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

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, dissenting.

I agree that the Tort Claims Act's prerequisites to suit are jurisdictional as to the Arancibias' claim. And because the Arancibias did not give timely formal notice of their claim as required by the Tort Claims Act, U. T. Southwestern's immunity from suit was waived only if it had actual notice of the Arancibias' claim as the term "actual notice" is used in the Tort Claims Act. In order for Southwestern to have had actual notice, it had to have timely, subjective knowledge that it was at fault in causing Irene Arancibia's death. *See Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 348 (Tex. 2004). The basis for the Arancibias' claim that Southwestern was at fault

is that the surgeons who first operated on Irene negligently caused her death by breaching the applicable standard of care. The Court does not identify evidence that Southwestern knew the injuries to Irene were caused by breach of a standard of care and that it therefore had actual subjective awareness it was at fault in causing Irene's death. Thus, I disagree with the Court's conclusion that Southwestern had timely, actual notice of the Arancibias' claim within the meaning of the Tort Claims Act.

I.

The Arancibia family did not give notice of claim to Southwestern, Parkland Hospital, where the surgery was performed, or any of the doctors who performed the first surgery until over seven months after Irene's death. By a letter dated May 7, 2004, they notified Dr. Mark Watson, who had supervised Irene's surgery, that the family intended to pursue legal action. On August 3, 2004, Irene's son and daughter filed suit against Dr. Watson and the doctors who had performed the surgery, Drs. Curtis and Yau, individually. They alleged that in several ways the doctors breached applicable standards of care and the breaches caused Irene's death. On January 28, 2005, the Arancibias amended their pleadings. They added Southwestern and Dallas County Hospital District d/b/a Parkland Hospital (collectively, the entities) as defendants and dismissed the doctors. The entities pled lack of notice under the Tort Claims Act and sought dismissal on the basis of sovereign immunity.

The trial court denied the entities' jurisdictional pleas and the court of appeals affirmed. 244 S.W.3d 455, 460.

Only Southwestern filed a petition for review. It asserts, in part, that sovereign immunity bars the Arancibias' claims because section 311.034 makes prerequisites to suit jurisdictional, *see* TEX. GOV'T CODE § 311.034, the Arancibias admittedly failed to give timely notice of claim under section 101.101(a), *see* TEX. CIV. PRAC. & REM. CODE § 101.101(a), and Southwestern did not have actual notice of the claim pursuant to section 101.101(c). *See id.* § 101.101(c). In response, the Arancibias urge that formal notice to Southwestern was not required because they first sued the doctors individually as opposed to the entities, and reading the Tort Claims Act to require pre-suit notice to Southwestern under such circumstances would yield an absurd result. They also claim that Southwestern had actual notice of their claim so formal notice under section 101.101(a) was not required.

II.

Section 101.101(a) of the Tort Claims Act establishes the general rule that timely notice of a claim must be given to a governmental entity as a prerequisite to suit against that entity:

> A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
>
> (1) the damage or injury claimed;
> (2) the time and place of the incident; and
> (3) the incident.

TEX. CIV. PRAC. & REM. CODE § 101.101(a). As the Court notes, the purpose of the notice requirement "is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial."

Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (citing *City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981)).

Even absent the formal notice of claim required by section 101.101(a), however, section 101.101(c) waives a governmental entity's immunity if the entity "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). In *Cathey*, the Court held that to have actual notice under section 101.101(c), the governmental unit must have "knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved." *Id.* at 341.

The Court clarified the second element of this standard—the governmental unit's alleged fault producing or contributing to the death, injury, or property damage—in *Simons*, a case strikingly similar to the case before us in regard to whether the governmental entity had actual notice of its fault. *See* 140 S.W.3d 338. In *Simons*, a work crew from the Terrell Unit of the Texas Department of Criminal Justice was digging postholes using an auger attached to a power take-off (PTO) mounted on the rear of a tractor. The auger became stuck in the ground, so the PTO was disengaged and a pipe wrench was attached to the auger in an attempt to back the auger out of the ground by hand. The TDCJ work supervisor, Ron Canon, left the area of the auger, went to the tractor and re-engaged the PTO. Simons was struck in the head and severely injured when the auger rotated and the pipe wrench swung around.

TDCJ immediately investigated and took statements from Canon and all the work crew. The statements and the report of the accident submitted by the prison safety officer indicated that when

Canon went back to the tractor to re-engage the PTO, the pipe wrench had been taken off the auger, the workers had been told to stand clear of the auger, and Canon looked back before he engaged the auger and could see Simons but could not see that the pipe wrench, instead of being off the auger, was on the auger. *Id.* at 339-41.

Three days after the accident, the prison safety officer and the TDCJ regional safety officer took a statement from Simons who was in the hospital and on a prescription pain reliever. Simons opined that the person operating the tractor was "kinda new." Simons remembered putting the pipe wrench on the auger and making one or two turns to back the auger out, and he did not remember hearing anyone say "stand clear." He also opined that he did not blame anyone for his injury, he did not want anyone to get in trouble or lose good time over it, it was a mistake and "a mistake is a mistake." 140 S.W.3d at 339-42. Thus, there was an unquestioned, unintended injury that resulted from a TDCJ employee's intentional act of re-engaging the PTO while a pipe wrench was attached to the auger, the wrench was out of the employee's field of view, and the injured person attributed the injury to a "mistake" without directing blame toward anyone specific.

The court of appeals held that TDCJ had actual notice under the Tort Claims Act. *Tex. Dep't of Criminal Justice v. Simons*, 74 S.W.3d 138, 142 (Tex. App.—Beaumont 2002), *rev'd*, 140 S.W.3d 338 (Tex. 2004). In reaching its conclusion, it noted that there was an unquestioned injury, a TDCJ employee had re-engaged the PTO that resulted in the injury, and an investigation was accomplished that put TDCJ on inquiry of its possible fault:

> To support its argument that its records do not raise a fact issue on notice of culpability, the Department relies upon the conclusion it reached after it completed its investigation of the incident. We are concerned here only with the Department's

> realization of its possible culpability, that is, whether the Department realized that it could be accused of negligence arising from the accident. . . . [T]he Department's safety officers conducted an extensive investigation of a serious injury that occurred while the inmates were operating motor-driven machinery in a supervised work detail. Reports were prepared and promptly submitted to the unit's safety committee. That notice, sufficient to put the Department on inquiry of its possible fault, is demonstrated by the existence of the safety review actually conducted. The Department did investigate the accident and gather the information it needed to defend Simons's claim.

Id. This Court disagreed and explained:

> 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. *If a governmental unit has this subjective awareness of fault, along with the other information to which it is entitled under section 101.101(a),* then requiring formal, written notice in addition would do nothing to further the purpose of the statute—which is, "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." It is not enough that a governmental unit should have investigated an incident as a prudent person would have, *or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault.* If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

Simons, 140 S.W.3d at 347-48 (emphasis added).

Proof of a defendant's fault in a health care liability claim does not depend on proof of ordinary negligence, such as failing to assure that no one would be injured by the auger or an attached pipe wrench when a PTO on a tractor was engaged, but is rather dependant on proof that the defendant breached an applicable standard of care. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (requiring timely service of a report providing an expert's opinion regarding applicable standards of

care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005). Then, if breach of a standard of care is shown and it is also proved that the breach proximately caused the injury, the defendant may be found liable for damages. *E.g.*, *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965) (noting that it is not enough in a medical negligence case to show an injury and that the injury might have occurred because of a doctor's negligence). In this case, the Arancibias allege that the surgeons who first operated on Irene were at fault because they breached standards of care. They also allege, of course, that the breaches caused her death and Southwestern is liable for the surgeons' fault or negligence.

III.

A.

The Arancibias first claim that they were not required to give notice of claim to Southwestern at all because they first sued the doctors individually. I disagree.

Under section 101.106 of the Tort Claims Act, plaintiffs must elect to sue either government employees or their employers. TEX. CIV. PRAC. & REM. CODE § 101.106. The Arancibias assert that the notice requirements of section 101.101 do not apply to suits against employees sued individually and because they first sued the doctors individually, interpreting the Tort Claims Act to require notice to the doctors' governmental-entity employers is unreasonable and absurd. They argue that plaintiffs will not generally give notice when they sue government employees individually because they are not required to. Thus, as will generally be the case, if notice has not been given to the entity,

then requiring the governmental entity to be substituted for the employee is unfair and requires a futile action because the entity will do what Southwestern has done here and assert its lack of notice. The Arancibias, however, do not point to any language in the Tort Claims Act that indicates the Legislature intended section 101.106 to dispense with the notice requirements of section 101.101.

In responding, Southwestern makes four arguments: (1) section 101.101(a) specifies that it applies to any claim against a governmental entity "under this chapter," and the clear statutory language contains no exceptions; (2) the Legislature did not intend to allow plaintiffs to grant themselves an exemption from the notice requirement by suing employees first, and to do so makes no sense because regardless of when the governmental entity is sued it still needs notice, so it can investigate the claim; (3) the Arancibias' interpretation would eviscerate the notice requirements of section 101.101 because a plaintiff who failed to give notice could initially sue an individual employee, wait for the inevitable motion to dismiss the employee pursuant to section 101.106(f) and then sue the employer; and (4) it is not unfair, as the Arancibias claim, to require all claimants to give notice pursuant to section 101.101(a)—the notice requirement is clearly stated and compliance is simple and inexpensive.

I agree with Southwestern. There is no language in the Tort Claims Act indicating the Legislature intended section 101.106 to allow persons to sue governmental entities without giving statutory notice. Regardless of the Arancibias' concerns, construing the Tort Claims Act's language as they urge would, for all practical purposes, negate the notice requirements of section 101.101(a). Plaintiffs who failed to give notice of claim as required could sue a governmental employee individually, wait for the employee to move for dismissal, and then sue the employer, thereby

avoiding the notice requirements. Thus, I would hold that regardless of the fact that the Arancibias first filed suit against the doctors individually, the Arancibias must still have satisfied the notice prerequisites of section 101.101 in order to maintain their suit against Southwestern.

B.

As to actual notice, the Arancibias urge that Dr. Watson's e-mails to his supervisor and the subsequent investigation prove, or at least create a fact question about, whether Southwestern had subjective knowledge of its fault. They also rely on testimony by Victor Arancibia that one of the surgeons who performed the corrective surgery after Irene returned to the hospital told Victor "somebody did something very wrong" during the first surgery and Victor should get a lawyer. Southwestern argues this evidence does not raise a fact question regarding whether Southwestern subjectively knew that breach of a standard of care, as ultimately claimed by the Arancibias, caused Irene's death.

First, Victor Arancibia's testimony that following the second (corrective) surgery, one of the surgeons told Victor that he should find a lawyer because someone had done something wrong during the first surgery is not evidence that Southwestern had subjective knowledge it was at fault in causing Irene's death. Victor did not identify the surgeon who made the statement and there is no evidence the surgeon was an employee of Southwestern or that the surgeon's opinion should be imputed to Southwestern. Further, whether "in the first operation somebody did something very wrong" is not the issue. Everyone agrees that the colon perforations were an unintended and undesirable result. The issue is whether Southwestern had subjective knowledge that the surgeons

breached a standard of care appropriate to the laparoscopic surgery. That issue was not addressed by the statement Victor attributed to the unknown surgeon.

As for the actions of the doctors, immediately after Irene's death Dr. Watson e-mailed his supervisor, Dr. Edward Livingston, Chief of the Gastrointestinal Endocrine Surgery Division at Southwestern, and Dr. Robert Rege, Chair of both the Department of Surgery at Southwestern and the Division of Surgery at Parkland Hospital, about the situation. Dr. Watson described Irene's death as a terrible outcome, noted that he had "scrubbed the entire procedure," thought it went well, and advised Drs. Livingston and Rege that he had already spoken with risk management.

Parkland has a possible three-step review process that takes place when an unexpected patient care occurrence is identified. The first step is initial screening by the hospital's quality management team. The second is referral to a physician or monitoring committee if certain criteria are identified in the screening process. The third step is review by a Division Peer Review Committee if the second-step physician reviewer or monitoring committee so recommends.

Dr. Livingston was assigned to review the surgery as part of Parkland's quality control process.[1] His review was the second of the three-step process. The documents used by Dr. Livingston in making his report were preprinted with specific questions about most aspects of the patient's care. He answered in one instance that "[c]linical management contributed to" Irene's death and explained his answer by a narrative that "a technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury." In regard to questions as

[1] The parties stipulated that Dr. Livingston's investigation and findings could be considered for the purpose of determining if Southwestern had actual notice of the Arancibias' claim.

to medical management, he checked the "No" box in response to "**Criteria 1** = Practice [was] consistent with established standards. Physician Reviewer comfortable with practice. Practice Acceptable." However, he checked the "Yes" box in regard to "**Criteria 2** = Reviewed practice not necessarily consistent with established standards, but still acceptable. Physician Reviewer comfortable with practice. Practice Acceptable." He checked additional boxes to indicate that the reviewed practice did not deviate or deviate significantly from established standards or that the practice was unacceptable. He included a narrative statement of his findings/conclusions in which he said that the unfortunate occurrence was a recognized complication of laparoscopic hernia surgery and no standard of care issues were identified. He did not recommend further review of the case. *See Roark v. Allen*, 633 S.W.2d 804, 811 (Tex. 1982) (holding there was no evidence that a doctor's negligence proximately caused the injury when forceps slipped during delivery and a baby's skull was fractured).

In regard to Dr. Watson's e-mail statement that he had contacted risk management about Irene's death, evidence that an employee or agent contacted an enterprise's risk management department is not evidence that the employee or anyone else subjectively believed the enterprise was at fault. Most entities of any significant size have risk management departments and require accidents or unusual incidents to be reported to the risk management team. The reporting requirement generally exists regardless of who, if anyone, is suspected of being at fault in causing the accident or incident.

The Arancibias point to the fact that Dr. Watson contacted risk management, but the record does not contain evidence explaining why he made the contact or what he reported to risk

management. For example, there is no evidence of whether (1) Dr. Watson contacted risk management pursuant to routine protocol because a death was involved or because of the unexpected patient outcome, (2) his contact was not routine but was out of an abundance of caution, or (3) his contact was because he subjectively believed a breach of appropriate standards of care caused Irene's death. Although Dr. Watson could not recall what he told risk management, the evidence is undisputed that he reported to Drs. Rege and Livingston that he believed the surgery went well and that the perforations could have been retraction injuries that occurred out of the field of view of the surgeons. Absent evidence of the reason Dr. Watson contacted risk management or what he reported, the fact the contact took place does not raise an inference that he believed Irene's death was due to a breach of applicable standards of care as alleged by the Arancibias any more than it raises an inference that the contact was the product of routine protocol or some other reason. *Cf. Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring in part and dissenting in part) (noting that the equal inference rule is a species of the no-evidence rule that "when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence"). For the same foregoing reasons, the fact that Dr. Watson reported his contact with risk management to Drs. Livingston and Rege, without more, does not support an inference that any of the doctors subjectively believed Irene's death was due to a breach of applicable standards of care.

Next to be considered are Dr. Livingston's investigation and report. The evidence shows that when a patient dies, Parkland's standard procedure is to have the case reviewed for quality management purposes. There is no evidence Dr. Livingston's review was other than pursuant to standard procedures. His report contains language that, considered in isolation or out of context,

might support an inference that he developed a subjective belief the surgeons may have been at fault. For example, he indicated "[c]linical management contributed to" Irene's death, "a technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury," and checked the "No" box in response to "Criteria 1 = Practice consistent with established standards. Physician Reviewer comfortable with practice. Practice Acceptable." But in considering all the evidence, as we must, Dr. Livingston's explanatory statement giving his opinions and conclusions cannot be disregarded. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824-25 (Tex. 2005). He checked boxes specifically indicating Irene's death was not the result of a breach of standards of care and in a narrative statement on the form he clearly set out his opinion that the unfortunate occurrence was a recognized complication of laparoscopic hernia surgery and "no standard of care issues were identified." *See Roark*, 633 S.W.2d at 811. He recommended that no further review be taken, and none was. The third step in Parkland's quality management follow-up process was not initiated and there is no evidence that further investigation of any nature was made.

The Court recently considered the actual notice issue in a non-health care setting in *City of Dallas v. Carbajal*, ___ S.W.3d ___ (Tex. 2010). There, the plaintiff sued for injuries she suffered when she drove into a gap in the roadway in a construction area. A City of Dallas police officer promptly investigated the accident. The officer's written report indicated that the plaintiff drove through an unbarricaded area. The plaintiff sued over a year after the accident, but she had not given timely formal notice of claim to the City. The trial court denied the City's plea to the jurisdiction based on lack of timely notice under the Tort Claims Act and the court of appeals affirmed. The court of appeals' opinion turned on the City's immediate notice that an incident had occurred, the

lack of evidence of a responsible entity other than the City, and the City's knowledge of its possible fault in the matter:

> [T]he police report here shows the City had *immediate notice* of the incident and its *possible fault* in failing to block the gap in the road properly with barricades. . . . [T]here is no evidence here of a responsible entity other than the City, and the police officer making the report is an employee of that entity. . . . [T]he police report here is more than just notice of an accident or a description of a road condition; it is the police officer's report of her perception of the cause of the accident.

City of Dallas v. Carbajal, 278 S.W.3d 802, 806 (Tex. App.—Dallas 2009), *rev'd*, ___ S.W.3d ___ (Tex. 2010) (emphasis added). The Court reversed the court of appeals' judgment. In doing so, the Court quoted and emphasized some of the previously-quoted language from *Simons*:

> "It is not enough that a governmental unit should have investigated an incident . . . , or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault."

Carbajal, ___ S.W.3d at ___ (quoting *Simons*, 140 S.W.3d at 347-48). The Court concluded that "[w]hen a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue." *Id.* at ___. That same reasoning should apply to the Arancibias' claim.

Dr. Livingston was designated to investigate the care Irene received and determine whether breaches of applicable standards of care occurred as part of routine procedures. His report shows that he recognized the perforations in Irene's bowel were technical errors, yet it also shows his opinion was that the perforations were a recognized complication of the surgery Irene underwent and were not outside the boundaries of accepted standards of care. He made an unambiguous hand-

written summary statement to that effect and recommended that no further review of the matter take place. Dr. Livingston explained his reasoning in his deposition and maintained that his report correctly set out his subjective opinion that there were no standard of care violations. Based on Dr. Livingston's recommendation, the third step of Parkland's quality management review process did not occur. And there is no evidence that before the Arancibias finally sent their letter notice to Dr. Watson more than seven months after Irene's death, Southwestern believed it should take action to gather information "necessary to guard against unfounded claims, settle claims, and prepare for trial." *See Cathey*, 900 S.W.2d at 341.

The Court's holding today does not take into account the nature of determining "fault" in health care cases. All the physicians recognized that the unrepaired perforations and Irene's death were bad results. But although there is always possible, or potential, liability for a bad health care result, a bad result simply is not evidence that a health care provider was at fault because standards of care were breached. The Arancibias dispute Dr. Livingston's opinion, but they do not point to any reason for Southwestern to have subjectively disbelieved the sincerity of his findings and conclusions. Nor do they refer to evidence that Southwestern or any of its physicians discounted Dr. Livingston's investigation and opinion or otherwise independently formed a subjective belief that the surgeons caused the perforations by breaching any standards of care. Thus, there is no evidence that Drs. Watson, Livingston, Rege, or Southwestern had subjective knowledge or belief that the surgeons and Southwestern were at fault in regard to Irene's death—and until today such knowledge has been required for actual notice when a litigant fails to give timely formal notice of claim.

In *Simons*, the Court stated that "a governmental unit cannot acquire actual notice merely by conducting an investigation, or even by obtaining information that would reasonably suggest its culpability. The governmental unit must have actual, subjective awareness of its fault in the matter." 140 S.W.3d at 348. And in *Carbajal*, the Court rejected the argument that immediate knowledge of the facts by the City of Dallas together with the absence of evidence of other responsible parties and its knowledge of possible fault because of missing barricades was actual notice. ___ S.W.3d at ___. The Court should likewise reject the argument that Southwestern had actual notice because it knew of injuries and knew of undetected and uncorrected technical errors that potentially could generate allegations that the injuries were caused by breaches of standards of care.

IV.

I agree that statutory notice is jurisdictional under the Tort Claims Act as it applies to this case. I would hold that the notice issue is dispositive: Southwestern did not have actual notice, thus the Arancibias were required to, but did not, give timely formal notice. I would reverse the judgment of the court of appeals and dismiss the Arancibias' suit against Southwestern for lack of jurisdiction.

_____

Phil Johnson
Justice

OPINION DELIVERED: October 22, 2010