought her out and told her individually. And that's where the statute comes into play, and the fact that where the bottom line

is, we did not know that he was HIV positive. And until a health care provider has that information, we think it is an overly broad, onerous burden to ever place on a health care provider.

In the *El Chico* and *Otis Engineering* cases, the court looked at the knowledge that the defendant had to determine whether there is a foreseeable risk of harm. And in both of those situations those defendants knew of the obvious intoxicated state of an individual. In this situation, the only allegation has been made that we knew that he might possibly have HIV. That is not sufficient for a legally foreseeable risk of harm.

Santa Rosa did not create this harm, because the time in which Mr. Balderas, as sad as it is was exposed to this deadly disease, was before there was any testing. There can be no actionable misconduct against or placed on Santa Rosa for the fact that Mr. Balderas was exposed to HIV through tainted blood products.

One of the primary concerns when you read the literature regarding HIV, the spread of the virus is that it is very important for individuals to be tested and counseled. We believe that if there was any sort of a duty imposed upon a health care provider to inform third-parties that someone might be at-risk or might possibly be HIV positive, that this would act as a deterrent for individuals to seek treatment, to be honest with their health care providers that they may be involved in risky activities, such as unprotected sex or IV drug use. And that this would certainly violate their privacy rights when all we know is is they might possibly by HIV positive.

HANKINSON: Is it your position that the statute controls and that we need to look at the question of whether a duty exist at common law?

SHEEHAN: Yes, the statute controls and we do not need to. And I'm making the alternative argument just in case. The bottom line is, we did not know he had HIV, and without that knowledge there can be no foreseeable risk of harm.

HECHT: Does Ms. Garcia have AIDS?

SHEEHAN: The record indicates as the last time she was tested, no, and she was tested twice.

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RESPONDENT

POWELL: I think one of the things that they concede regarding the definition of ""test result"s" is that there has to be a statement of some sort regarding a specific individual. I think they also concede in this case that there was no statement whatsoever from any source regarding Alberto Balderas, who is the individual who was infected with AIDS, and was married to Linda Garcia.

HANKINSON: Do you agree that the statute controls in this case?

POWELL: No.

HANKINSON: Why not?

POWELL: Because there was no statement made of any sort that Alberto or anyone involved in this case had or might possibly be infected with the HIV virus. The definition of a “”test result”” refers to specifically 1) a statement; 2) that it be directed towards a specific individual; and neither of which we have here.

I think what we have here is what is referred to in the case that is cited in the opinion by the appellate court *Wildly(?) Research Institute v. Beeson*, in which they described how the knowledge of AIDS being infected or the virus being infected into the blood supply came about, and why in that case it provided a cause of action. In 1983, they determined that the blood supply was infected by the HIV virus, because of a substantial number of homosexuals who had given blood. This was in late 1982. In January of 1983, it became common knowledge and the blood supply banks started changing their practices as to how they both accumulated, collected the blood and the distribution of the blood. It was as the court described in the appellate opinion in our case a situational situation, situational knowledge that was common throughout the blood supply system in the US, and in Europe as well. That’s how they came to know that in all probability, or there was a very good chance because of his being a hemophiliac, that Balderas was in fact infected. They also knew according to us that his brother had died in 1985 of AIDS, because he also was a hemophiliac who got his blood from the same center.

Balderas testified in his deposition that the only place he or his brothers have ever gotten blood was from Santa Rosa. Their practice would be: They call Santa Rosa on the phone and say we need Factor VIII; Santa Rosa would tell them: well what you do is you go through a specific doctor down there in the Valley, we’ll send the Factor VIII to that doctor, and he or she will administer the blood factor. Factor VIII is a clotting factor.

HANKINSON: Let me take you back to my question. What is the purpose of this statute if it is not intended to indicate to whom information is to be released, who is to release it, and under what circumstances it is to be released? You’re telling us that this statute doesn’t apply in this case, and I’m having a hard time understanding what the purpose of the statute is if not to be used in this type of situation.

POWELL: The purpose of the statute is that when they decided they were going to start testing for AIDS in the late ‘80s, there was concern with the results of these tests being used to identify certain groups who might be discriminated against because they are infected with the HIV virus. So, in particularly, the purpose of the statute was to protect those who are in the workplace from being discriminated against, losing their jobs. I think they even refer to some of the articles in

their brief that the statute came about because of lawsuits filed by what is called the _____ Legal Defense Fund, and the ACLU representing various gay groups who are concerned that they would be identified, particulary in school groups, they would use these "test result"s to find out who they are, and kick them out of their jobs. That's why that particular statute came into effect.

In 1989 it was changed, because the federal government mandated change come about because the states were told that if you did not provide for partner notification, then you will receive no federal funds for the treatment of AIDS or for the identification and research into AIDS. That's why the statute was changed in 1989 to provide for that.

You asked what was the purpose of it? That was the purpose of that particular statute. Directly relating to testing, going out and telling people: Okay, you have to take a test. Those specific people being concerned that what if this test shows something, what is going to happen to me in the workplace, and in other areas out in the public life? We're not talking about the public life nor are we talking about people who have been submitted to tests. What we're talking about here is an infected blood supply, an infected blood supply which has the very large possibility of not just infecting hemophiliacs, but infecting those who are the partners of the hemophiliacs.

OWEN: So what you're saying is the statute would apply if they had attempted to notify his employer, but it doesn't apply to his fiancee, is that your position?

POWELL: The statute was designed towards employers. In the case of Balderas, the problem is, we are not dealing with a test.

OWEN: Well, that's my question. If they had wanted to notify Balderas's employer are you saying this statute wouldn't prohibit them from doing that, because there was no "test?"

POWELL: I think if they were to notify Balderas's employer this statute would not...well it depends on what kind of notification you're talking about.

OWEN: They intend to make a statement or assertion that Balderas is at-risk because he was exposed to this blood supply. Now are they permitted under this statute to notify his employer of that or not?

POWELL: I would say no. Because what we're dealing with is a situation in which you have to have identifiable third-parties who are at-risk of being infected. There is where we get back to what we've talked about throughout this case, and is being talked about in the other cases is the *Tarasoff* doctrine.

ABBOTT: Is it incumbent upon the hospital to go out and try to identify all those people who may be at-risk, not only people who may be a spouse or fiancee, but maybe everyone with whom that person has had intimate relations?

POWELL: I think from a practical standpoint, we have to deal with readily identifiable third parties.

ABBOTT: How do you define that?

POWELL: Well in this case, they had a conversation on the telephone with Linda Garcia...

BAKER: Was she married to him at that time?

POWELL: At that time, she was engaged, they were getting married in the near future.

BAKER: So she wasn't a spouse?

POWELL: She was not a spouse at that time.

BAKER: Does that make a difference?

POWELL: I would say, no.

BAKER: Because you argue the statute doesn't apply?

POWELL: Not only that the statute doesn't apply, I would say no, because she is 1) a sexual partner; 2) in this case they knew they were getting married in another month.

BAKER: Who knew that?

POWELL: Representatives of Santa Rosa based on their conversation with Linda Garcia on the telephone.

BAKER: So the record shows that when she talked to them on the phone, she said: well, I'm his fiancee, we are going to be married in a month, why are you calling?

POWELL: Yes. She was at his mother's house, and as part of what they have brought up themselves is part of this continuous attempt to get hold of Balderas, not only did they write him letters they also called on the telephone to say you need to come in for your appointment. On one of the occasions that they called his mother's house, Linda happened to be there at the house. She took the telephone call and had the conversation with the representative of Santa Rosa.

ABBOTT: But does the record make clear that she identified herself as his fiancee?

POWELL: Yes.

OWEN: If she hadn't picked up the phone, would they owe her a duty?

POWELL: Well it's different that she did pick up the phone.

OWEN: Had she not answered the phone, would they owe her a duty of notification?

POWELL: I think that if she had not picked up the phone, they owed her a duty to, at least through Balderas, attempt to find out who she is, or if he has any sexual partners. This is completely consistent with the duty that has been imposed on the public health system throughout this country for at least the past 50 years as to the containment of contagious diseases.

ENOCH: You said this is a duty that's imposed, and you're talking about partners and sexually active and all of that. The response from Santa Rosa is: here's the statute; the statute doesn't identify who you don't tell; it identifies the person who has the information doesn't tell. Now it provides a specific exception that says: You can tell the spouse. Now does this statute have an exception for partners or does it have an exception for: well if we know they're sexually active and someone identifies them self to the hospital that they are one of the partners, that you can tell them. I mean is there anything in the statute here that contains any of the language or words that you're using in this argument?

POWELL: No, there's not. The statute does not. The statute refers to "test result"s. I will give you an example of what I think notification should at least at a minimum contain, is a statement that the blood supply has been infected. Those that receive blood particularly hemophiliacs who received Factor VIII which contains products from many different blood sources, not one person, has been infected with this virus, those who have received this product should be very cognizant of the fact that they themselves may be infected, and either refrain from sex or warn their partners as to the condition.

SPECTOR: Is your statement covered by the definition in the statute of ""test result"?" In other words, the at-risk portion of it?

POWELL: No, it's not, because 1) it's not a statement, it's not a result of a statement they have received regarding an individual; and 2) it is not a result of something directed towards any specific individual.

OWEN: I guess that's where I have a problem. You keep saying for the purposes of the statute, Balderas is not readily identifiable. But then you're saying, but she is readily identifiable for common law purposes?

POWELL: He is readily identifiable in the sense that he has received the blood product. There has been no statements specifically made towards him by some other source, who has said: Balderas, individually is an at-risk person. And that's what this "test result" definition says: Any

statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection. Clearly, we don't have anything like that here. If they send out a statement saying: that all persons who have received blood in this time-frame, particularly Factor VIII, need to be checked because they may have received infected blood, that clearly is not the same as this. If they say to an individual person, a sexual partner, a spouse that this blood supply was tainted, you need to think about that, then you're talking about again, not talking about an individual, what you're talking about is a statement as to the blood supply.

ABBOTT: It seems as though you're asking us to develop a fairly detailed common law standard?

POWELL: Correct.

ABBOTT: And considering the fact that the legislature has dealt in detail in this area would it not be fairly arrogant for the court to say: you all have your policy considerations, you may have passed something, you didn't pass other, we are going to implement our own policy about what should be done in this area.

POWELL: I think the fact that they have done something detailed and left out what I am talking about leaves an area that has not been addressed by that.

ABBOTT: Maybe it was not addressed by them for certain policy reasons?

POWELL: Well I think the specific policy reasons is, because as I've stated in response to the earlier question, that this statute was specifically designed in response to the move to have test and either require testing under certain circumstances. And certain groups were worried about what would happen if the person who was tested under these circumstances is infected, what is done with those tests? That is the kind of situation that this statute was meant to address. It is not meant to address a general knowledge of what is in the blood supply, and it is not meant to address the containment of a contagious disease that like other contagious diseases have been and can be spread through certain types of contact.

ABBOTT: You're not suggesting that we develop a body of common law for the containment of contagious diseases are you?

POWELL: Well I think that this does fall within that, yes. I, very much think that. Because what we have right now is, that we have AIDS that's been treated completely differently than most contacts than public health has treated contagious diseases in the past. And the main difference in the way AIDS has been treated or HIV was treated, particularly in the late '80s, early '90s nationwide and in Texas is in partner notification. For example, in any sort of sexually transmitted disease they are required to notify partners of the fact that they you might have an infected partner. And AIDS has been significantly different in that regard. Now, it's moving away

from it because there's a realization that this is the only really effective way or one of the only effective ways to contain the spread of the disease.

PHILLIPS: Are those requirements by law or ordinance, or are they common law requirements on the other sexually transmitted diseases?

POWELL: Statutory in most states.

PHILLIPS: The common law cases in this area are the ones set forth on page 6 of your brief, is that right?

POWELL: *DiMarco* would be a common law. It is almost identical to this as to a common law context. There you have a nurse who is pricked by a needle while providing care to a hepatitis infected person. And the hepatitis virus being very similar to the AIDS virus. And that person is pricked by a needle, becomes infected with the hepatitis virus, that person has sex with his girlfriend, he dies, and the girlfriend becomes infected with hepatitis. The Pennsylvania SC held that there was a cause of action, she could have the cause of action against the hospital for not having warned him. And then they say not even having warned her that she should not have sex with this guy who is infected with the hepatitis virus. So that is a common law finding that is very similar to this. The difference being, you have a needle prick as opposed to a IV in a hemophiliac. But that is a common law finding that is very similar. The same as the *Tarasoff* case as well as the *Kerrville* case. Those would be common law findings of warning. As far as the containment of diseases, then I would point the court to the Pennsylvania SC case.

ENOCH: If I understand your argument, you're saying Santa Rosa provides blood to hemophiliacs? Santa Rosa comes to the realization that all of their patients that are hemophiliacs are at-risk for HIV. As a result, Santa Rosa had an obligation to find out all of the spouse's partners of sexually active hemophiliacs and notify them directly that they are at-risk of HIV.

POWELL: Or that the blood supply was infected.

ENOCH: That means your at-risk. The definition in §81.101 says: The "test result" means any statement or assertion that an individual is at-risk for the HIV antibody.

POWELL: They are talking about Balderas in that context.

ENOCH: Why isn't the Santa Rosa statement to Ms. Garcia calling her saying: you are at-risk because the blood supply's at-risk, not a specific statement that Balderas is at-risk because the only way Garcia would be at-risk is because of her relationship to the hemophiliac who was receiving the blood from Santa Rosa. Why isn't that a "test result" that's made confidential under this statute?

POWELL: Because the information that they have as to why Balderas is at-risk is not as a result of any "test result". Their knowledge does not come from testing of Balderas. As it says here that there has to be some statement given to them from some source that would result from either testing of some sort, that he is a person at-risk. What we don't have is that. What we have is something that very narrowly, admitted, is different than that. And that's why my position is that this is not something that is covered by their definition of "test result".

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REBUTTAL

GIBSON: Santa Rosa attempted to follow the law in regard to Mr. Balderas, and they got sued for doing exactly that. The record is complete to show that when Santa Rosa realized that their hemophilia patients were at-risk, that they undertook to notify those patients, that they undertook on numerous occasions to notify Mr. Balderas. And Mr. Balderas acknowledges that he received phone calls, he said he didn't see the letters, but he acknowledges: yes, they would call the home and I did not go, because I was busy and I felt fine.

The fact of the matter is, had Mr. Balderas come to Santa Rosa, he would have been tested, chances are he would have tested positive, he would have been counseled. But the facts are, that is not what happened.

The situation in this case is, that we're being sued because when a phone call was made to the home, Ms. Garcia, who then was a finance, answered the phone and we are held liable for not telling her: Ms. Garcia, oh, your Alberto's finance? Well you need to be careful about that, because you know Alberto might have AIDS because he is a hemophiliac. That would have been totally inappropriate. It would have been a violation of law. It would have exposed that person to possible criminal penalties. Not only the AIDS statute, which we have discussed and the court is well familiar with, but art. 4495b, the general medical privacy statute would have forbid that. And that imposes civil and criminal penalties for disclosing confidential medical information. There is no exception for this kind of situation. Besides that, the AIDS statute up until Sept. 1989, said: There is no cause of action for not notifying a spouse. Period.

SPECTOR: If Balderas had been tested, how does subsection (b) come in? Must he agree to release that information?

GIBSON: No, not under (b). Once there is a positive "test result", the health care providers have the privilege to notify a spouse. For instance in this case, if Alberto had been adamant: No, don't tell my wife, please don't tell my wife, Santa Rosa still could have done so.

SPECTOR: But it's not mandatory?

GIBSON: It is not mandatory.

BAKER: The definition says a "test result" is a situation that can exist where a person has not even been tested."

GIBSON: That's exactly right.

BAKER: So you can say that person hasn't been tested but they may be at-risk because of the blood factor?

GIBSON: It would have been inappropriate for our nurse or unit clerk, or whoever was making the calls to say: You know, Ms. Garcia he has not been tested for AIDS, and should be. That would have been a violation of the statute.

PHILLIPS: 4495(b) or something in this statute?

GIBSON: On both of them. This is specific to the situation and that is why we have relied on it primarily. But art. 4495(b) applies just as well.

PHILLIPS: The day they got married then could _____?

GIBSON: If there was a positive "test result". The statute says: a "test result" may be released to the wife if the person test positive for AIDS; and, then, and only then. This is the way physicians work, they work from a diagnosis and they work from there. Alberto never had a diagnosis, he was never tested positive.

PHILLIPS: So a statement that someone has not been tested for AIDS has to be a negative "test result" or an at-risk "test result"?

GIBSON: It actually says: that statement or assertion that the person's positive, negative, at-risk or has not been tested for AIDS, including a statement or assertion that he is at-risk.

PHILLIPS: Those are "test result"s, but none of those can be positive unless you've actually been in and have a test?

GIBSON: In order to notify a spouse, the "test result" has to be positive; otherwise, you're in violation of the statute.