ORAL ARGUMENT — 12/08/98
98-0363
CHILKEWITZ V. HYSON

WALKER: Pete Chilkewitz should prevail in this petition for review based on the undisputed facts of this case. The bottom line in this case is that Pete Chilkewitz timely filed, timely commenced a health care liability claim against respondent in its assumed name of Morton Hyson, M.D.

Mr. Chilkewitz filed his original petition suing respondent in its assumed name within the 2-year and 75 day time period required by art. 4590i, §10.01. So the 4590i language is that notwithstanding any other law no health care liability claim may be commenced unless the action is filed within 2-years. That notwithstanding any other law language is not even triggered. You do not even get to that issue when you have a timely filed action. So in this case, it's our position that Pete Chilkewitz timely commenced his health care liability action by filing an action against respondent in its assumed name. That position is supported by the Dallas CA case, *Bradley v. Etessam*. And in that case, the Dallas CA held that when you do have a timely filed action within the 2 year and 75 day time period, that the notwithstanding any other law language is not triggered. And the Dallas CA examined the legislative intent behind art. 4590i, §10.01, and found that when you do have a timely filed action within the 2-years and 75 days, that the notwithstanding any other law provision is not triggered.

So it's our position that if this court is so inclined it may dispose of this petition for review by determining only that Pete Chilkewitz timely sued respondent in its assumed name of Morton Hyson, M.D.

SPECTOR: Is the association solely Dr. Hyson?

WALKER: Yes. The record reflects that Dr. Hyson is the sole officer, sole shareholder, sole director, sole physician of the association.

SPECTOR: But he was not the surgeon in this case?

WALKER: The facts of this case are that "SEP" monitoring was performed by one of the professional association's employees, Mary Slodowski.

SPECTOR: Who is not a physician?

WALKER: That's correct. And also in Mr. Chilkewitz's 7th and 8th amended original petition, and I believe in his 6th also, there were allegations of negligence against Morton Hyson, M.D. in the training and supervision of Mary Slodowski.

PHILLIPS: Did you preserve error on your assumed name theory?

WALKER: Absolutely. In this case, in fact it's our position that it's respondent who has not preserved error. Because the facts of this case compel the application of Rule 28. Mr. Chilkewitz offered uncontroverted evidence at trial that he had properly and timely sued respondent in the assumed name of Morton Hyson, M.D.

BAKER: You use the phrase "assumed name". Did the professional association actually file a certificate of assumed name in the county records to show that it was doing business under the name of Morton Hyson, M.D., or are you just using that because they are so similar - a misnomer say?

WALKER: No, I am using that because Rule 28 uses the term "assumed name."

BAKER: I know, but isn't that a term of art in Texas?

WALKER: No.

BAKER: Why not?

WALKER: Because any entity - if I went out and did business as any entity, for example: Nako Brakes, involves a case where a defendant did business as Nako Brakes, and just because I don't file an assumed name certificate doesn't mean I'm not doing business as Nako Brakes, and that I'm not subject to being sued in the assumed name of Nako Brakes. Rule 28 expressly provides that a lawsuit may be brought by a plaintiff in their assumed name, or against a defendant in their assumed name. And filing an assumed name certificate is not a necessary predicate to the institution of a lawsuit against a party in their assumed name.

HECHT: An assumed name is not usually somebody else's real name?

WALKER: That's true.

HECHT: Nako Brakes isn't anybody, but Hyson is somebody?

WALKER: That's true.

HECHT: It's kind of unusual for a legal entity that has no existence other than at the law to take on the name of a flesh and blood person?

WALKER: That's true. In this case, based on the record before this court though, the facts establish that Morton Hyson, M.D., P.A. was doing business as Morton Hyson, M.D. Pete Chilkewitz introduced into evidence a letter on Morton Hyson, M.D. letterhead that was signed by

Morton Hyson, M.D.,P.A. So the P.A. was doing business as the M.D. He also introduced a yellow pages ad where Morton Hyson, M.D.,P.A. was advertising as Morton Hyson, M.D. And that evidence was not controverted. In fact, respondent waived any objection to the introduction of that evidence. The TC specifically asked: Do you have any objection, and the respondent said, No. Respondent never came forward with evidence controverting that. The question was never asked at trial of Morton Hyson: Was you P.A. doing business in the name of Morton Hyson, M.D.? He was never asked that question. Respondent in no way controverted the evidence introduced by Pete Chilkewitz that in fact respondent was doing business as Morton Hyson, M.D. Therefore, because the parties agreed to try all factual determinations for the statute of limitations to the TC, that finding is deemed in support of the judgment. So it's our position that we are beyond any factual determination of whether or not the association was doing business as the M.D. That fact is deemed in support of the judgment.

ABBOTT: Your original petition provides at least to me the impression that you are suing Dr. Hyson for his own conduct. And then the amended petitions give the impression that you're suing Dr. Hyson primarily for his supervision of others for allowing others who may be employees of Dr. Hyson, P.A. and their conduct. Would you comment on that?

WALKER: As I said, it's our position that - first of all, I agree with your characterization that the original petition does seem to imply that Morton Hyson is being sued also for the supervision of the "SEP" monitoring.

ABBOTT: I didn't say that. I did not discern that from your original petition. What I discerned from your original petition is you were kind of targeting Dr. Hyson for his own conduct, which seemed to be his own negligence. It's kind of vague. It's kind of not clear. But that's the impression I got, and I would appreciate your response about that characterization?

WALKER: It's our position at this point in time - if we want to go back behind - in order to get to where you are to go back behind and look at the original petition, you're going to have to set aside the presumption that that factual finding, which was tried to the TC, that the fact finding that Morton Hyson, M.D., PA was doing business as Morton Hyson, M.D., and was sued in the assumed name of Morton Hyson, M.D., you're going to have to set aside the implied finding of the TC that that fact was deemed...

ABBOTT: I'm going to assume that's true. Here's my point, and that is assuming your argument - let's say you prevail on your argument and that's the way the law should be in the State of Texas, it seems to me that if in fact your original petition targeted Dr. Hyson for his own negligence, and then you realize that we really need to sue this other entity because it wasn't Dr. Hyson for his own negligence who was responsible, but it's because of someone who really worked for Dr. Hyson, then you're really dealing with a totally separate claim, totally different from the application of Rule 28.

WALKER: That may be true if we could go back to that point in time. But what I'm saying is that there are certain procedural constraints that this court and the CA are bound by, and that constraint is that because the parties agreed to try the statute of limitations to the TC, the finding that Morton Hyson, M.D., PA was doing business as Morton Hyson, M.D. and was properly and timely sued in its assumed name of Morton Hyson, M.D., that finding is implied in support of the judgment. And that implied finding has not been challenged by respondent on appeal. There is no point of error claiming that the evidence supporting that implied finding is either legally or factually sufficient.

BAKER: You do agree that even under your argument that the bottom-line issue, which you said was that whether he timely filed under 10.01. And your argument is that notwithstanding any other law facet of 10.01 is not triggered, because the facts don't permit it. But we're still here trying to decide the legal issue are we not? I mean, assuming all the facts that you've said applied, the question is still, How does 10.01 apply to this case?

WALKER: Correct. I would agree with you. And to address that issue there are numerous legal reasons compelling the application of rule 28 to this case. First of all, Rule 28 is not a tolling provision. The Dallas CA erred when they classified rule 28 as a tolling provision, because the case law is unclear. Some of the cases use the word "tolled" as in halting the running of the statute of limitations. That is, the statute's running, running, running and then an original petition is filed, so the filing of the lawsuit halts the running of the statute of limitations. So tolled is used in that context to mean halting the running of the statute of limitations.

BAKER: Let me ask you about *Bailey* then. We held in 1995 that it's a procedural rule of equity which allows Texas courts to toll a statute of limitations. How do we get around that language?

WALKER: In *Bailey,* when this court used that term it meant halt the running of the statute of limitations. And Pete Chilkewitz has no problem with Rule 28 halting the running of the statute of limitations. When Pete Chilkewitz timely filed his original petition against respondent in its assumed name of Morton Hyson, M.D., he did halt the running of the statute of limitations. And that suit was timely filed, and that's why the notwithstanding any other law provision doesn't come into play. So to the extent that rule 28 is classified as a tolling provision, ie., filing suit in someone's assumed name halts the running of the statute, we would agree with that. It's our position that the tolling provisions that 4590i, §10.01 prohibits are the ones which extend the time to file suit outside the 2 years and 75 days. And rule 28 simply does not do that. Rule 28 has no application if there is not a timely filed original petition.

BAKER: But you have to have Rule 28 in your favor in this case to win your argument don't you?

WALKER: We have to have rule 28, or the doctrine of misnomer, or the doctrine of

misidentification. I have chosen today to focus on Rule 28 due to time constraints. But there is evidence in the record supporting implied findings in Chilkewitz's favor on rule 28 and also the doctrines of misnomer and misidentification. So if the judgment is upheld on any of those theories, then Pete Chilkewitz prevails.

HECHT: Did you sue both the individual and the PA by naming one entity in the original petition?

WALKER: Our position is that we sued the PA, respondent, the PA, which would then have vicarious liability also for the acts of Morton Hyson, M.D.

HECHT: So your position is you didn't sue the individual. By calling it the individual, you sued the association?

WALKER: Yes.

HECHT: But you didn't sue two people?

WALKER: Correct.

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RESPONDENT

ALSUP: I represent Morton Hyson, PA, the association. This court is called upon to interpret a statute it has repeatedly interpreted, §10.01, which embodies a policy decision by the Texas legislature that a health care liability claim must be brought against the right party absolutely within 2 years, no exceptions.

This may not be the emotionally satisfying position in this case, but it is the correct, and it is the fair result.

ABBOTT: Does your argument fall apart if we construe rule 28 not to be any other law?

ALSUP: No, it doesn't. And the reason is Rule 28 does not even apply here. This is not an assumed name case. This is a misidentification. Dr. Hyson, individually and the association, are two totally separate legal entities separately existing entities. The wrong party was sued. That is the misidentification. And in order to get beyond misidentification, you have to use a court created exception to misidentification, the *Hilland* exception, which we can talk about. But going back to assumed name, which is your question, with assumed name you get the right body into the courthouse...

ABBOTT: Your claiming that misnomer and misidentification would be common law,

and therefore, it would be any other law?

ALSUP: Misidentification simply means you've got the wrong party. In order to get beyond misidentification, you have to get to the exception to misidentification, which is an equitable tolling doctrine court created, that says there's no prejudice, not misled, both parties knew, the wrong party knew about it. That is law. That is a court created exception, and that is law. Just as assumed name is law in order to get the right party in there you have to show an assumed name, and that is any other law.

ABBOTT: Let's assume that we were to apply rule 28, and let's assume that we were to construe rule 28 not to be any other law, that it's just a rule of procedure, would that mean that you would lose?

ALSUP: It still does not mean that I would lose, because assumed name was never preserved, which is a question that CJ Phillips' asked. Assumed name was never pled until Dec. 8.

ENOCH: I think that may be your position, but let me interject this question. If that's a factual determination and you have a judgement against you, then it seems to me the courts have to deem that finding to support the judgment. If we deem that finding to support the judgment, you have to assume that was what was tried, and therefore, a liberal amendment of pleadings must be permitted. And so, the argument that it wasn't pled until at some other time isn't what raises the question. What raises the question it seems to me is that it's a deemed finding in favor of the judgment. And then we simply look to see if there was a pleading supporting that. How do you get around this deemed finding in favor of judgment?

ALSUP: Because I think that is too many leaps in the evidence. The evidence throughout the trial was they were two separately existing entities. The agreement that has been raised by petitioner over and over again was in regard to a motion for instructive verdict. That was on Dec. 7, the time-line shows that. At the time only misnomer was pled. The association said, I move for instructive verdict on limitations. The court said, we will take evidence on that. Evidence was admitted, which was some of these documents that petitioner has talked about, and some testimony from Dr. Hyson's deposition, and the court said, I deny the motion for instructive verdict. Well first the court said, are those exhibits for this court only or are they for the jury? And the party said, No, this court is going to have to determine the factual matters as to limitations. The court says, I except the exhibits and I deny the instructive verdict. After that, the next day, before the case went to the jury assumed name was pled. But that cannot be deemed to support the judgment because there was controverting evidence during the trial and it was Chilkewitz's burden to get a fact finding on assumed name, and he did not get it. And you cannot deem that finding in support of the judgment, because it was his burden to get a fact finding. And so it is not preserved, because he got no fact finding from the jury on assumed name.

ENOCH: So that was a contested issue that should have been submitted to the jury is

your point?

ALSUP: Absolutely.

ENOCH: And it wasn't, and so it can't be deemed. But if you're missing a question to the jury, and there's no objection to the missing question, aren't we in the same presumptive mode where you presume that this is an incidental finding necessary to the judgement and supports the judgment? Wouldn't there have to be an objection to the failure to submit the issue and call the courts' attention that there's not an issue supporting this to have that issue?

ALSUP: No, I don't believe that's correct in this case, because on the face of the pleading, the pleadings showed as a matter of law that the suit against the association was time-barred. And then it is petitioner's burden to plead, prove and get findings on that matter in an avoidance of limitations. And a matter in avoidance of limitations cannot be deemed to support the judgment.

So, no, I don't think you can make that leap and assume that that matter was a deemed finding. And, moreover, assumed name isn't even the right doctrine. He sued the wrong party. This is a misidentification. This is not an assumed name case.

HECHT: If it were an assumed name case, and it really were the assumed name filed with the local authorities, would that not be a limitations problem?

ALSUP: If it were an assumed name case, I think you get back to the issue that we're here for, and that is, the legislature said two years absolutely no exceptions. And assumed name is a law. It is any other law invited in rule 28.

HECHT: But it's what you're being called. Your suing - I want to sue this doctor, but he refers to himself as something else. He's entitled to do that under the law, it's the same person, he just has another handle.

ALSUP: And that's where I disagree with you. It's not the same person. It is two separately existing legal entities.

HECHT: I understand that in this case. But I'm asking in another case. I understand that's your position in this case. But if it were just one entity, there was no question about it was the right entity, would it be different?

ALSUP: If you got the right entity into the courthouse, I think you still have the problem of whether that is another law. And the cases are replete, as Justice Baker pointed out, that assumed name tolls the statute of limitations, and the legislature has said: we want consider any laws that affect our two year statute of limitations.

HECHT: If you were suing Physician Associates, PA, that's their legal name, and you left off the "s", Physician Associate, PA, and it really was this entity, you got the right entity, you served them, and that's who was there, would that be a limitations problem?

ALSUP: I don't think so. You would have the right person in the courthouse. In this case, you don't have the right person in the courthouse.

This is not an assumed name case. This is a misidentification. There are two separately existing legal entities. The Professional Act gives the physicians the right to perform a professional association. Dr. Hyson did that. Two separately existing legal entities.

ENOCH: If the only _____ on the door was Hyson, M.D., and the only stationary that he used was Hyson, M.D., and the only titles that he used were Hyson, M.D., the fact that he had corporate records that demonstrated that Hyson, P.A. was separate from Hyson, M.D., would there still be a claim that he's operating under assumed name? That entity is operating under the name of Hyson, M.D.

ALSUP: There could be a claim but it would have to be pled, proved in a jury finding. But in this case it's different because the suit as it turned out looked like it was a suit against Dr. Hyson, individually, because he actually was a treating doctor for Chilkewitz. But as discovery progressed, what the suit came to be about was an employee of the association, and that's completely different in suing the individual verses suing an employee of the association.

If you take the hypothetical - turn this same case around, you've got a professional association and there are 10 doctors that are members of the professional association and three of those doctors participated in the surgery somehow in this case. And the same facts are present that it was not anything that those physicians did with their SEP monitoring, but rather a grounding pad for the electric scalpel that caused the problem, because the hospital changed the grounding pad without telling anybody and because the grounding pad was improperly manufactured.

The suit is against the association, and the association is in there. And all 10 doctors know about it, including the three who were at the surgery, and it caused a burn. But they're not concerned, because they know nothing they did violated the standard of care since it was the hospital and the manufacturer adjudged to be 85% liable, as it was in this case. Three years later, if plaintiff tried to bring in those doctors individually, I don't think there's a TC around who wouldn't say that that suit under 10.01 is barred by the statute of limitations, the strict 2-year statute of limitations, and that is this same case. He sued the wrong party. The legislature's policy determination when it enacted this statute was to solve a health care liability crisis. It wasn't an equitable consideration for an equitable statute of limitations. It was get the right party, and do it within 2 years.

Chilkewitz had 2 years and 75 days to get it right. He waited 2 years and 16 days after his injury before he sued Dr. Hyson individually. By the time discovery was going to be due, this statute would have passed. Those answers to discovery show that Dr. Hyson did not participate in the surgery, rather an employee did the monitoring. But if your read the record in this case, Chilkewitz even knew that because he was awake and talked to that technician before he went in for the surgery. So characterizing this case as an assumed name case is wrong, and it's legally incorrect. Chilkewitz sued the wrong party. He had ample time to sue the right party.

In order for this court to find for Chilkewitz, you have to make a number of leaps. First is, you have to find that this was an assumed name if you're going to go that route, which it wasn't. Hyson and Hyson, PA are two separate entities, and the evidence at trial proved they were two separate entities, and Mary Slodowski was an employee of the association. If you look at as you should, that it is a misidentification case, then you have to find that that exception and misidentification was pled, and it never was. It wasn't pled. No jury findings were obtained.

Then, you have to ignore the legislative language about notwithstanding any other law, that this is not a strict two year statute of limitations. Then you have to ignore this court's own precedent where you've repeatedly held that notwithstanding any other law means just what it says. And then you have to find that that matter in avoidance, the exception to misidentification is not law.

This court should affirm the CA. It reached the correct decisions. Chilkewitz suit against the association was time barred.

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REBUTTAL

HECHT: To follow-up on Justice Abbott's question, your original petition says, That defendants Hyson and Elboar are individuals who practice medicine. That sounds like people rather than corporations does it not?

WALKER: I had the opportunity also to pull out that original petition, and that's what it says and it also provides that while under the care of the defendants, Elboar and Hyson, he sustained severe electrical burns as a result of the test that were ordered and performed under the general supervision of said defendants. So, I think that the problem we're having here is that it's our position that we are beyond that. Respondent had an opportunity in trial to come in and contest the fact that he was doing business as Morton Hyson, M.D. He did not do that. He expressly waived any...

HECHT: But it wouldn't make any difference even if you proved that that was an assumed name of the PA, you could still sue the person, you could still sue the individual guy as opposed to the association, and if that's what you did, it doesn't make any difference if there's something else that's also called Hyson. You said you only sued one person.

WALKER: That's correct. If you will look on our 7th and 8th amended original petitions, we specifically pleaded that Morton Hyson, M.D., PA was sued in its assumed name of Morton Hyson, MD. And that is on the first page of the 7th amended original petition, and the first page of the 8th amended original petition where we say, Additionally or alternatively Morton Hyson, M.D., PA was doing business as Morton Hyson, M.D. and was sued under its assumed name or common name of Morton Hyson, M.D. And so we feel that we pleaded that fact and we've offered evidence of that fact. It was uncontroverted. Any objections to that evidence were waived and that finding is deemed in support of the judgment. So it's our position that we're beyond the TC. We're beyond the time to make those factual kinds of determinations. And we're here before this court and before the appellate court with those findings deemed in our favor. And they are unchallenged.

HECHT: What troubles me is that in the original petition though, you refer to Hyson as an individual, but then subsequently you refer to Hyson, PA as an association. So it seems to draw a distinction there between individual and association so that you couldn't have thought in the original petition that Hyson was really the corporation. But you say the findings later supplant that.

WALKER: What I am saying is that this at point in time, I don't think it's relevant what we thought. The bottom-line is that we pleaded and we proved that we timely sued Hyson, M.D., PA, respondent, in its assumed name of Morton Hyson, M.D. And that findings deemed in support of the judgment. And in order to go back behind that finding, this court's going to have to set aside the rule of law that factual findings tried to the court are deemed in support of the judgment. This court's going to have to set aside the fact that respondent failed to challenge the legal or factual sufficiency of the evidence to support those findings, and that's the only way that this court is going to be able at this point in time with the procedural, the very unique unrepeatable procedural posture that this case is in, that this court is going to be able to go back behind there and unfind that.

HECHT: Well I guess I'm focusing a little more closely. If there are two things a) and b), and they are both called by the same name, b's real name is something else, but B has assumed A's name. There's no question it can be deemed, it can be found, you can have a jury verdict that B really did take on A's name, but there's still a question of whether you sued A or B in the first instance isn't there? Even if it's true that the association went by the name of the doctor isn't there still a question: Did you sue the doctor or the association in the first pleading?

WALKER: It's that fact finding that we believe is deemed in support of the judgment. We pleaded that fact in the 7th and 8th amended original petition, and we offered evidence of that fact and it was uncontroverted. So it's our position that it is that very fact which is deemed in support of the judgment.

Because of the pleadings that we just discussed in the 7th and 8th amended original petition where we pleaded that we had timely sued respondent in its assumed name of Morton Hyson, M.D., the face of the pleadings do not show that the suit was time barred. The face of the pleadings show that we timely sued respondent in its assumed name of Morton Hyson, M.D.

So when you look at the pleadings, the face of the pleadings, they do not show as respondent contends, that the suit was time barred. We contend that there was no need for us to get findings of fact because these matters were agreed to be tried to the TC. All parties agreed and the TC agreed on the record to try all factual matters to the TC concerning statute of limitations. Even the Dallas CA's majority opinion held that with respect to assumed name, Chilkewitz also presented evidence regarding this doctrine and also held that that evidence was encompassed by the agreement to try all statute of limitations factual matters to the TC.

So I think at this point in time for respondent to come in and say that that wasn't truly their agreement is just too little, too late. I think the record reflects that at the time of trial, the parties as well as the TC agreed to try all factual statute of limitations matters to the TC. And we would ask this court to enforce its prior holding in *Johnson v. Swain*, where this court held, That when there is an agreement on the record by the parties, that this court will enforce it.

I would also point out that this court has recognized the doctrine of fraudulent concealment. And this court has applied that doctrine...

BAKER: Did you plead it?

WALKER: No, and I'm not suggesting that's applicable in this case.

BAKER: Fraudulent concealment is not in any way, shape or form the same as a discovery rule?

WALKER: Correct. I would agree with that.

BAKER: And it's not pleaded here?

WALKER: Correct. I use that by way of analogy to show that this court has recognized a certain situation where a suit filed outside the 2 year - 75 day time limit will nonetheless be allowed to be pursued. And in our case, whether you apply rule 28, or misnomer, or misidentification, they are all pivoting on a timely filed original petition. In other words, to claim either the doctrines of misnomer, misidentification, or rule 28, you must have timely filed your original petition. I point out the fraudulent concealment doctrine to show that what we're asking in this court in this case is far less than what the court has done in fraudulent concealment cases.