# ORAL ARGUMENT – 10/15/03
# 02-0701
# BATTAGLIA V. ALEXANDER

CARNEGIE: The legal proposition that we contend controls this case is that if the only person who can act on behalf of a professional association (PA), the only person whose acts are acts of the PA is not negligent, then the PA cannot be negligent. We think that's the controlling principle.

PHILLIPS: Wasn't this case tried where everybody understood at the TC level that if you're talking about medical negligence depends on a doctor doing something, that was the doctor individually, and if you're talking about the doctor's administrative negligence - hiring the wrong person, that was going to be submitted as the PA?

CARNEGIE: I don't agree with that at all. If you look first at the plaintiff's pleadings, and the critical portion of the record is page 38 of the clerk's record, is the portion of the plaintiff's pleadings that controls this. Those are the allegations of administrative negligence. And the way those are phrased they say, Dr. Battaglia, Battaglia PA, Dr. Polk and Polk PA, all violated a duty to enforce and promulgate policies in the following respects, and then they list them.

That makes two things clear _____. The administrative negligence allegations were made directly against the individual physicians; and second, the administrative negligence allegations against the PA were based on the acts of those physicians.

So for example, when the TC granted directed verdict in favor of Dr. Polk it was necessarily granting directed verdict on all claims alleged against Dr. Polk.

O'NEILL: So this is a pleading issue you're talking about. You don't quarrel with the notion that the doctor can act in two capacities, both as administrator and as a doctor. You're just saying because the grant of a directed verdict was broad, and the pleadings alleged both, it covered it?

CARNEGIE: That's correct. He could act in two capacities clearly. But when you grant directed verdict on all claims you're saying he's not negligent. Period.

HECHT: Then why not grant the directed verdict in favor of the PA?

CARNEGIE: They probably could have and should have...

PHILLIPS: But he didn't even ask for it.

CARNEGIE: You're right. He didn't ask for it. But what he did do, which I think amounts to the same thing, is when it came time for the charge, he objected. There is no evidence of

negligence to support the submission of the negligence question against the PA. And then he elaborated on that and said, the only allegations are of vicarious liability.

I think what he is saying, if you look at this in context of the pleadings is, he's saying the allegations of negligence against this PA are based on this doctor's acts. And, therefore, since this doctor has been held not negligent in any respect, there is no basis for submitting a jury question against this PA. And I think that's right.

OWEN: Isn't it like arguing - let's say I'm an individual and I'm also a director. And I negligently hire someone. I can't be liable in my individual capacity. As a matter of law you can't reach me, but you could reach me in my capacity as a director. Wasn't that what was happening here?

CARNEGIE: I don't think so. As you know a PA doesn't provide liability insulation. For purposes of professional liability it's treated the same as the doctor. So for any professional malfeasance if the doctor is negligent, the PA is automatically jointly and severally liable with the doctor.

Now what the plaintiffs are trying to do here is they are trying to say, Well for the doctor we're going to parse out his negligent acts. And say for the doctor it's medical negligence, but for the PA it's this administrative negligence. And by doing that, we're trying to get two entities on the hook directly liable for negligence. What that does is it allows the plaintiff in this circumstance to circumvent the statutory liability caps under the medical liability act.

He obtained directed verdict for Dr. Polk, and then when it came time to submit the jury questions, he objected to the submission of the jury questions against the PA's I think on the rights grounds. There is no evidence that the PA did something separate and apart from what these doctors did that would justify submitting a separate jury question against the PA independently.

There would need to be some additional acts, some separate acts from what the doctors did to justify a separate jury question. Otherwise you're effectively asking the same question twice. And that's what the gist of the objection is. There's no evidence that justifies separate or additional one, because everything that could possibly support their liability is subsumed within either the directed verdict against Dr. Polk, or the jury questions being submitted against Dr. Battaglia.

Now there's nothing in the jury question against Dr. Battaglia that says, Gee jury, you can only consider evidence against Dr. Battaglia if it relates to medical negligence, or that relates to acts in a particular capacity. The question was very broad. Was Dr. Battaglia negligent? And the jury answered that no.

In light of that question, the breath of that question, and the fact that the PA can only act through Dr. Battaglia, there was no basis to submit a separate question against the PA,

because there was no allegation or evidence that the PA did something in addition to or separate from what Dr. Battaglia did in any capacity. So this was all covered by the directed verdict or the jury question.

Even if you were to accept this medical administrative distinction that plaintiffs advance, and I contend it doesn't exist, there is still no evidence to support the submission of the jury question against the PA.

In order to have evidence of negligence, you must have evidence in this kind of case: expert testimony of the standard of care. Now the CA refused to consider that. They said that an objection to no evidence of negligence doesn't preserve an objection. That there's no evidence of the standard of care. This is the only case that I'm aware of that has ever said an objection to no evidence of negligence doesn't preserve an objection to the standard of care. And the reason of course is, that's what negligence is. It's a violation of the standard of care. The standard of care is a vital fact that has to be proven. So when you object that there is no evidence of negligence you're saying there is no evidence of a violation of the standard of care. No evidence of violation. No evidence of the standard.

The CA then went on to do something that I think is really a logical impossibility. They said, well we're not going to consider whether there is evidence of the standard care, but we're still going to consider whether there is evidence of negligence and they found that there was.

The question is, if you look at an act and you say, well I find that this act is evidence of negligence, the question is how do you know if you don't know what the standard of care is and you haven't looked at it? That's what negligence is. It's a violation of the standard of care. If you look at an act - you know the doctor cut the nerve during the operation, therefore, he was negligent. Well how do you know? Maybe he complied perfectly with the standard of care and still cut the nerve because it's a difficult operation and that just happens.

So the CA's analysis just can't work. You can consider the negligence question without considering evidence of the standard of care. Now here there is no evidence of the standard of care. Plaintiff's expert in this case never talked about the PA at all, never talked about the standard of care for a PA. So plaintiffs are kind of left in their brief with default arguments. They say, well nurse Cernocek was negligent. Since she was negligent, therefore, the PA must have violated the standard of care. Sort of a res ipsa argument.

I don't think that's valid at all. The PA could have perfectly applied the standard of care, and nurse Cernocek still could have ended up committing a negligent act.

Then they rely on evidence, which isn't evidence of the standard of care, things like Dr. Battaglia is saying, I have a responsibility to insure that patients get quality medical care. Well that may be a statement of his duties, but it's not a statement of a standard of care.

Nurse Cernocek had certain standards that she had to meet to maintain to her certification as a CRNA. Well is the standard of care for the PA higher than making sure she meets those requirements? The hospital had internal quality control standards in training for what the PA's were supposed to do. Did it go above and beyond the hospital's training requirements and what they were supposed to do? There is absolutely no evidence about that.

This court in two cases recently, American Transitional, I believe is one that talked about what it takes to be evidence of the standard of care. And you have to say what is it specifically that this entity was supposed to do that they didn't do? And there is no evidence like that in this record.

Turning to the prejudgment interest issue. The issue here is what are past damages as that phrase is used in the medical liability act, in (P)? I think the answer to that question is addressed directly by the act, because there is a specific definition of past damages in 16.02(D) of the Act. Past damages are the amount awarded to compensate the claimant for past losses. They are not the amount found by the jury as past losses. And there is a very clear dichotomy in the statute between amounts awarded to compensate the claimant and amounts found by the jury.

If the legislature had wanted to define past damages as amounts found by the jury, it could and would have done so. But it made a very deliberate distinction here.

O'NEILL: Then why didn't they just say awarded judgment as they had before?

CARNEGIE: They could have done that too. But I think this gets to the same place. If you construe these provisions together what you get is, it has to be awarded to compensate the claimant and found by the jury. It has to satisfy both standards. And that doesn't make found by the jury meaningless, because for example there are certain categories of damages that oftentimes are not found by the jury that are stipulated. This case is a perfect example. There was $57,000 in medical expenses that were not found by the jury that were stipulated. Nevertheless, the court awarded prejudgment interest on those two, which I think is sort of inconsistent with plaintiff's own argument.

If you look at the entire purpose of this act, which is to make awards rationally related to the damages to reduce doctor's liability, this idea that you can have a doctor liable for zero actual damages because of settlement credits, and yet be liable for $100's of thousands of dollars in prejudgment interest on amounts that have been paid by some other settling defendant, that the plaintiff has had the use of that money all along doesn't make any sense at all. In addition it creates terrible problems when you try to apply this in conjunction with 33.012 of the Civ. Prac. & Rem. Code, and 33.013.

If you have for example a plaintiff or a tenant who is found 1% liable and has zero liability for damages, you might think well he's going to be liable for 1% of the prejudgment interest that's awarded. But if you look at 33.013 it doesn't apply that way. It says you apply the

percentage findings to amounts found by the jury. There's no mechanism in that statute for saying we'll apply that 1% to the prejudgment interest.

So you end up with ths 1% liable doctor with no mechanism for reducing this prejudgment interest. The same analysis applies with regard to for example contributory damages. 33.012 says you apply the reduction for contributory negligence to damages. It doesn't say you apply it to prejudgment interest. And mathematically if you apply it to damages first and then calculate the prejudgment interest, you come up with a different result than if you calculate the damages plus the prejudgment interest and then apply it to contributory negligence reduction.

So under plaintiff's argument to get any reduction at all you have to make the word "damages" in 33.012 mean something different in medical liability cases than it means in every other kind of case. And I think that damages means damages for all cases.

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RESPONDENT

DUBOSE: The TC and the CA both correctly held that there was evidence to support the negligence finding and that the prejudgment interest was calculated correctly.

The first is a pure no evidence review; the second question is a pure question of statutory construction.

I will begin with the first argument about the standard of care and the PA's which again is a no evidence argument. I noticed that J. Hecht in the first argument this morning pointed out in the no evidence review of a negligence question, which this is, this court only looks at whether there is any evidence from which a rational person could conclude that there was negligence. There is more than enough evidence of that in this case.

HECHT: The part that troubles us I think is, how do you separate an entity from its only principal? I know you have a vicarious liability argument but on the direct liability how do you ____ evidence?

DUBOSE: You do because that principal as they repeatedly testified in this case at different times wear different hats. Sometimes they are practicing medicine and sometimes they are administering rules to the PA.

As J. Phillips pointed out, that was well understood in the way that this case was tried. The doctors talked about wearing different hats. As you pointed out, I believe, at the motion for directed verdict, not only did they not move for directed verdict on the PA, but when they moved for directed verdict on behalf of Dr. Polk the judge said, are you also asking for a directed verdict on behalf of the PA? And they said oh no, absolutely not. Whereas if this argument was what they had in mind at the time they certainly would have.

In the way that the case was tried, and particularly if look at the closing argument, in plaintiff in closing argument was talking to the jury about how to interpret these questions. And he was talking about question No.2. And he first talked about the doctors and nurses and said, so the question is, was nurse Cernocek, was Dr. Crowder, was Dr. Battaglia providing good competent care? But then you get to the duties of the PA. If you're going to be an administrator, if you're going to be the exclusive provider of anesthesia services and have an exclusive contract, doesn't that have some responsibility then to provide good supervision to assure that the care inside is provided correctly, adequately and competently. So that's the question asked about Dr. Battaglia, PA and Dr. Pope, PA.

So he clearly delineated those differences. There was no confusion. There was no two bites to the apple. There was two different types of arguments.

HECHT: One thing that troubles is will this give rise to situations where every time you go to see a doctor who is a PA, and he has a nurse or someone else help with the treatment and you claim that that was negligent, you would have one claim against the doctor for medical negligence, another claim against his association for perhaps negligently hiring a nurse or overseeing the nurse, even though it's really just him, and of course a claim against the nurse. It seems to be possible to make this same argument virtually in every case.

DUBOSE: Only if his PA has taken on the responsibility of supervising that nurse. There's no common law duty to do that. But in this case, the PA's entered into an exclusive contract with the hospital and said we will be responsible for making sure that those people comply with professional standards.

In the way that this case was submitted to the jury on negligence question no. 2, there were different instructions for the different parties that were submitted. The instruction for the doctors said you may consider what is the standard ordinary care for a medical doctor. A medical doctor typically does not have a duty to insure that there are policies and procedures in an anesthesia department. That's something the PA took on by contract.

On the question for the PA's they said you should consider what is the ordinary standard of care for a PA? A PA can't practice medicine by statute. So by limiting those duties and their authorities, the court was saying you can only consider what a doctor should have been doing when we asked you about the doctors and you consider what a PA, which is essentially a business entity, can do when including that part of the question.

JEFFERSON: And you don't think there's expert testimony necessary in the claim against the PA for the administrative obligation?

DUBOSE: I do think there's expert testimony about the breach. I think the question becomes whether there was an expert who uttered the magic words "the standard of care for a PA is X." And I don't think they needed to do that and here's why. Up until a couple of years ago, the

longstanding practice in medical malpractice cases articulated by this court in Hart v. VanZandt in 1965, said that you have to have expert testimony of negligence and causation. Negligence consisting of a breach of the standard of care.

Two years ago in Palacios(?) this court when interpreting statutory language in 4590(I) about expert reports, because the statute said you have to have an expert report that articulates the standard of care, identifies the breach, and then establishes causation. The court wrote an opinion that said you have separately articulate the standard of care based on that statutory language.

Now if this court is going to say that that applies across the board with the trial testimony it can do so. But that case came out after this case was tried. As a matter of fact about 3 weeks before this case was tried, the CA's opinion in Palacios(?) came out and that opinion said that an expert report that merely said the healthcare provider breached the standard of care was sufficient. That's the law this case was tried on. If it then changed two years later with Palacios(?) and now you have to have someone specifically articulate the standard of care, that's not something we had the benefit of at the time. And if that is going to be the rule, and if we didn't meet it, which I think we did in this case, then we're at least entitled to remand in the interest of justice to try the case again under the appropriate rule.

But I think we did meet that standard of expert testimony. Because in this case we had the hospital contract that was entered into with the PA's, which said we will assure that both the doctors and the nurses under us comply with all hospital policies and procedures with PA's standards of ethics and conduct, and with the general standard of care.

Now this isn't a case where we merely said they had these duties and if the nurse and the doctor were negligent, then the PA's are automatically negligent. I think you can read their contract that far, but you don't have to in this case. Because we had expert testimony that identified specific things that they should have done but did not do that caused this plaintiff's injuries.

Let me talk about two of those. The first is they said in the surgical suite there are these monitors that monitor vital signs. And there are alarms on those monitors that go off if they dip below dangerous levels. In this case the expert said the alarms had been turned off. And the expert, Dr. Kirby, referred to the standards of professional organizations plus his testimony about the standard of care, which said the standard requires that you have those alarms turned off.

Dr. Battaglia admitted that these PA's did not have a policy against turning off the alarms, and they left that up to the individual physician.

One of the problems in this case was Nurse ____ did not notice vital signs for 20 minutes, and by the time she did it was too late. If that alarm had gone off these consequences wouldn't have followed.

That's a specific policy and procedure, not a medical treatment matter, but an administrative policy. There was expert testimony about and which there was state witness testimony that they did not have.

Secondly, there was a question about leaving CRNA's unsupervised in the surgical suite. The hospital policies and procedures in this case, which the contract required them to follow, said that anesthesia services will be provided by an anesthesiologist. CRNA's will be utilized and supervised by the anesthesiologist. And anesthesiologist who goes for a coffee break for 1 hour in the middle of a surgical situation like this is not supervising the CRNA. Policies and procedures also said that Nurse _____ had practiced in this hospital under the supervision and direction of a licensed physician who is an anesthesiologist.

Dr. Battaglia and two nurse anesthesiologists testified that it was common practice in this hospital with the anesthesiologist department run by these PA's to not require the doctor to be present, not require the doctor to be supervising the CRNA.

So those are two concrete policies that we had expert testimony about saying that's what you should have done and you did not do that. And that's where the standard of care comes from and the breach of the standard of care that supports the jury's finding of negligence.

With regard to prejudgment interest. I think there are three simple points that eliminate this argument. The first is, is that every decision by this court about statutory construction says that the place you start your analysis is with the plain language of the statute. Here we have a statute that says you award interest based on the damages found by the trier of fact.

HECHT: Past damages.

DUBOSE: Past damages found by the trier of fact, and the PA's have not offered any reading of that language that supports their position.

They rely on a definition of past damages, which says an amount awarded to compensate the claimant. Amount awarded is something that this court has used to describe both judgments and jury verdicts. Compensate is something that comes up in judgments and jury verdicts. Juries are asked what amount would compensate the plaintiff.

If you take that definition of amount awarded to compensate plaintiff and put it in 16.02(b), it says you award damages based on the amount awarded to compensate the plaintiff found by the trier of fact. So the only way you can harmonize that definition of past damages and the language about found by the trier of fact, is to find the amount awarded to compensate the plaintiff . If found by the trier of fact must be found by the trier of fact. That's what the plain language of the statute indicates.

The second point is, that this court must presume that when the legislature

passes statutes it is aware of the common law interpreting that matter. When this statute was passed in 1995, a year before this court had decided C&H Nationwide, and one of the things the C&H Nationwide case said was that the phrase "damages found by the trier of fact" means a jury verdict before deducting the settlement credits.

There was another case decided two years earlier, S_____ Security v. Dunsmore th
at interpreted language in a different statute about amount of the judgment, which said that means damages after deducting the settlement credit. So the legislature had a choice. It could follow the language in Dunsmore about the judgment, or it could follow the language in C&H Nationwide that says damages done by the trier of fact, which we know means before deducting settlement credits. And the legislature chose the language "damages found by the trier of fact," which had been interpreted the year before by this court in C&H Nationwide.

Finally, the third point is that in the 1995 legislative session there were two different bills that came from the legislature. One of them had language about damages awarded on the judgment. That died in committee. The other one had language about damages found by the trier of fact. And that was passed.

HECHT: Is there anything in the history that indicates that anybody intended a difference one way or the other?

DUBOSE: Nothing that we have been able to find. So based on the plain language of the statute, and based on this court's presumption that the legislature was aware of what C&H Nationwide said that that language meant, and based on the legislature's consideration of the two different statutes, if this court were to go in the PA's interpretation, that would honor the rejected statute and reject the past statute, which is certainly contrary to legislative intent.

SMITH: Can you address Mr. Carnegie's argument that the pleadings didn't permit the argument you're _____ here. In other words, everything was based on the doctor's conduct and that sort of flowed up through their conduct and that's how you pleaded the case?

DUBOSE: In the pleadings there are two separate paragraphs. One paragraph has a series of bullet points that talk about medical negligence. The next paragraph has a series of bullet points that talk about administrative negligence. It's true that at the beginning of both paragraphs, the plaintiff's pleadings pled generally and said all defendants have done all of these acts. I don't think the court is limited by that. It's limited by the way the case was tried, by the proof, and by the jury charge. And as I say, the jury charge by focusing on the duties of a medical doctor verses the duties of a PA, which is a business entity, solves that problem.

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REBUTTAL

O'NEILL: If there's no evidence to support a submission to the jury, the proper request is a directed verdict. Isn't that right?

CARNEGIE: Correct. Or in this case a rendition of judgment.

O'NEILL: So why was there no objection to submitting the PA to the jury?

CARNEGIE: There was an objection to submitting the PA to the jury.

O'NEILL: Was there a motion for directed verdict on the PA?

CARNEGIE: No. There was no motion for directed verdict on the PA, but there was an objection to the submission of the question to the jury on the PA on the basis of no evidence of negligence.

PHILLIPS: Which PA?

CARNEGIE: Both PA's.

PHILLIPS: But there is an exchange in the charge where the judge says you're talking about the doctor.

CARNEGIE: The exchange is in the context of the motion for directed verdict. Mr. Wilson, the trial counsel, moved for directed verdict on behalf of Dr. Pope. And plaintiff's counsel simply conceded there was no evidence of medical negligence, and said but you're not asking for directed verdict with regard to Polk, PA are you? And Mr. Wilson said no. And then he said but I'm moving for directed verdict on behalf of Dr. Polk. because there is no evidence that he was negligent in any regard whatsoever. So clearly he is moving for directed verdict in favor of Dr. Polk on the grounds that there is no evidence of negligence of anything that is alleged against him in the pleadings, which includes the administrative negligence.

Now when they say, oh, gee the judge understood that he was only granting directed verdict on medical negligence, that's refuted. If you look at the final judgment itself, on the 2nd page of the final judgment, about 4 lines from the top, it says after the close of the evidence and prior to the submission of the charge to the jury, all claims against Tommy A. Polk, M.D. were dismissed on directed verdict. So there's no question here that the directed verdict was on all claims including the administrative negligence claims.

O'NEILL: If you say all claims against M.D. that's medical negligence?

CARNEGIE: All claims against MD has to refer to all claims that are alleged against MD in the plaintiff's pleadings.

O'NEILL: Which would not include PA.

CARNEGIE: Which don't include PA, but they include all of the allegations of medical negligence. So what that directed verdict establishes is administrative negligence. Because what the allegations are is, Tommy Polk was administratively negligent. Tommy Polk, PA was administratively negligent. Well why? Because Tommy Polk acting for the PA is doing administratively negligent things according to the pleadings.

OWEN: If the TC thought that why wouldn't the TC have asked the question, well you're not pleading to dismiss against the PA. And then over objection submitted the PA's negligence. I mean if the TC really thought what you say was communicated it doesn't seem like the TC would have acted the way it did.

CARNEGIE: I think that argument sort of begs the question. The legal - you may be right, but the legal issue here is, as a matter of law Tommy Polk wasn't negligent. He wasn't administratively negligent or medically negligent. What's the legal effect of that finding? In light of that finding, can you then submit a question against the PA? Because if Tommy Polk wasn't negligent who was it who acted on behalf of the PA that caused the PA to be negligent? And then if you look at the jury question against Dr. Battaglia, I would concede that hypothetically at least you could submit two questions, one against Dr. Battaglia and one against the PA, but not when you submit the question as broadly against Dr. Battaglia as you did, such that it subsumes everything that the PA could possibly have done. In that circumstance, you're just asking the same question twice. So you can't - you would have to have some separate or additional negligence that is not subsumed within the question against Dr. Battaglia in order to justify the additional question against the PA.

OWEN: Did you argue there was a conflict in the findings?

CARNEGIE: No. Because technically the way that you judge a conflict, I don't think a ____ conflict can ever exist when it's two separate parties. I think it really is a true no evidence point and a point that Mr. Wilson made about this vicarious liability argument that's been made, which is essentially the PA's liability is based upon what this doctor is doing. There's no separate thing here to justify the separate submission against the PA.