IN THE SUPREME COURT OF TEXAS

NO. 08-0215

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS, PETITIONER,

v.

THE ESTATE OF IRENE ESTHER ARANCIBIA BY ITS BENEFICIARY VICTOR HUGO VASQUEZ-ARANCIBIA, VICTOR HUGO VASQUEZ-ARANCIBIA, INDIVIDUALLY, AND CECILIA VASQUEZ-ARANCIBIA, INDIVIDUALLY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued September 10, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT.

This appeal turns not on the merits of the underlying claim but on whether prerequisites to suit have been satisfied, and if not, whether an interlocutory appeal is available. Because the relevant requirements were met here, and because interlocutory appeal was appropriate, we affirm the court of appeals' judgment.

I. Background

Irene Arancibia underwent laparoscopic hernia surgery at Parkland Memorial Hospital on September 4, 2003. The procedure was performed by two resident physicians, Drs. Curtis and Yau, and attended by Dr. Watson, an assistant professor of surgery in the gastrointestinal/endocrine division, Department of Surgery, at U.T. Southwestern in Dallas. Arancibia was discharged later that day. Two days later, she presented to Parkland's emergency room with severe abdominal pain. Emergency surgery revealed that, during the hernia repair, her bowel had been perforated in two places, leading to acute peritonitis with sepsis. She died the following day.

Her family initially sued the operating physicians but later nonsuited them, naming Southwestern and Parkland in their stead. Southwestern moved to dismiss the case, contending that the trial court lacked jurisdiction because the Arancibias failed to provide timely notice of their claim. The trial court denied the plea, and the court of appeals affirmed. 244 S.W.3d 455, 462. We granted the petition for review, 52 Tex. Sup. Ct. J. 910, 911 (June 26, 2009), and now affirm.

II. The 2005 amendment to Government Code section 311.034 applies.

Absent a waiver, governmental entities, like Southwestern, are generally immune from suits for damages. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The Texas Tort Claims act waives immunity from suit "to the extent of liability created by [the Act]." TEX. CIV. PRAC. & REM. CODE § 101.025(a). To take advantage of this waiver, the plaintiffs must notify the government of a claim within six months. *Id*. § 101.101(a). The notice must reasonably describe the injury, the time and place of the incident, and the incident itself. *Id*. But this formality is not required "if the governmental unit has actual notice that death has occurred [or] that the claimant has received some injury." *Id*. § 101.101(c).

In 2004, we concluded that the notice requirements were mandatory, rather than jurisdictional, and that there was no interlocutory appellate jurisdiction over an order that denied a governmental unit's jurisdictional plea based on a claimant's failure to provide notice. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 365-66 (Tex. 2004). Shortly thereafter, the Legislature amended the Government Code to provide that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034. The 2005 amendment did not change those statutory prerequisites; it merely stated the consequence of a failure to comply with them. The amendment took effect September 1, 2005. Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 2, 2005 Tex. Gen. Laws 3783, 3783.

Southwestern then filed a plea to the jurisdiction, contending that it had no pre-suit notice (formal or actual) of the Arancibias' claim. The court of appeals did not reach this issue, because it held that this case, filed years before the 2005 amendment, was not governed by its terms—an issue that has led to considerable disagreement among our courts of appeals (including a split between Houston's First and Fourteenth Districts).[1]

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[1] 244 S.W.3d at 459 (holding that amendment was "not retroactive"); *compare Howard v. Harrell*, No. 07-08-0013-CV, 2009 Tex. App. LEXIS 2322, *10-11 (Tex. App—Amarillo Mar. 31, 2009, no pet.)(amendments to section 311.034 do not apply to case filed before statute enacted), *and Dallas Cty. v. Posey*, 239 S.W.3d 336, 339 (Tex. App.—Dallas 2007) (same), *vacated on other grounds*, *Dallas Cty. v. Posey*, 290 S.W.3d 869, 872 n.1 (Tex. 2009) (per curiam), *and Tex. Tech Univ. Health Sci. Ctr. v. Lucero*, 234 S.W.3d 158, 166 (Tex. App.—El Paso 2007, pet. denied) (same), *and Baylor Coll. of Med. v. Hernandez*, 208 S.W.3d 4, 8 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (same) *with Tex. Dep't of Criminal Justice v. Thomas*, 263 S.W.3d 212, 218 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (amendment applies to case filed before enactment), *and Med. Arts Hosp. v. Robison*, 216 S.W.3d 38, 41 (Tex. App.—Eastland 2006, no pet.) (same), *and Tex. Dep't of Criminal Justice v. Simons*, 197 S.W.3d 904, 906-07 (Tex. App.—Beaumont 2006, no pet.)(same); *see also* Hon. Scott Brister, *Is It Time To Reform Our Courts of Appeals?*, 40 HOUS. LAW. 22, 25 (Mar./Apr. 2003) (noting that "conflicting interpretations of the law are especially acute in Houston, due both to the volume of litigation in Harris County and the larger uncertainty as to who will hear the

If the amendment applies, a lack of notice would be jurisdictional, meaning that the trial court could dispose of the case on a plea to the jurisdiction, and a governmental unit would have a statutory right of interlocutory appeal if the plea failed. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *Loutzenhiser*, 140 S.W.3d at 359. If the requirement is merely mandatory, a governmental unit would be entitled to summary judgment, but the trial court's denial of that motion could not be immediately appealed, and the governmental unit could waive the issue. *Loutzenhiser*, 140 S.W.3d at 359.

The Legislature did not state whether the amendment applied prospectively or retroactively, nor did the act contain a savings clause for pending suits. The amendment merely provided that it "takes effect September 1, 2005." Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 2, 2005 Tex. Gen. Laws 3783, 3783. We presume the statute is prospective unless expressly made retrospective. *See* TEX. GOV'T CODE § 311.022.

But the prospectivity presumption does not necessarily answer whether the amendment governs this suit. Another rule provides that a court is to apply the law in effect at the time it decides the case. *See Bradley v. Sch. Bd. of the City of Richmond*, 416 U.S. 696, 711 (1974); *Tex. Mun. Power Agency v. Public Utils. Comm'n of Tex.*, 253 S.W.3d 184, 198 (Tex. 2007)(explaining that jurisdictional statutes should be applied as they exist at the time judgment is rendered); *see also Landgraf v. USI Film Prods*., 511 U.S. 244, 264 (1994)(noting the "apparent tension" between these two maxims). On closer examination, however, these two rules can be reconciled. *See Landgraf*,

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appeal"). This conflict gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c), (e).

511 U.S. at 273 (noting that "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations"). A statute does not operate retroactively merely because it is applied in a case arising from conduct predating the enactment. *Id*. at 269.

The prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes typically do not affect a vested right. *Tex. Mun. Power Agency*, 253 S.W.3d at 198. Because application of a new jurisdictional rule generally takes away no substantive right but simply impacts a tribunal's power to hear the case, present law normally governs in such situations. *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). Thus, the Supreme Court of the United States has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id*. at 274. Statutes—like section 311.034—that do not deprive the parties of a substantive right and "speak to the power of the court rather than to the rights or obligations of the parties" may be applied to cases pending at the time of enactment. *Id*. at 274-75 (noting that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity") (citations omitted). We agree that it is appropriate to do so here, and such a construction is not retroactive. *See Quick v. City of Austin*, 7 S.W.3d 109, 132 (Tex. 1999).

Because the amendment applies, the purported failure to provide notice would deprive the trial court of jurisdiction, an issue that may be raised on interlocutory appeal. We now turn to Southwestern's contention that it lacked actual notice under the Act.

III. Southwestern had actual notice under Government Code section 101.101(c).

The Tort Claims Act states that formal notice is not required "if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX. CIV. PRAC. & REM. CODE § 101.101(c). But we have rejected an interpretation of actual notice that would "require[] *only* that a governmental unit have knowledge of a death, an injury, or property damage," because a defendant, like a hospital, would then have "to investigate the standard of care provided to each and every patient that received treatment," eviscerating the notice requirement's purpose. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (emphasis added). Instead, we held that the governmental unit had to know of its "alleged fault producing or contributing to the death, injury, or property damage."[2] *Id*. This standard led to some confusion among our courts of appeals,[3] and we explained it further in *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004):

> What we intended in *Cathey* by the second requirement for actual notice was that a governmental unit have knowledge that amounts to the same notice to which it is entitled by section 101.101(a). That includes subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury.

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[2] We also held that actual notice required that the governmental unit know of the death, injury, or damages claimed, as well as the identity of the parties involved. *Cathey v. Booth*, 900 S.W.2d at 341. Southwestern does not dispute that it had notice of those matters in this case.

[3] *See Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 345-48 (Tex. 2004) (collecting cases).

Simons, 140 S.W.3d at 347. We observed that, if a governmental unit had this awareness of fault, along with the other information to which it was entitled under section 101.101(a), then requiring formal, written notice in addition would do nothing to further the statutory purposes of information gathering, settling claims, and preparing for trial.[4] *Id.*

We must, then, decide whether this record demonstrates Southwestern's subjective awareness of its fault, as ultimately alleged by the Arancibias, in producing or contributing to Arancibia's death. Although we have said that actual notice may be a fact question when the evidence is disputed, *id.* at 348, the pertinent facts here are uncontested. Dr. Watson was present during Arancibia's laparoscopic hernia repair. The day after her death, Watson emailed his immediate supervisor, who was chief of the division. The email begins, "I wanted to give you a heads up on a terrible outcome with a Surgery A patient." Watson described the surgery, which he believed went well, and Arancibia's return to the emergency room two days later. A laparotomy at that time "showed an unrecognized bowel injury," and Arancibia died the next day of multiple organ failure. Watson's email concluded, "I have already spoken with risk mgt."

Watson's supervisor responded, thanking Watson for the notification and mentioning that he would forward the email to the Chair of the Department of Surgery. The Chair responded and discussed several of the reasons patients might present with symptoms more than twenty-four hours after surgery. His email began, "I heard about this today."

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[4] We did not decide whether the TDCJ had actual notice of Simons's claim because, in a case decided the same day as *Simons*, we held that a claimant's failure to provide notice did not deprive the trial court of jurisdiction. *See Simons*, 140 S.W.3d at 348-49 (citing *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004)).

Dr. Watson surmised that the bowel perforation "was a result of a retraction injury out of the field of view." He stated that, in Arancibia's subsequent surgery, the physician observed a "through and through hole in the jejunum."[5] This was confirmed by the surgery records, which showed two perforations in the jejunum.

Shortly thereafter, upon reviewing Arancibia's treatment, Watson's supervisor concluded that "[a] technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury" and that "[c]linical management contributed to" Arancibia's death. He stated that "[a]lthough unfortunate, this is a recognized complication of laparoscopic hernia surgery. No standard of care issues were identified upon review."

We conclude that this record shows that Southwestern was subjectively aware of its fault, as ultimately alleged by the Arancibias, in producing or contributing to Arancibia's death. Although Dr Watson's supervisor determined that there were no standard of care violations, he noted that a "technical error" was made, that clinical management contributed to Arancibia's death, and that the care "was not necessarily consistent with established standards." His ultimate conclusion that those errors were acceptable does not detract from his subjective awareness that medical error contributed to Arancibia's death. It is true that, although Watson said he had contacted risk management, there was no evidence of why he did so or what he reported. But Watson and his superiors knew that Arancibia had died of multiple organ failure caused by sepsis, that her jejunum had been perforated in two places (an injury that Watson surmised probably occurred when surgical tools were being

[5] The jejunum is "the first two fifths of the small intestine beyond the duodenum usu. merging almost imperceptibly with the ileum though somewhat larger, thicker-walled, and more vascular and having more numerous circular folds and fewer Peyer's patches." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1213 (2002).

retracted), and that risk management had been alerted. *Simons*, 140 S.W.3d at 348 (noting that subjective awareness will often be proved, "if at all, by circumstantial evidence").

Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed. Thus, we have held that a police report showing that barricades were missing was not evidence of a governmental unit's subjective awareness of its fault after an accident, because "a private contractor or another governmental entity (such as the county or state) could have been responsible for the [missing barricades]." *City of Dallas v. Carbajal*, 53 Tex. Sup. Ct. J. 715, 716 (May 7, 2010) (per curiam). But that cannot be the case when the sole instrumentality of harm is the government itself. Here, the government has conceded that its surgical error perforated Arancibia's intestine, resulting in sepsis, multiple organ failure, and death. A jury may absolve the government of liability for that death for any number of reasons. But a government cannot evade the determination by subjectively refuting fault. We cannot conclude that Southwestern was unaware of its fault in producing or contributing to the injury alleged.

Under the dissent's approach, only an unqualified confession of fault would provide actual notice of the incident. The dissent would conclude that because Southwestern's internal investigation found no breach of the standard of care, Southwestern could not have been aware of its fault in producing or contributing to Arancibia's death. But "fault" as required under *Simons* is not fault as defined by *the defendant*, but rather "as ultimately alleged by *the claimant*." *Simons*, 140 S.W.3d at 347 (emphasis added). Here, the Arancibias alleged that physician error led to Arancibia's perforated intestine and, ultimately, her death. That Southwestern was aware that its surgeons' errors caused those perforations and that clinical management contributed to her death is undisputed.

The purpose of the notice requirement is "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Cathey*, 900 S.W.2d at 341. The notice here satisfied that requirement; "requiring formal, written notice in addition would do nothing to further the purpose of the statute." *Simons*, 140 S.W.3d at 347. Indeed, such notice would state exactly what Southwestern already knew. And while a bad result, in and of itself, is not evidence of a breach of the standard of care, the proof of actual notice in this case went beyond the mere fact of Arancibia's death. Viewing the evidence in the light most favorable to the Arancibias, as we must,[6] Southwestern had actual notice as required by section 101.101(c).

IV. We need not reach the question of whether a party may raise on interlocutory appeal an issue of sovereign immunity that it failed to raise in the trial court.

Even assuming that it had the requisite notice, Southwestern contends that the Arancibias did not substitute it as a party within thirty days of Dr. Watson's motion to dismiss under Tort Claims Act section 101.106. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(f). Because Southwestern failed to raise this argument in the trial court, the court of appeals refused to consider the issue on interlocutory appeal. 244 S.W.3d at 461. Southwestern challenges this conclusion and argues that because we have held that immunity implicates subject matter jurisdiction, we may reach on interlocutory appeal issues the parties failed to raise in the trial court. The Arancibias disagree, contending that immunity is different from standing, ripeness, or other matters involving subject matter jurisdiction, and interlocutory appeal is different from final judgment.

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[6] *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

We need not resolve this issue today. The 101.106 argument fails as a matter of law even if Southwestern could raise the issue for the first time on interlocutory appeal.

V. Dr. Watson's answer was not a 101.106 motion.

Section 101.106(f) requires that "[o]n the employee's motion, the suit against the employee shall be dismissed" unless amended pleadings naming the governmental unit as a defendant are filed within thirty days. TEX. CIV. PRAC. & REM. CODE § 101.106(f). Dr. Watson moved to dismiss the case against him on January 20, 2005. Eight days later, the Arancibias filed their amended petition naming Southwestern as a defendant.

Southwestern argues that the Arancibias failed to meet the thirty-day deadline because the last sentence of Dr. Watson's answer (and his prayer), filed months earlier, mentioned 101.106 and prayed for dismissal. Southwestern urges us to treat Watson's general denial as if it were a 101.106 motion, triggering the thirty-day amended pleading deadline.

We conclude that Southwestern's general denial was not a 101.106(f) motion. Section 101.106(f) lists several prerequisites that must be satisfied before an employee is entitled to dismissal. The employee must show that the suit was filed against him based on conduct within the general scope of his employment and that it could have been brought under chapter 101 against the governmental unit only. *See id.* Watson's motion attached an affidavit stating he was acting within the scope of his employment with Southwestern; his answer did not.

Watson's motion incorporated portions of Arancibia's petition and argued that the claims she alleged were ones that could have been brought against Southwestern in the first instance; his answer did not.

Watson's motion was entitled "Motion to Dismiss Pursuant to TCPRC Section 101.106"; his answer was not.[7]

The motion attached a blank fiat setting the matter for hearing; the answer did not.

The parties' Rule 11 agreement stated that Dr. Watson would not file a 101.106(f) motion before January 31, 2005 (long after he had filed his answer). While that agreement has no bearing on whether the answer was a motion, it shows that the parties certainly did not consider it as such. Nor do we.

Watson's answer bears little resemblance to the motion he filed subsequently. Pleadings must give fair notice of a claim, and we must construe them "so as to do substantial justice." TEX. R. CIV. P. 45. Construing the answer as a 101.106(f) motion would not comport with this rule. Even assuming Southwestern's 101.106 complaint was properly before us, Watson's answer was not a motion to dismiss under section 101.106(f).

VI. Conclusion

Southwestern had the right of interlocutory appeal, but it also had actual notice and a timely substitution after a section 101.106 motion. We affirm the court of appeals' judgment. TEX. R. APP. P. 60.2(a).

Wallace B. Jefferson
Chief Justice

[7] It was titled "Original Answer, Abatement and Special Exceptions to Plaintiffs' Original Petition."

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