ORAL ARGUMENT – 01/07/04
03-0611
MARTINEZ V. VAL VERDE MEDICAL CENTER

LAWYER: The primary issue in this case from petitioner's perspective is whether or not the Texas legislature intended to preclude a minor plaintiff who has satisfied the liability requirements of the Texas Tort Claims Act from pursuing a cause of action because of the impossibility of a legal requirement.

In this state this court and the Texas legislature have consistently protected the rights of minor children. In fact the law in Texas dates back approximately 150 years stating that not only are children excused from the limitations provision, until they reach the age of majority, but in fact they are without the legal capacity to sue.

HECHT: Do you think the legislature could do it?

LAWYER: Could the legislature allow children?

HECHT: No. Disallow. Could they intentionally do what they've done here?

LAWYER: No. We don't believe that they could, because it would be inconsistent with 16.001.

HECHT: I mean they can be inconsistent.

LAWYER: That's true. They can do anything.

HECHT: Like here in the first case. Can they do it and get away with it?

LAWYER: Not if this court is watching.

HECHT: On what basis?

LAWYER: Because if the court did that it would be taking away a cause of action that this court has recognized, a minor plaintiff doesn't even have the right to bring until they reach the age of majority. In fact in the Ruiz opinion, which J. Enoch you wrote on that opinion. In that case this court held that a minor plaintiff - or actually referred to a disabled, mentally incompetent person, but it also referenced minor plaintiffs, that there was a duty to protect those individuals. And that this court would not engraft something in the legislation that would harm that group of individuals.

We ask the court to recognize that same protection today in looking at the Tex.

Civ. Pract. & Rem. Code in conjunction with the Texas Tort Claims Act.

Now the Texas legislature in 16.001 has codified the 150 years of jurisprudence from this court. And recognized that a minor plaintiff operates under a legal disability and is incapable of initiating a lawsuit. In fact if that minor does so, this court has recognized that that proceeding should be abated pending the majority of that minor plaintiff.

BRISTER: Have the tolling provisions of 16.001 been applied to limitations period, other than those in subchapter 16?

LAWYER: Not that we can find. And in fact that brings up a good point. The issue in this case is not whether 16.001 on its face allows for the tolling of a notice provision. The issue is whether in looking at the absence of any language as to whether or not the legislature intended to allow minors to toll this notice provision, in the absence of any language in the Tort Claims Act, can we look to other places to see what the legislative intent would be?

HECHT: But you're not making a constitutional argument here. You're making an argument with respect to the statute.

LAWYER: That's correct.

HECHT: And as a in the first case before you get to it, does the first part of the CA's opinion matter to you? Does it matter whether it's jurisdictional or it's just a requirement?

LAWYER: It does matter in someways. And the reason it matters - let me first say why it may not matter. In Dubie(?) this court held and stated that there was a wrong assumption that something is functionally different about a noncommon law proceeding and that a noncommon law proceeding, a statutory cause of action traditionally is viewed in a harsher light. And in fact, that appears to be what happened in the 4th court in this case. Because even though the court below found that this was a nonjurisdictional requirement, the court still talks about strict compliance with the notice provision citing to the Streetman case, which certainly looks to be decided on jurisdictional grounds prior to Dubie(?) and not referencing that opinion.

HECHT: Like the plaintiffs in the first case today, whether you lose by a plea or lose by a motion doesn't really matter to the plaintiff.

LAWYER: It does make a difference in this case. And in fact, the reason it makes a difference is, if you are going to strictly apply the statute then you are going to look at that statute and say well there is no tolling provision. So that's the end of our discussion. However, if you look at this on a summary judgment basis, then you are going to look at what is the effect of that statute upon the litigation itself? You've already gotten in to the door in other words. And that's what we really believe the Tort Claims Act does in this case. The important distinction to draw is when you look at the Tort Claims Act under 101.025, that provision specifically is entitled Waiver of

Governmental Immunity Permission to Sue. You would expect that the legislature under that provision would set out when governmental immunity is to be waived. Well that provision says sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

If you look at the liability provision of the Texas Tort Claims Act, it's not the notice provision. It's 101.021. And it's entitled Governmental Liability. And this is exactly the reasoning that the 4th court went through in finding that the notice provision was not a jurisdictional requirement. Under 101.021, the legislature has stated that a governmental unit in this state is liable for personal injury caused by a condition or use of tangible personal property. With the irrelevant sections omitted.

We have alleged in this case adequate facts to meet that jurisdictional prerequisite. We have met the waiver of governmental immunity and the permission to sue requirement under the Tort Claims Act.

Interestingly, the notice provision is in a separate subchapter under §101. Subchapter B, which includes the waiver provision and governmental liability, is entitled Tort Liability of Governmental Units. But the notice provision is found in subchapter D, which is entitled Procedures.

BRISTER: The legislature could condition the waiver of sovereign immunity on notice. It just didn't this _____ jurisdiction.

LAWYER: That's correct. And that's why my answer earlier was that it would depend on how this court looks at Dubie(?). If the legislature was to take this and place it under the waiver of governmental immunity provision, then Dubie(?) would come into play. And the question would be, Do we have to look at these statutory prerequisites in determining jurisdiction? In this case the court doesn't even have to do that, because the legislature has set up what constitutes jurisdiction and what doesn't? The notice provision is not part of that requirement. And so we would ask the court to affirm the 4th court's holding in that respect.

Because the plain language of the statute creates a waiver of immunity through the showing of governmental liability as defined in the act, petitioners have satisfied that burden. But the 4th court stated that because the cause of action in this case exist by virtue of the Texas Tort Claims Act, petitioners must strictly comply with the notice provision. We would assert to this court that that holding is inconsistent with the 4th court's earlier holding that this is not a jurisdictional requirement.

There is no need for strict compliance in this case. The issue is, What was the intention of the legislature, and did the legislature intend to even though a minor has until age of majority to bring a cause of action, that minor who is legally incapable of initiating a lawsuit must somehow perform the legal impossibility of giving notice.

BRISTER: As they point out though, 16.001 says for the purposes of this subchapter these are the legal disabilities. And of course this subchapter does not include the Texas Tort Claims Act.

LAWYER: That's absolutely correct. However, our position again is, it's not that the language specifically tolls the notice provision. It's that the result would be absurd if the holding would be minors are incapable because they operate under a legal disability, they are incapable of giving statutory notice. However, they are going to have until they reach the age of 18 to bring their cause of action.

HECHT: So the bottom line is, your argument is that by not saying anything the Tort Claims Act allows tolling for minority?

LAWYER: We believe the omission speaks for volumes. And the reason we believe that is first, because at the time that the tort claims act that this notice provision was adopted by the legislature, there was already a large body of law that supported the proposition that a minor cannot bring a legal claim. Under those facts if the legislature is presumed to know the law at the time it enacts the statute, under that set of circumstances why wouldn't the legislature if it wanted to create an exception or say that minor's claims would not be tolled, why wouldn't the legislature have included that.

BRISTER: So we're not just deciding Texas Tort Claims Act. Your argument is that DTPA or challenge in a liquor license or anything else unless it specifically says anything about unsigned minors it tolls them too?

LAWYER: Yes to the extent that the law is very clear that an individual that is either an incompetent or a minor is unable to bring their cause of action. Unless the legislature says otherwise as it attempted to do under the 4590i. However, it didn't do that in this case, and it certainly could have if it had chosen to do so.

But secondly, the reason behind the notice provision is important to consider. The reason as this court has recognized is to make the governmental unit aware of the claim so that it can either defend it or try to settle it. That is the same reason as we've discussed in our brief for the statute of limitations provision. If you construe those consistent with one another, and in fact the 4th court even said that there was an analogy between the statute of limitations and the notice provision, if you construe those consistent with one another then this notice provision should be tolled during that period of time, because it does serve the same purpose as the statute of limitations.

There is nothing inconsistent about holding the legislature to what it has said in other area of law. In fact it would be inconsistent to believe the legislature intended to on the one hand create a cause of action, and in the other hand take it away.

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RESPONDENT

MOLINAS: The issue in this case is whether minors are excused or should be excused from compliance with the mandatory notice provision found in 101.101. And the argument of petitioners necessarily would require this court to engraft some sort of tolling or exception requirement onto a statute, which this court's prior opinions regarding statutory construction clearly disallow such statutory amendment by the judiciary.

The facts are undisputed in this case. At least the pertinent ones relating to the issue before the court. Unlike the first argument heard this morning this does not involve a fetus. It involves a medical procedure performed at Val Verde Regional Hospital to a 3-year old child. It's also undisputed that the first notice that Val Verde had of the claim, which is what they have to have notice of, was a letter sent more than 6 months later.

There was a medical malpractice suit brought against Val Verde by the parents. Also sued were a physician and nurse anesthetist. Now Val Verde filed a plea to the jurisdiction at the time all the claims were joined together. In answer to several of the questions in both cases, Val Verde believes that viewing this as a jurisdictional issue is important. Because in the first case there was a motion for summary judgment filed, and it was 5 years later that the case got to a point where it could go to an appellate court to determine what was a dispositive issue whether you look at it as a plea to the jurisdiction or by summary judgment.

The dismissal became final because there was a severance. And so I guess from a practical standpoint in this case right now it doesn't really matter. Because the plea to the jurisdiction was sustained by the TC and severed, and then became final and could be addressed by a CA. The difference occurs when the plea to the jurisdiction is denied. And then the governmental unit has a right to an interlocutory appeal to avoid the discovery, the trial, etc.

HECHT: What worries me about that is that the notice provision existed a long time before the interlocutory appeal provision. And we ought not to take a different view of the notice provision now than we would have taken on it 10 years ago when there wasn't an interlocutory appeal permitted.

MOLINAS: In terms of whether or not this is a jurisdictional issue, I don't think the court has decided that in terms of this particular statutory provision. And I think that the court could find this to be jurisdictional in the context of a tort claims act case without disturbing Dubie(?) for instance. The difference here is that with regards to a tort claim against a governmental unit no court in the state of Texas has subject matter jurisdiction over that claim unless there's been a waiver or consent by the legislature. And the waiver provision that petitioner quoted from says that immunity from suit is waived to the extent of any liability created by this chapter. 101.021 is not the only liability provision. There are several others. And the fact that this has been placed in a procedural subchapter also is not dispositive. The fact remains that there is immunity or bar to liability if the notice provision is not followed. And that's undisputed.

BRISTER: Do you agree with the state earlier that every procedural requirement that is

now or ever is put in to the tort claims act is jurisdiction?

MOLINAS: No. I think a distinction could be made between for example - where I have some problems following it through is with a presentment requirement. For example, 60 days before suit, like in a local gov't code. It's also in a different code so it's a little bit different animal. But here there is - whether or not suit is filed has nothing to do with the notice provision, or when suit is filed doesn't have anything to do with the notice provision. That notice has to be given 6 months after the incident giving rise to the claim, or there is no liability on the part of the state.

BRISTER: But that doesn't have to be. You could file suit a week after the incident, and give notice 6 months later. It's not a matter of it having to be pretrial. You've got to have notice. You've got have limitations. This is the way you've got to submit the jury question. This is the pre-judgment interest. All requirements, all mandatory in the Texas Tort Claims Act. Which ones are jurisdictional and which ones aren't.

MOLINAS: I don't think that something having to do with trial procedure would be jurisdictional. You're already in court.

BRISTER: Well you were already in court, too, until you raised the plea to the jurisdiction.

MOLINAS: Maybe I'm not understanding your question. What I'm saying is is that the - in the first hypothetical that you stated where suit is filed a week later, and then notice is given 6 months later. None of this is necessary because the suit is actual notice and that's the only exception in the statute.

BRISTER: We can't necessarily say Oh, well. Things that are pre-filing are jurisdictional and post-filing are not. Because the filing itself might be notice.

MOLINAS: Having certain trial procedures within the statute necessarily assumes a waiver of immunity from suit.

BRISTER: The legislature couldn't condition waiver on particular trial procedures couldn't it?

MOLINAS: It would be very difficult.

BRISTER: We waive sovereign immunity only if you try it in these kind of courts for instance.

MOLINAS: You mean a retroactive sort of waiver?

BRISTER: Say they set up a court of claims, just like the feds have, and drive it only in

this court. I mean they can certainly do that. And so why should we do it? You're saying we should do it. We should decide what's trial procedure and what's not, and therefore, draw a line.

MOLINAS: What I'm saying is, is that the provision here is a mandatory one. And it might be a little easier to view it if the court goes back and looks at the prior statutory language before it was codified in to the Civ. Pract. & Rem. Code, because it is somewhat different. And that language is quoted in the Stanford case. And it's not stated in terms of the governmental unit being entitled to notice. It's stated that any person with a claim must give notice.

OWEN: Mandatory doesn't necessarily mean it's jurisdictional does it?

MOLINAS: I agree. For example in situations - 4590i and the DTPA, this court has held that although the language there about 60 days notice is written in mandatory terms. The purpose of it can be fulfilled by abatement.

OWEN: Looking at just the structure of the Tort Claims Act §101.101 is notice. And the very next section 101, 102 says commencement of suit. But the first provision deals with venue. It says that it must brought in the state court, in the county in which the cause of action or part of the cause of action arises. Clearly that's mandatory, but that's not jurisdiction.

MOLINAS: True. But also if its' brought in the wrong venue and motion to transfer venue is filed, it doesn't affect the liability of the state. This provision, however, does.

OWEN: You might be entitled to summary judgment based on the notice, or lack of notice. That doesn't mean that it's jurisdictional. It seems to me you can waive venue just like you can waive notice. If the state doesn't raise venue, and you can't raise it for first time on appeal and say, they filed in the wrong county. Let's start all over. It seems to me the same thing is true in the notice provision. It's not something you can raise for the first time on appeal.

MOLINAS: I have trouble also then with if - 101.021 - failure to comply with that is a jurisdictional provision. It's a pleading issue. So that could be raised later under the cases that say you must plead yourself within the Texas Tort Claims Act, and if your suit is such that there's no way you are going to bring it in within the waiver, for example that the facts show it clearly wasn't...

OWEN: That's different. I'm talking about look at where these procedures are. There's a notice provision, then there's comment of suit, which includes venue and certain other requirements. It's one thing to say your set of facts, you cannot allege use of tangible personal property, and so you're out. That's one thing. But isn't it another thing to say the fact that you didn't give notice is jurisdictional. In other words, I have a hard time seeing how the state can wait till the Texas SC to say for the very first time after it's gone to the TC and the CA, no jurisdiction because they didn't give me notice. It seems to me that's something that can be waived, if it's not timely raised, just like venue. If it's timely raised you're entitled to rely on it, but that doesn't make it jurisdictional.

MOLINAS: I think in the context of the Texas Tort Claims Act, this court should resolve any ambiguities in that statutory scheme in favor of immunity. That's what the court said in Wichita Falls. And so I guess looking in part because the waiver is not presumed. And the waiver is not liberally construed. The waiver is as narrow as possible. Only in the context of the Tort Claims Act, and waivers of sovereign immunity. And so maybe that would be a way to distinguish it from these other instances and other statutory schemes that don't involve that sort of waiver of immunity from suit. Because for example, cities. They are immuned from liability but they've never been immuned from suit.

BRISTER: You win on summary judgment or a plea to the jurisdiction. This should be jurisdictional so we can keep having all of these come up by interlocutory appeal, which we're being flooded with. But that's the reason we should make sure it stays jurisdictional. Any stronger reason from a judicial perspective?

MOLINAS: Technically speaking it could be completely avoided in this case because it has never been argued. I realize that with the two cases together, I'm prepared to address it.

BRISTER: So jurisdiction is not normally waived?

MOLINAS: What I'm saying in this case there was no complaint made about the CA's ruling on jurisdiction. In other words, we did not file a petition for review and ask for the greater relief from this court, which was an affirmance of the dismissal. We were going to go down and do what the CA instructed us to do and file a motion for summary judgment. And in fact, just out of curiosity, I did a count up of the cases involving these issues of notice and exceptions from the notice requirements, discovery rules, etc., and most of them did arise in the context of summary judgment.

JEFFERSON: Why shouldn't the tolling provision apply whether based on ch. 16 or based on the law that was in existence from this court and others prior to the enactment of ch. 16, to permit somebody who has no legal capacity to sue sometime bring their claim after they've reached majority?

MOLINAS: If the court goes back and looks at virtually all of those cases, whether it's involving legal disability or the discovery rule, they are decided in the context of constitutional challenges and in particularly mostly open court challenge to a statute of limitations or some sort of provision. And here that sort of challenge is simply not possible and has not been brought. The Crider case points out I think very correctly that all of the cases against municipalities where minority - there was an exception for minority, it violated the open courts provision, the charter provision did. Here on the other hand, there is no common law right to sue the state, which is a necessary requirement for a constitutional challenge. So I think it's for the legislature to determine what exceptions to this statutory requirement to a cause of action that could only exist through creation by the legislature to determine if there are in fact going to be any exceptions. And the same argument can be made with the discovery rule, with someone who claims a mental disability. The fact remains that no one can sue the state unless it consents. So to the extent that the wavier of

immunity is less than would be - in other words you would have less of a right or less of a remedy than against a private person is not a reason to engraft a provision on to this statute that doesn't exist. It's for the legislature to do so.

There are a couple of cases. I believe Greenhouse is one, and also the lower court, Martinez itself discusses unfairness and points out that the fact that there is some unfairness in cases against state entities is for the legislature to deal with. We believe that the court should affirm the CA, and quite frankly not reach the jurisdictional issue in this case because it wasn't raised by either party.

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REBUTTAL

LAWYER: I would like to look at the big picture first, and then relate some arguments to some specifics. This case is about children who have no legal capacity to comply with a procedure in the statute. The issue that is presented to this court is whether the legislature intended to require children to perform an impossible action, or is that absurd result to be avoided by this judiciary, this court or the judiciary, applying legal principles that have been applied in the past and that have been codified and written by the legislature to toll notice as it does for limitation periods of which notice is a part? And of course, we believe is the latter.

Just as words used in vacuum mean nothing, the absence of words mean nothing unless considered in the context of the remainder of the statutory law. This is important in regard to the issue of the fact that there is no tolling provision in the Texas Tort Claims Act.

Secondly, please understand that the Texas Tort Claims Act has no limitation provision. Does that mean that there is unlimited limitation? Of course not. We apply the limitation provision in ch. 16. And to the same extent there is every reason to apply the tolling provision of ch. 16 here. The legislature could not have intended the absurd result because of having no tolling provision, but engrafting a limitation provision from ch. 16. Just because they are in different parts of the legislation, does not mean that a court has its hands tied and has to reach an unfair result because it cannot apply the entire body of statutory law. That's all we're asking the court to do. Is to apply the whole body of statutory law.

This court has stated that the notice provision presupposes the existence of a person who is capable of complying with notice. Now that is stated in McCrary v. The City of Odessa. Yes, it is a constitutional case, but not this case. Yes it is a city case, and this is not. But the principal of having someone who is capable of complying is completely applicable. And as in Ruiz v. Conoco where J. Hecht stated that a tolling statute reflects a considered legislative judgment that in enumerated circumstances the strong policy in favor of a prompt disposition of disputes, which is the purpose of limitation and notice, must give way to the need to protect a plaintiff. Here, a child who is unable to protect himself or herself. That need will continue so long as the plaintiff

remains incompetent. This child is incompetent and incapable of performing that action.

BRISTER: So the tolling provisions apply to the limitations provision as well in the Texas Tort Claims Act. Have to.

LAWYER: We're saying that the tolling provision applies to the Texas Tort Claims Act, just as the limitations provision applies from ch.16 because it's nowhere found in the statute itself. The legislature chose not to put it in there, and, therefore, you look to other parts of the law to reach your conclusion.

The case presents a circumstance very much like in Bridgestone and Firestone v. Glenn Johns. Where words no matter how plain will not be construed to cause a result that the legislature certainly could not have intended. This is J. Hecht concurring at page 135. The legislature could not have intended to exclude children who have no capacity to give notice.

There was some statement made about well couldn't a next friend give notice? Certainly. But a child has no capacity herself to give notice. The child has no capacity herself to file the suit, and, therefore, there is a preclusion of a requirement that the child do so.

The meaning of the words in the statute depend on the context. An essential part of the context is the purpose of the words as used. And once the court has ascertained that purpose, the court should enforce that purpose even if that application seems inconsistent with the statute's strict letter. This was J. Phillips writing and quoting J. Joe Greenhill's opinion in 1979 in State v. Terrell. A tort claims act case.

That is what we are faced with here. You apply the law to have a just result consistent with the purpose of the statute. There is an absence of a provision for tolling, but there's a body of law that applies tolling. Because there is no statutory purpose to require children to do an impossible act to give notice, the act reasonably should be applied consistent with §16 of the Civ. Pract. & Rem. Code, to toll the notice requirement during minority.

The legislature could have written a two-year statute of limitation in the Tort Claims Act. It could have written a provision regarding tolling, but both were not necessary.

The Crider case and the discovery rule cases found that the notice provisions were jurisdictional. That was a complete disregard of this court's opinion in Dubie(?). And for that reason, those cases are not sound. The court below on the one hand found that there was no jurisdictional requirement for notice. And yet they turned right around and inconsistently found and rung their hands and said, citing Streetman which was a common law attempt to it being drafted on a statute, that we are really sorry that this is unfair but we can't do anything. The court below was mistaken. The judiciary can do something. It can apply the entire body of statutory law, including ch. 16 to find that there was no purpose to exclude children, and that the statute must be applied consistent with its purpose. That is the basic _____ in the statutory construction: to ascertain the

purpose and apply the statutory law consistent with that purpose to reach a just result. It could not possibly be a just result in this case to deny a child the right to bring a cause of action, to give notice where it's impossible for her to that. And I don't believe that this court would want to so hold.