ORAL ARGUMENT - 1/15/97
96-0433
DIAZ V. WESTPHAL

VILLARREAL: Dr. Diaz received a summary judgment from the TC. Part of that summary judgment was affirmed; part regarding the minor Eric Westphal was reversed; and we are here on my petition seeking to have that part of the reversed summary judgment heard and the CA opinion reversed on that basis and the summary judgment affirmed.

First I think it's important to just run through the facts a little bit. Dr. Diaz last treated Michael Westphal in Aug. 1984. In Sept. 1984, Michael Westphal went on vacation in North Carolina. He experienced urinary tract bleeding and went to the ER there. A physician there told him that he had been on Cytoxan too long. Cytoxan was a drug that we being given to him, prescribed to him since 1977 by Dr. Diaz and earlier by other doctors. The physician in North Carolina told him not to take the Cytoxan - he had been on it too long, and he stopped taking it. He continued his vacation to Colorado where he was hospitalized for 2 weeks with the same urinary tract bleeding and inability to urinate. He came back to Texas and was immediately sent to Citizens Hospital in Victoria for another emergency hospitalization, and with the same symptoms.

It is relevant to note that when he returned to Texas he did not go back to Dr. Diaz. His wife explained on deposition that the reason they didn't go back to Dr. Diaz is that they felt that he had committed an error in professional judgment in treating Michael and leaving him on the Cytoxan for the period of time that he had.

Now in March 1991, Michael Westphal was diagnosed with cancer. He died in April 1992, and the suit was filed in May, 1993.

CORNYN: Did you conclusively establish that the blood in the urine was related to bladder cancer, or does it make any difference?

VILLARREAL: It was not just blood in the urine your honor. What was established in the deposition was that he had continual problems with his bladder from 1984 to his death in 1992. And repeated hospitalizations related thereto. They were going to reconstruct his bladder and that's when they detected the cancer.

Now with regard to the relationship between the cancer and the initial hospitalizations, I think the connection was established by the plaintiffs themselves where they in their petition allege that the cancer was caused by Cytoxan. And in deposition explained that the injuries, the hospitalizations that were experienced in 1984 were from the same prescription of Cytoxan. In other words the same wrong, the same incidents, the same occurrence.

CORNYN: They had expert testimony connecting the initial symptoms of blood in the urine to Cytoxan?

VILLARREAL: No there is no expert testimony to that effect.

CORNYN: So you're relying on their pleading?

VILLARREAL: I'm relying on their admissions that they connect the Cytoxan prescription, and we accept those for purposes of the summary judgment. We accept their pleadings saying that the Cytoxan caused the cancer.

CORNYN: There is no independent proof; you're relying on admission in their petition?

VILLARREAL: That's correct. The CA said that I should have had by expert testimony established that the Cytoxan caused the cancer, which is diametrically opposed to my client's position in the case. It would be ridiculous for me to go into court and establish through expert testimony that the Cytoxan caused the cancer.

ABBOTT: The plaintiff had no expert testimony at all?

VILLARREAL: No your honor. All the testimony we have here is really from Mrs. Westphal herself. It's either her deposition testimony or her affidavit testimony. They offered an affidavit to controvert our proof. We offered her deposition testimony.

ABBOTT: If we determine that the limitations period begins running from the date that it was learned the drug may have caused the cancer, would you lose?

VILLARREAL: Yes your honor. There's are a lot of good reasons why I think you shouldn't.

ABBOTT: I agree with that.

VILLARREAL: But yeah I think if...it was filed less than 2 years and 75 days after the diagnosis of cancer; after she says it was diagnosed. And so yes if the date of diagnosis is used then we've got a problem.

CORNYN: If Mr. Westphal believed that the symptoms, the blood in the urine were related to Cytoxan, does that necessarily put him on notice that it may cause cancer? In other words does a cause of action accrue for the cancer?

VILLARREAL: I think there are a multitude of cases from particularly the CAs, not necessarily from this court, but if you look at the Cody case where an IUD implanted and she has pelvic inflammatory disease, and then 5 years later she has a hysterectomy and she tries to sue based on the

hysterectomy date. They say no it goes back to that...

CORNYN: I agree there are a lot of cases that say even though there is some damage, even though the full extent of the damage is not known, but those were singular claims of injury. And here I guess what I am asking is the blood in the urine, which you say started the statute running, and the cancer the same thing, same injury, or are they different; should they be distinguished from one from the other?

VILLARREAL: The allegation is that Cytoxan over prescription caused the cancer. The allegation is that the Cytoxan over prescription caused the bladder damage and urinary tract bleeding that led to several hospitalizations in 1984. Yes, I think that it accrued in 1984 and that's when they were on notice of a claim. I think the statute of limitations inquiry that this court has established is two-stage. First whether or not there is any wrongful...at this intersection of wrongful death and malpractice that is this two stage analysis. First of all, under Russell v. Ingersoll Rand I think Justice Hecht's opinion very clearly states that first inquiry is whether or not the cause of action accrued. And for that we evaluate the statute of limitations as to the decedents cause of action and evaluate whether he would have had a cause of action immediately prior to his death. Now the second stage of that analysis being okay if we get beyond that accrual statute of limitations then has the claimant brought suit within the statute of limitations as applicable to them. And in the last 14 months this court has decided 2 cases involving wrongful death claims in medical malpractice situations: Baptist Hospital v. Arredondo case and Bala v. Maxwell case. Both of those cases were decided on the second part of that two stage inquiry. That is in both cases you had an accrual because at the time of death in Baptist Hospital v. Arredondo, the 2-day old infant who died, in the other case the cancer, at the time of that person's death there was a cause of action that was still available based on the appropriate trigger dates for the statute of limitations. And so this court has yet to decide a case involving wrongful death claims arising out of medical malpractice based on the first part of this analysis as the court did in Russell V. Ingersoll Rand. And that's what I think this case provides the court an opportunity to write on. That is to clarify that the first inquiry is whether or not the decedent had a cause of action at his demise.

PHILLIPS: Under the current medical malpractice act if there had been treatment in 1984 and no symptoms, no blood in the urine, but cancer had developed in the late 80s or early 90s, when would limitations start running on that. The last time he saw Dr. Diaz was in 1984, but there is an allegation that the course of treatment there caused a cancer which manifested itself for some years later. Under the current medical malpractice and medical improvement act, whatever it's called, when does limitations commence running?

VILLARREAL: I believe that §10.01 states that the end of the course of treatment, in this case it was a course of treatment that we are dealing with, because he was being treated for Hodgkin disease with the Cytoxan. So the last date of treatment would have been August 1984, that would have triggered the beginning of the statute of limitations. It would have run by August 1986, or 75 days thereafter.

ABBOTT: Let's assume that you go to a doctor today and the doctor prescribes for you as a general health measure, that you take 10 aspirin a day, and you do that and you find out 1 year from now that you have some stomach disorder, maybe some bleeding from the stomach, and as I mentioned you learned that 1 year from now, but you decided not to sue because you've heard before that taken a lot of aspirin could cause some type of stomach disorder. But then you learn 5 years after that, that unbelievably taking that many aspirin can cause cancer. Would you agree that even though you had no clue when you learned that you had the stomach bleeding problem, that you may also have cancer, would you agree that you would have no cause of action pursuing that doctor for prescribing you 10 aspirin a day for causing you cancer?

VILLARREAL: I think that's the way the statute reads. I think that's the way the cases out of this court would require the result.

PHILLIPS: Could not have not known that though, it never manifests itself in less than 5 years; isn't that where our open court's decisions have...

VILLARREAL: I understood Justice Abbott's question to mean that it did manifest itself, that I had bleeding...

ABBOTT: You had bleeding unquestionably, but you had no indication of cancer.

VILLARREAL: I understood that there was some indication of harm occurring contemporaneously with the treatments.

PHILLIPS: So no matter how minimal that harm is, even if it costs you $100,000 to prosecute the case and your damages are going to be $1.50, if you had any manifestation then you conclude that the statute starts running and open courts doctrine would not avail you to toll the running?

VILLARREAL: We get into deciding well what is legally significant injury so as to begin the triggering. But if we do that, if we put it in the context of cases that have talked about what injury would put someone on notice, what's established is 3 weeks of hospitalization and continued bladder problems until his demise in hospitalizations thereafter. That I think would fall within what has been characterized as _____ injury so as to begin the statute of limitations to running. The other case that I think is relevant on this issue is Justice Baker's opinion in Jennings v. Burgess(?). There a negligent referral situation. The court says that at the time of referral the patient knew that she was being referred to a general practitioner instead of a specialist and so that triggers the statute of limitations to begin running. This is before the patient has any clue that this is going to be maltreatment, or any damages are going to result to her or anything else. And so if we are saying well what establishes a trigger? what degree of harm? If the referral in Jennings v. Burgess is sufficient so as to trigger the beginning of statute of limitations, then certainly the hospitalizations and the injury that Mr. Westphal had in 1984 are sufficient to trigger the statute of limitations from that.

GONZALEZ: Under your analysis and your argument given the fact that Eric's wrongful death and survival actions is derivative of his father, Mr. Westphal, if Mr. Westphal did not have a cause of action at the time of his death, we need to look no further and say because his father Mr. Westphal did not have a cause of action, the son did not have a cause of action, and we do not need to get into the tolling of whether or not the tolling provision is applicable in this case?

VILLARREAL: Absolutely. And my contention is the court needs to establish basically a hierarchy or the order in which this 2 stage analysis needs to take place. And I respectfully submit that the first stage should be whether or not there is an accrual under Russell v. Ingersoll Rand and for that we need to evaluate whether the decedent had a cause of action at the time of his death? And I think the court needs to openly reserve them because I can anticipate the argument: well what if the decedent dies and he has a cause of action and the minor doesn't bring it until 20 years later or 18 years later, whatever? That's not our facts here. Our facts here are we have treatment, we have damage in 1984, the statute of limitations runs in 1986; Eric Westphal is not even born until 1987 or 1988. And then there's a diagnosis of cancer and eventual death.

But I think that establishing the order in which you take these inquiries would go a long way to resolving this case.

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RESPONDENT

THOMAS: May it please the court. I've been wrestling on how to open. As I've talked to you for probably 25 times the last 3-4 weeks as I've been getting ready to come up here, and I'm just going to tell you why I took the case. Because you need to know what happens down in little towns like Refurio, and Goliad, where people are very patriotic, conservative, like to get back up off the ground after they've been knocked down, they don't like to sue people because they just think there is other things that are better in life to do than run into the courthouse and sue somebody. And when I visited with these people and learned the facts and got the truth from them as she said in her deposition, Mrs. Westphal, that my husband Michael, my highschool sweetheart, he just wanted to get back to work. He didn't want to rush into the courthouse because he's got Hodgkin disease. He can handle a hospitalization. But it's a different story when I'm going to die, when I am going to leave my son.

GONZALEZ: Did you allege Cytoxan caused the cancer?

THOMAS: Yes, no question about that.

GONZALEZ: How would you analyze this case given Russell v. Ingersoll Rand?

THOMAS: If your honor would please. Is that the slightest harm case?

GONZALEZ: No Russell v. Ingersoll talks about whether or not the cause of action accrues before the individual that is harmed, and if the harm to Mr. Westphal was the wrongful prescription of Cytoxan, that's what caused the harm. And his wife admitted in deposition that they knew that that injury had occurred, whether they decided to sue or not for whatever reason, and if Ingersoll Rand stands for the proposition that the survivor's cause of action is derivative from the person that was injured, how do you get around the fact that if that is the case Eric's cause of action did never accrue because his father didn't have a cause of action?

THOMAS: I do not get around that case if that is the case. If this court when it determines the social contracts between people and what we do when there's a breach of our social contracts, if this court has decided and is going to keep _____ if it has decided, that no matter how minor the breach in our social contract is, that I am required then to go into court or be told that I have slept on my rights.

PHILLIPS: It's really not our deciding because we are operating under statute. And _____ on its face no exceptions and it's what the people of Texas demanded by this constitutional language that we've had since 1836 about the courts being _____. But that's not a carte blanc check to us to say: the legislature says absolute 2 years statute of limitations plus 75 days but we'll just extend that when people are conservative or when this or when that.

THOMAS: The legislature with all due respect your honor did not use the slightest harm language. That's not in the statute. The legislature did not say when they said the cause of action for wrongful death accrues upon the death, that's what they said. This honorable court as it does using its collective wisdom, its conscience, the resources that this court has in its God given and God blessed duty, this court has decided what those words mean. And that's why we are here because you and your fellow justices are going to decide what those words mean. And when you determine what the words mean, that's why we are here. The legislature and the people have spoken. You in your wisdom tell us what those words mean. And reasonable minds can differ and they have, and sometimes when I read the opinions and I read dissents it hurts inside because sometimes dissents to me they lose sight to me of the fact that reasonable minds, good men and women of conscience can differ on points. I'm here to serve you and hopefully help this law rise to something higher than just argument over words. And I believe that Justice Gonzalez's question how do I get around the Ingersoll case if the case is derivative which this court has spoken well that it's derivative this this court has said and I'm paraphrasing in effect that rights of widows, children, others, can be affected by the fact that in this case the father did not sue. And that's just life, that's why, that's the law. If it's derivative, then I'd ask the court to look at its ruling and its decision on slight harm. And this is where it hit me in my heart, was that no matter how slight the harm once there's this social breach, then the clock starts running on whether or not anybody can even come into court. And those people that are truly the bedrock of this state hardworking, nonlitigious, pick yourself up off the ground, get back on the horse that threw you kind of people, are told they can't come into court. People that want to sue, people that are sue happy this statute and this courts construction of this law I don't think is going to have any effect on those type of people because those types of people are rushing

to the courthouse anyway.

ENOCH: I don't really understand your point to be that this was less than slight harm. It seems to me your point really is that the patient here, the injured person should be subjected to the statute of limitations only if they knew or should have known what the actual injury was as opposed to just having some injury. It seems to me that's your _____ point.

THOMAS: Excellent way to say it your honor.

ENOCH: And if that's your point, how could the spirit of the statute that says the time is going to run when this treatment ends. Because the victim could always say well I knew, I had blood in my urine, but I just didn't know it was cancer. I thought it was something else. Couldn't a plaintiff always say I didn't know that that was the reason I was injured and avoid the statute of limitations. How do we craft your kind of exception to make the statute of limitations to remain viable?

THOMAS: First, I don't think there's anyway in the world that this court can craft any kind of law that prevents people with no conscience, with no sense of integrity from lying. And I think that's the first part of your question is how are we going to keep people from saying something's true when it's not. And I don't know of any way in the world that you can do that. The second part to answer it is in a medical case you've got all these medical records of what somebody told; what is the prognosis. Is this the steps when somebody goes into the hospital and has a problem. They are hospitalized. How does somebody know that well this is now going to go into cancer. If they are required to sue, if Mr. Westphal was required to sue for his cancer that he didn't have back in 1986, the open courts provision we won't talk about that because we're talking slight injury that he has notice of harm, if he was required to sue in 1986, then the way the law is is that he has to come in get his medical experts and everybody gets to do that scientific mumble jumbo that looks into the future. Well he might get it, he might not, you have that kind of trial. And you probably have those all over the state now about what's going to happen in the future, what's going to happen. If someone is allowed to come in after it's happened, after it has manifested itself, when I say it, the injury, has manifested itself into the type of injury that people rightfully should become very serious about, then you just have to look at the medical literature, you look at the result, I submit that for those of us who try the cases we don't. And those of you who review the cases we don't have to talk about fortune-tell, we can look back, we can talk about what happened, not what might happen. I hope that answered your question.

CORNYN: The cancer was diagnosed for the first time in 1991?

THOMAS: Yes sir within 2 years of the lawsuit and Mr. Westphal died before the 2 years for him would have passed. That's just the way it happened.

ABBOTT: Is hodgkins disease a form of cancer?

THOMAS: I will tell you that I think it is from this lawyer's standpoint. I do not know that answer.

ABBOTT: If it is a form of cancer would that undermine your position to some extent by perhaps the argument that this gentlemen already had cancer in a way that would be unrelated to the drug that he took to make that cancer go away?

THOMAS: It certainly could if the court is going to talk about a type of disease as opposed to the stage of the disease. I know in this case that what we're talking about is a very complicated process once you look at it. I unashamedly and unabashedly admit that on how do you keep everybody from...how do you dot it? I do not know. I know that death, I know that once somebody tells you you are probably going to die in 18 months, that's pretty serious. And that to be told that you've slept on your rights because 6 or 8 years earlier you found out you had urinary bleeding, I'm just here to tell you of the true practical harsh results that that has on good people.

As I talk to my son about it, as I tell him what the law is in Texas, I tell him don't make mountains out of molehills. The way that I believe that the law is being argued and maybe perhaps the way the law is, is that one that there is no such things as a molehill when you have...if it's a legal injury it is a mountain and people if they are not allowed to wait until you actually have a mountain then everything's a mole hill, every mole hill is a mountain. And people should rush to the courthouse instead of holding back.

Those are my thoughts and I don't need to waste any more time on the case. I gave you my thoughts.

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REBUTTAL

VILLARREAL: I realize as I was sitting down the court is grappling with this question of well what degree of injury needs to be known back in 1984? And I would respectfully submit and I did a very poor job of answering that earlier, but it's absolutely irrelevant. Under all of the decisions of this court you don't do an open courts analysis in a wrongful death case. You don't even get that far. You don't get to the gut wrenching issues that you guys are dealing with. And you reaffirmed that most recently in Baptist Hospital v. Arredondo. You've reaffirmed it in Balo v. Maxwell; Moreno v. Sterling, Russell v. Ingersoll Rand. I guess what I am saying is that in all of those cases the court says...first of all Morrison v. Chance says the only thing that's left of the discovery rule is when the statute is unconstitutional under the open courts provision. The first stage in open courts provision is well is there a common law cause of action? The answer in all these case of this court and other lower courts including the Corpus court is offering is there's no common law cause of action because the wrongful death and survival actions are statutorily based. And so you can never have an open courts challenge.

These issues of well should he have had notice? is this slight injury? only becomes relevant if you are conducting an open courts analysis and that's improper under...

CORNYN: Your argument is limitations would bar the claim 2 years after the treatment concluded regardless of when the illness, the cancer, manifested itself?

VILLARREAL: That's true in light of the fact that we're talking about wrongful death in survival actions. And for purposes of distinguishing in Lucas this court held unconstitutional the damage can't under 45.90i and yet in Rose v. Doctor's Hospital in a wrongful death context this court held that the damage _____ is constitutional. It's a perfect analogy. This is the Rose v. Doctor's Hospital part of your Weiner v. Wasson rule. In Weiner v. Wasson you wrote that it was concluded that the statute of limitations under §10.01 of Art. 45.90i was unconstitutional insofar as it purported to cut off the minor's cause of action. That was a direct claim. The kid had been operated on when he was 15, and he brought suit when he was 19. And the court held that the 2 year statute of limitations was unconstitutional in that context. It wasn't a death case. In a death context you go back to not being able to do that open courts analysis and you wind up where you did in Rose v. Doctors Hospital. And I think it's a perfect parallel between Lucas and Rose and this case and Weiner v. Wasson.

ABBOTT: But isn't the analysis whether or not the deceased had a viable cause of action at the time of his death? And to determine that don't we have to go through the open courts analysis?

VILLARREAL: Not according to this court's opinions in Arredondo, Bala and Moreno. But under all those causes of action, the court says that as to the wrongful death cause of action, you don't do an open courts analysis. That's an error that I think both the majority opinion and the dissent opinion made. They went into this discovery rule or open courts analysis when there was no basis for doing so in a wrongful death action.

OWEN: We've recently held in discovery cases that if the injury is inherently undiscoverable when objectively verifiably, then the discovery rule may apply? Is this cancer, does it fall in that category?

VILLARREAL: I guess I'm not sure of the opinion the court is referring to which is why it makes it difficult.

OWEN: All Ty Computers and S.V. v. R.V..

VILLARREAL: Boy do I feel stupid because I don't know those rulings. But the injury here was verifiable at the time that it occurred. There was nothing including Michael Westphal from making inquiry at the time of his initial injury as to what the other damages from over prescription of Cytoxan were.

OWEN: Was there any evidence that he could have discovered the cancer within the two year limitations after treatment?

VILLARREAL: That would require expert testimony and there's been none your honor.

CORNYN: Are you saying in 1984 when he was hospitalized for bladder problems that he had bladder cancer then?

VILLARREAL: No I'm not saying that.

CORNYN: You're saying that's irrelevant?

VILLARREAL: It is irrelevant whether or not he had the cancer then, or what the disease progressed into. If he had some damage then applying the discovery rule which I don't even think this court should be applying in a wrongful death context, there is adequate basis to conclude that that triggers the statute of limitations.

CORNYN: Assuming we disagree with you just for purposes of my question and say that he could not have known of his claim that Cytoxan caused his cancer until 1991, would his claim still be barred?

VILLARREAL: The claim would be barred based on the damage that he incurred in 1984.
CORNYN: If his claim is I got cancer from taking Cytoxan, are his heirs saying he died because he took Cytoxan because it caused cancer, what would he have sued for let me ask it that way in 1984?

VILLARREAL: For the over prescription of Cytoxan which is his allegation in this claim, and the damages it caused. He would have gotten a doctor to testify as to his past damages and future damages, including the possibility of cancer.