ORAL ARGUMENT – 09/08/04
03-0750
WILKINS V THE METHODIST HEALTH CARE

LEE: This is a case that's about the necessity of service on misidentified defendant.

The one thing that is real clear about this litigation is that neither one of the lower courts that looked at the situation, neither at the TC nor the CA, felt like the system worked as it probably ought to in this set of circumstances.

HECHT: I'm unclear about how it ought to work. What rule do you think should be used in a situation like this so that we would feel better about it?

LEE: I think that there are two possibilities that's facing the court. There is a broader and a narrower approach. The broader approach would be to expand the Hilland line of reasoning to a situation where service was not affected. And that is to say, that if you've got a situation where the proper party (the one the plaintiff means to sue), the proper party has been misidentified, that the proper party is related to a sued party, and they have substantially similar sorts of names, that the proper party has notice. And here I think what the cases are telling the court is it has to be actual notice. It's not a constructive kind of notice. But has notice of the litigation. And that the fact that the proper party wasn't sued, or in this particular set of circumstances served does not operate to disadvantage the party. Then under those set of circumstances, not naming that party, or in our circumstance not serving that party should be viewed as having no consequence.

The idea that in the misidentification cases, which is the Hilland line of cases it resolves around, is if someone has notice of the claim and if they are not prejudiced by the fact that they may not have been named or again in our circumstances served with process, then they should not be heard to assert a limitation's defense.

HECHT: How related do they have to be? What if they were two sons or they were not wholly owned, they were in a corporate chain but they were cousins. They weren't parent and subsidiary like this case.

LEE: I think that's going to be a fact driven kind of answer. I think it's easy in this case and it's easy to think of cases where it's not difficult. Sister companies may not be related enough. The relationship has to be accompanied by a similarity of names. The idea I think is, is the point that is easily misled when the point that is dealing with the Methodist Health Care System and the Methodist Hospital, each of which do business under three or four different assumed names, that are variations of...

JEFFERSON: What if the plaintiff is not misled? What if the record shows that the plaintiff knew very well that there were differences in these entities even though they have similar names. Would the rule still apply?

LEE: That's an exceptionally interesting question. One that I hadn't thought of until this very moment. But it would seem to me like if the plaintiff is not misled, that is if the plaintiff intentionally sues the wrong party, then certainly the plaintiff ought not to be given the advantage of what is admittedly an equitable exception to the normal functioning of the statute of limitations.

JEFFERSON: And what if it's not intentional but it's reckless? They know through their prior dealings that they are separate entities and they have separate functions. Maybe they had litigations involving both entities before. They know the difference. And that lawyer then files suit against the wrong entity. Having that base of knowledge would that make a difference?

LEE: At one point or another you gear over into lawyer malpractice at least potentially depending on who's making the decision. Again, because it is an equitable doctrine that we are talking about, I don't think that you give the benefit of the equitable doctrine to somebody who has clearly demonstrated that they don't deserve the benefit of it.

JEFFERSON: Then how do you demonstrate that you deserve the benefit of equity when you read the other side's briefs. They say this is well known to you, the 4590i letter clearly doesn't delineate the hospital as different from the system in some of the discovery. And yet the hospital wasn't sued until limitation was final.

LEE: I think you have to look back to the record. And I think when you look back to the record it is clear, it's painfully clear that what the plaintiff's trial attorneys thought they were doing in this set of circumstances was suing the party that provided medical care to Ms. Wilkins. And you can see that in terms of what they are alleging in their pleadings, what they are saying in their response to the motion for summary judgment, what they are saying in the hearings before the TC. And the overall tenor of everything that happened in the TC is that these folks thought they were getting the hospital. And it's not just the situation where you've got stumbled on representation of the plaintiff. It's not just they didn't know what they were doing. There is a lot of, if not affirmatively being misled, certainly at the omissions on the part of the System that would lead somebody to believe that they had the right party.

Remember what happens in this case. The plaintiff has what is on the face of it a fairly garden variety medical malpractice case. Plaintiff sues the Methodist Health Care System d/b/a the Methodist Hospital System. Somebody answers. They answer in proposing about 25 defenses, and the CA has some sort of harsh things to say about the selection of those defenses. But significantly not one of them is a defense that even vaguely eludes, Hey, the plaintiff has the wrong party. We didn't do anything. We didn't have any involvement.

More importantly, at least from my viewpoint, of those 25 defenses there are a number of them that the System cannot assert. Only the hospital can assert them. It is those defenses - for instance if you look at the first answer, not the amended answer, at para. 12, 16 and 18, you will see that the System is asserting the right to a setoff for all medical services it provided

to the plaintiff for which it has not been compensated.

Now the System has no business asserting that defense. That's not a defense it can possibly have unless it's the hospital.

HECHT: The System is a management entity?

LEE: From what we know in our records, the System is a management and risk adjusting administrative parent corporation that is over Methodist Hospital and a number of other hospitals. What we know for sure that it provides in our case is all of the risk management and risk adjustment kinds of services. Because they are the people, that is the people employed by the System, are the people that plaintiffs get in contact with. They are the ones who take the claims as they are coming in and serve as risk adjusters. They are basically the business branch of these various hospitals. They do not, however, provide medical or so they have claimed in this lawsuit.

OWEN: Let's suppose this case had proceeded to judgment. You filed your amended petition. The System has now filed a verified pleading saying, I'm the wrong person. You sued me in the wrong capacity. You've amended your petition to name the hospital. The hospital never appears. You get a judgment against the System. Is it your argument you can abstract that judgment and then levy on the hospital's assets?

LEE: If the way that you proceed to judgment is that you get a judgment against the System, that is to say if its defense does not prevail, then the judgment is executable against the System.

OWEN: But you don't get a judgment against the hospital is my point.

LEE: That's correct. And the reason that sort of feels anomalous is that what the system should be doing is asserting the defense of we are not the correct party...

OWEN: Which they finally did.

LEE: Which they finally did and the TC granted. If you assume the TC doesn't grant that defense, then they are like any other defendant that had a bonafide defense, lost it at the TC.

OWEN: Let's go back then. They filed finally their 26 amended or whatever it was defense, and finally verified it 8 months later. So then they filed a motion for summary judgment saying, We're the wrong party. We are out of here. And the TC grants that motion for summary judgment. The hospital has never appeared. You've never served the hospital. Now what are you left with in the TC?

LEE: The hospital has never been served. That is correct. It's our position that

they have in fact appeared. In order to appear in Texas all you have to do is to be acknowledged in the jurisdiction of the court over the controversy, or seeking some sort of affirmative relief. The hospital is in that courtroom seeking affirmative relief.

OWEN: The System was, not the hospital.

LEE: The hospital is not there by pleading, but there are defenses that are being advanced on behalf of the hospital...

OWEN: Let's say the System abandons all of those, files an amended answer, ditches all of those defenses and says, We are the wrong people, give us summary judgment. And the TC does. So then what are you left with in the TC?

LEE: It is our position that the hospital has appeared.

OWEN: Through its parent company?

LEE: Yes.

OWEN: If we reject that. If we say you've got to get the hospital as a separate entity.

LEE: And then ultimately at one point or another, if you assume the TC lets the system out, the TC needs to rule. And it's our position the TC should have ruled that the hospital is in in the lawsuit despite the fact that they have not received service of citation. The same way in the misidentification cases that the courts rule that the misidentified parties, who admittedly have officially appeared in those cases, but the courts have ruled that if they've had notice and they are not prejudice it is as if they had been sued and brought into the lawsuit...

OWEN: The limitations is tolled. So you can still go out and serve them and if it's not too late. Isn't that the holding of the cases?

LEE: Service is not at issue. This is the first case that has come...

OWEN: I understand. But in those cases the only issue is saying, Well everybody was worried because limitations had run. Now to serve them they could say limitations had run. The court said no, limitations has been tolled. Isn't that what the holdings were?

LEE: In the Texas cases that never happens. That never happens because the misidentified defendant appears, asserts its defense. So service never becomes a question in any of those cases. That's what J. Brister points out in footnote 16 to the opinion. The odd thing is that we have so much misnomer, misidentification, and assumed name jurisprudence in this state, and we do not have a single case that addresses in this context the necessity of having proper official service of citation.

O'NEILL: So the addition you would make to the CA's opinion, the CA said, Okay there may be equitable tolling in this instance, but tolling until what? And the CA posits tolling until issuance of citation on the proper party. What you would say is tolling until the proper party appears.

LEE: I think the CA felt constrained to say that you cannot have the equitable remedy that we seek in the situation where you have not served, or the other party has not voluntarily appeared. I don't read the CA's opinion as giving us instructions that in this set of circumstances the lack of service would not be a problem. I think what the CA is saying is, this court has provided no guidance and there is no other Texas court to look to that has examined the situation of what you do when the proper defendant knows that the suits out there, knows that the intent is to make them the defendant, would not be disadvantaged but is not served.

HECHT: In your rule there is no component of negligence on the part of the plaintiff in this case? In other words, even if he just doesn't even look. He just sees Methodist. And he says, Well, I don't know. Methodist System is close enough. There might have even been some facts that put them on notice that maybe this was not really the hospital. You would say, Well, as long as there is no prejudice, you still get the remedy?

LEE: If there is actual notice. I think that's what the cases that are dealing with statute of limitations - that's the way the courts have come down in the past. I am not aware of any court analyzing the problem from the standpoint of what should the plaintiff have done after they get past the threshold inquiry, which is of course it would have been awfully nice had the plaintiff joined the proper party within the statute of limitations.

O'NEILL: Under your argument if we were to determine that the hospital appeared, the issuance of citation is immaterial?

LEE: It becomes like the misnomer cases. Correct.

OWEN: The TC dismissed the case without prejudice against the hospital. Why couldn't you have served the hospital on that date?

LEE: From a practical standpoint, by that point in time limitations has long, long since run against...

OWEN: Not under our case law. If limitations is tolled because of the misidentification issue and the TC has dismissed without prejudice, and you served the hospital the next day, how are you - why doesn't that work?

LEE: It doesn't work in the context in which the plaintiff is saying, We have joined that party. You're right. It is without prejudice. It is still going to be a problem though with regard to the statute of limitations unless something has happened which either tolls or prevents the statute of limitations from running.

OWEN: It would seem like the rationale in our cases would say limitations has tolled. All you have to do is go serve the hospital and get them in there.

LEE: That's not obviously the resolution that either the TC - We may be talking about different cases.

OWEN: Why did the TC dismiss the hospital without prejudice, giving you a chance to go serve them?

LEE: I suspect that the TC entered the order dismissing without prejudice because the TC had decided to her satisfaction that the hospital had simply never appeared. And never subjected itself to the jurisdiction of the court at all in that set of circumstance. If the court decides the party has not subjected itself to its jurisdiction, then a dismissal without prejudice is the only order the court can enter.

O'NEILL: So you think in this analysis, the first thing we have to focus on is the hospital's appearance? In other words, if the hospital appeared a lot of this analysis just goes away.

LEE: That's absolutely correct.

O'NEILL: But, if we were to determine they had not appeared, then we really do have a problem here don't we?

LEE: If you determine that they have not appeared, the question is do the four ____ factors which we started out the argument with proper party misidentified...

O'NEILL: Which would be tolling equitably. And as J. Brister said tolling until what? And that was the problem that I understood he focused on in the CA's opinion. Okay. Even given equitable tolling until what? Until they are served. And if they have not generally appeared to make service irrelevant, you are left with the argument that somehow because they have the same agent they were - no. I guess you wouldn't have that even.

LEE: I don't think that's correct. It's assuming the very thing I believe that we are contending over here, and that is do you have to have service in order to be able to bring them into the lawsuit. If you take the general appearance issue and the defendant's conduct related issues, they are all kind of clustered together, they are out of the picture, the question simply becomes do those four factors that Hilland says are sufficient to prevent a defendant from asserting limitations apply when that defendant has not been served, at that point in time presumably if you've still have a vehicle you can go out and serve them.

O'NEILL: I thought the four factors just related to tolling.

LEE: Correct.

O'NEILL: Irrespective of the service _____.

LEE: And the question is, do we apply those to this situation where there has not been service?

SMITH: Was there a request for disclosure?

LEE: A big practical problem is that there was a request for disclosure that was specific discovery that was propounded to the system that went to the specific issue of their identity as a defendant. And you have a potential defendant's relationship of the employees that have been identified to you. And in all of those circumstances, the response was that no other potential parties known, and we have been correctly named. In response to the varying discovery requests, the responses were not calculated to put anybody on notice. But the real defense is you've got the wrong party in the lawsuit.

The cases used to say that the non-identified defendant has no duty to come forward and point out the mistake the plaintiff has made to the plaintiff. That may still be the law. But under the discovery laws that exist in Texas today, clearly the defendant who is in the lawsuit has the duty to disclose, particularly in this situation, and that duty was not fulfilled in this case.

* * * * * * * * * *

RESPONDENT

PRIDGETT: The plaintiff knew who the proper defendant was at the time the lawsuit was filed, or at the time the lawsuit was amended or any point in the lawsuit, that the equity should not come to the aid of the plaintiff. In this case, I think we've established very clearly that the plaintiff knew that there were two distinct entities, the Methodist Health Care System and Methodist Hospital.

OWEN: What should be the remedy against the system - let's just assume for the moment that you intentionally withheld information in response to straightforward discovery request about who were the proper parties. What should be the remedy under those circumstances?

PRIDGETT: Under those circumstances - that really has no impact on the service question in this case.

OWEN: What should be the remedy?

PRIDGETT: If there is - I guess the question is if there was some prejudice to the plaintiff, then there may be some remedy under the discovery violation type rules. However, in this case, the System did in July 2001 identify the hospital as the proper party and gave notice, and practically begged the plaintiff to sue the hospital.

OWEN: Why didn't the System do that the day it was served with the petition?

PRIDGETT: When the lawsuit was originally served, I think that the System may have been under a misapprehension that this was really a products liability suit.

OWEN: How can that be a products liability suit for leaving something in the body of a woman?

PRIDGETT: Well it wasn't left in the body. The products liability suit, the principal defendant when the suit was filed was Aesculap, Inc, who designed the tip in the attachment mechanism for the tip on this laparoscopic instrument.

OWEN: It never crossed your mind, the hospital would have any liability?

PRIDGETT: At the time I wasn't involved, so it didn't cross my mind.

OWEN: You think it was reasonable it never crossed anybody's mind on the System side that the hospital might possibly be a person with some liability?

PRIDGETT: I think that the hospital was a person with potential liability...

OWEN: Then why weren't they identified?

PRIDGETT: And so was Dr. Wills, and so were the nurses.

OWEN: So why weren't they identified?

PRIDGETT: Because in this case the System believed that the plaintiff was aware of all of these entities...

OWEN: So that gets you off the hook when you're answering interrogatories: I don't have to tell you anything I think you already know.

PRIDGETT: I think in the interrogatories, we answered the questions - I think I explained in the briefing that the interrogatories were answered accurately. When hospital employees were identified, there was a list of names. At the bottom of the side it Methodist Hospital and it gave the address. When System employees were identified, the names were identified and the System was given as their employer at the bottom of the list of names. So I think that that was not misleading. As far as the request for disclosure that J. Smith asked about, I agree that at the time we received the request for disclosure, which was in Feb. 2001, the lawsuit against the hospital had been barred by limitations since July 6, 2000. So I think it was accurate for us under those circumstances not to identify the hospital as a potential defendant.

OWEN: Then why were you, as you put it, begging him to sue the hospital years later?

PRIDGETT: The plaintiff did amend the petition and added the hospital as a named defendant. And the System which was interested in obtaining a final judgment in the case begged for the plaintiff to file suit against the hospital so that the hospital could make a resolution of limitations issue. And that really couldn't happen until the hospital was joined. As he said, the System couldn't raise limitations on behalf of the hospital. The hospital had to raise that.

O'NEILL: How do you respond to the argument that the hospital made an appearance through its parent system by answering the way it did?

PRIDGETT: I think under the record, we can't tell whether these defenses belong to the hospital or the System. And I don't know if those medical bills were owed to the System or to the hospital. We don't know under the record. And as far as other defenses, another concern that I would have also in this circumstance is that when answering these kind of lawsuits, they are small lawsuits and you don't really know exactly what the scope of the lawsuit when it was first brought who is the defendant to assert as many defenses as may be applicable, and then later whittle it down to the ones that are actually going to apply in this case. And I think that's what was going on when the original answer was filed.

OWEN: But not capacity. You didn't think of that one right off the bat.

PRIDGETT: I think that under the circumstances, we were not the primary defendant.

OWEN: But you said you thought what was going on here that you just put everything you could think of in the defenses, but you just didn't happen to think of capacity along with the other 25 that you originally sent.

PRIDGETT: That may well have been what happened. But the end result of that is that it was asserted. And at that time if the plaintiff could establish the relation back rule under Hilland, our identification of the hospital at that time, assuming that we were acting inequitably, assuming that all that happened as they said, that the plaintiff was protected by equity at that point already. The plaintiff _____ sue and serve the hospital and as long as the service was diligent...

JEFFERSON: But you catch yourself coming and going then. Because if that was true that the Hilland could have been asserted then, then it could have been asserted at the time of the request for disclosure as well. So the hospital would be a potential party, which you didn't name in response to a legitimate discovery request.

PRIDGETT: Possibly. But I would also think that until Aesculap Labs was dismissed as a defendant - it was dismissed around the same time that we amended our answers, we really did pursue this case and we thought the case was being pursued as a products liability case. And that that was an honest mistake. It was an honest mistake. And that would be something that could be

determined...

OWEN: But the hospital was involved in using the instrument as well. I still don't understand how when you cast it as a products liability claim, that explains why you didn't identify the hospital as a potential liable party.

PRIDGETT: The plaintiff has the option of choosing which defendant they which to sue. And that's what appeared to happen in this case.

OWEN: But then they asked you, Who else could be liable? Aren't you obligation to tell them?

PRIDGETT: I looked actually to find out if there was any guidance on the scope of the requirement of disclosure under the rules of disclosure, and I couldn't find anything. And I think that the best I can answer that is that our best good faith belief at the time was that we were answering it accurately. Because we thought it was a products liability suit, because if they were trying to sue the hospital, even by the time the system received notice limitations had already expired. And because we didn't believe an equitable exception would apply, because in this case we knew that the plaintiff's attorneys representing the plaintiff had sued the hospital and knew about the hospital. And we knew that under the 4590i letter, they had identified the hospital. So we thought they were fully aware of the hospital as a defendant and chose not to sue.

There are a couple of federal cases that are in the briefing. One of them is Atamar(?) involving a casino, where the plaintiff brought a suit against the casino. The plaintiff had a heart attack while he was at the casino and the casino's medical director, who was an independent contractor and who oversaw which equipment the casino kept on hand to deal with these kind of emergencies, rushed to his aid. The man had suffered serious and permanent disabilities because of his heart attack and he sued the casino. The doctor was aware of the suit. He was given actual notice. He knew all of that. He participated in discovery. And later on when the plaintiff tried to amend his petition to join the hospital, the court said that the plaintiff is entitled to make a choice between its defendants, and the defendant isn't obligated to interpret the plaintiff's lawsuit, find out what they really meant to do and volunteer additional defendants, or volunteer yourself as a defendant if you are not sued and come forward in the TC and say, Your honor, I think the plaintiff should have sued me as well or meant to. There's no case out there doing that.

SMITH: What is the evidence of prejudice against the defendants? If this suit goes forward against the hospital is there any records the hospital threw out or people moved on in reliance on the fact that they didn't get served?

PRIDGETT: I think there's a presumed prejudice of the hospital due to the limitations expiration. There's nothing in the record about who threw out what or what witnesses have lost what memories. We don't know. That's the whole point of limitations is that there is an assumption that after given a period of time, in this case 2 years and 75 days after the plaintiff gave their notice in

the 4590i letter, that those things are going to happen. And so I think we have that presumption in our benefit here that the hospital has lost memories and has lost equipment.

Actually in the record there is the evidence that the laparoscopic tip itself was lost during this 2 year delay, which was admissible.

As far as why the court shouldn't adopt an equitable exception, I think first of all what's going to happen...

O'NEILL: An equitable exception to what?

PRIDGETT: Whether this court should adopt an equitable exception to the service process requirement. Right now under the rules it's clear that there is a service of process requirement and I think the court's going to have to change the law if they are going to excuse the plaintiff's failure to serve at all.

HECHT: Because if the hospital had been served late, then there might be some question of - a different question about whether it related back or whether there was some other tolling of limitations?

PRIDGETT: Certainly there would have been a question at that point if limitations which could have been presented to the TC - and that's actually another prejudice that the hospital has suffered is that at this point - if there is no service process requirement that the hospital is not going to be able to assert diligence of service as a part of its limitations _____ service requirement, then there is no diligence of service at all and the defendant has to appear.

HECHT: If there had been service, then I guess the way to analyze it would be to say, Well we've been served, but now we claim limitations. And then the plaintiff would say, Well but we contend that 1) it relates back; and 2) it's been tolled.

PRIDGETT: Well I think there's only one argument really and that's that it relates back. I think Continental _____ and Hilland allows a service that is outside the limitations period on a misidentified defendant to relate back if the requirements are satisfied. However, I think that still this court's jurisprudence on diligence and service should apply. And the TC thought so too. At the summary judgment hearing, this was discussed and I think that the hospital expected to be served at that point. And when the TC asked the plaintiff's attorney why didn't you serve the hospital, or why don't you serve them now?, the attorney said, then we would be faced with this limitations problem. And the TC said I agree. It's been 6 months or more since you joined them or amended the lawsuit to join them, and you haven't served them. I think there's no diligence here. And if you did join them at this point limitations would apply. I think the TC made that pretty clear. And I think that also answers the question of why the hospital was dismissed without prejudice. The TC was giving them the opportunity to serve the hospital. So the issue could be keyed up and there could be **TAPE STOPS -**