

GONZALEZ The Court is ready to proceed in the case of Dr. Guillermo Salinas, Dr. Abel Salazar v. Dr. Rafati.

MARSHAL May it please the Court. Mr. Larry Macon will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

MR. MACON Thank you. May it please the Court. The fact that this is a no - that there was no evidence to support the award of \$1.4 million for the plaintiff's one-third interest in a medical practice is supported by two basic theses. First, under 38.1 of the Partnership Code, the income method is improper to value the property of a dissolved professional partnership. Secondly, and one that's very clear, is that the award of the additional \$1.3 million above what even the plaintiff's own expert had said was simply not supported by the evidence. But let me to come to the more general proposition. As the Court's aware, where there is a dissolved partnership, 38.1 of the Uniform Partnership Act says that what you do is you take the partnership property and that's the key word, property, and you first apply it to the partnership liabilities, and that any surplus shall be distributed in cash to the partners. Very important words. And it's particularly important in the event of a professional partnership because, as this Court has recognized in *Nell v. Nell* and in other cases, it's rare to have any sort of goodwill in a professional partnership. The Illinois and the New York courts have specifically taken this provision of the Texas Partnership of the Uniform Partnership Act - and said where you're dealing with a professional partnership, there is no goodwill to be divided. Now, why it that? Well, as lawyers, we understand that when a partnership dissolves, that there seldom is anything that goes forward - the same thing is true with doctors.

CORNYN If you were to leave Akin Gump, would that be - there is certainly some value in the goodwill of Akin Gump that is yours upon dissolution of the partnership, is there not, or unless it's subject to the - some other written agreement?

MR. MACON Let's put the written agreement aside. I do not believe that I have any right to any part of goodwill of Akin Gump. Any goodwill is mine. It is with me. Akin Gump, although you know, the larger the entity the more incremental it becomes, but I assume that Akin Gump that exists today is a partnership that includes my goodwill. When I leave, if I had a great ego, I would say that when I leave, Akin Gump will lessened by it. And let me go ...

CORNYN If we can direct, maybe, and I didn't - if we can direct to the facts of this ...

MR. MACON Yes.

CORNYN If you could clarify for me. My understanding is from reading the briefs that Dr. Salinas and Dr. Salazar continued on with the Radiology Associates, is that correct?

MR. MACON That is totally incorrect. Number one, they did not continue using the name. Both entities, Salinas and Salazar, used a totally new name which they called Associates in Diagnostic Radiology. Dr. Rafati used a separate name. No one continued to use the name.

CORNYN Did they retain the contract with Mercy Hospital?

MR. MACON The contract with Mercy Hospital was retained by Dr. Salinas. It had been in his

name for - since 1984. It continued in his name. It never was in the name of the partnership and there was no jury finding of any kind that this was a partnership asset. To come to both of your points, further, this is a strange - the facts of these are strange in that nobody moved out of the office. Each of them - there were three offices that they had in the hospital. They didn't change. There wasn't a name on the door that said Radiology Associates. There was no goodwill associated. The name went away and disappeared. The location didn't change for anybody. So, if you go back to *Nell v. Nell*, it talks about two elements of goodwill in professional partnerships: name and location. Name, unlike Akin Gump, Radiology Associates, went away. So there's no goodwill there. Location. Each of the doctors showed up at work the day after the dissolution totally unaffected.

GONZALEZ How can Dr. Rafati be not affected when Dr. Salinas was head of the radiology department of the hospital can determine who gets the business and who does not. Apparently the jury thought that Dr. Rafati was very much aggrieved by this new arrangement.

MR. MACON Judge Gonzalez, let me say that number one, there is no evidence that Dr. Salinas had any control over what - who got what radiology work. As a matter of fact the evidence was that it is the patient's doctor who makes that decision.

CORNYN Didn't he have the contract though with Mercy Hospital?

MR. MACON He had a contract.

CORNYN So why because he had that contract, how does that jive with your last statement? In other words, ... he had the contract with Mercy Hospital to provide radiology services. He very much had a say in who got the radiology business.

MR. MACON He had no right to veto any doctor if a doctor said "I want" - if a treating physician says "I'm going to use Dr. Rafati", the evidence was from the director of Mercy Hospital that if any doctor said "I'm going to use Dr. Rafati for my - to do my radiology", he had the absolute right - he had privileges and he had no control and Dr. Salinas had no control and no veto power of any kind. Further, it was only a six-month - the six-month termination provision and there was no testimony of any kind as to the value of that contract. To back you up, the contract, there was testimony, was primarily for administrative duties, and you can look at it and you can see that at no point did Dr. Rafati had the right to say "no" - I mean, I'm sorry - did Dr. Salinas had the right to say "no, we do not want Dr. Rafati to do anything." He had no control over ...

SPECTOR Was there any evidence that he did?

MR. MACON No, there is no ... the evidence is that Dr. Salinas, even though he continued as medical director, did not stop any business from Dr. Rafati. There was evidence that there was not one patient whose doctor said "I won't use Dr. Rafati". There was not one who was refused in any way. Dr. Rafati continued with his office at Mercy Hospital until he voluntarily left much later, after the trial, and he continued to service patients in Mercy Hospital with no change whatsoever.

CORNYN You state that the income stream - income-based model for valuation - is inappropriate for dissolved partnerships?

MR. MACON Dissolved professional partnerships, sure.

CORNYN Dissolved professional partnerships. But what other method of calculation might be used - here again, to get back perhaps to the circumstance where you're a partner with Vinson and Elkins, let's

say, for twenty years, rather than picking on your firm. But if you've been with that firm for twenty years and then you are essentially kicked out of the partnership and it continues on and all the clients stay with Vinson and Elkins, why isn't the income stream method appropriate under those circumstances?

MR. MACON Well, of course, as we know, this is a different situation in that the name was not used, but let's come back there, is that there is a thought - there is a belief that the Vinson Elkins that existed with Lawyer X is a different Vinson Elkins and with less goodwill than is used without Doctor X. Okay. What is the appropriate method. Let's use exactly what the Partnership Act says. Use the property, not the fair market value, not the value some expert says, but to use the property. It's the asset method. It - you weigh what the assets are, at that ...

CORNYN You would concede, wouldn't you, that that doesn't really measure the loss of the excluded partner because if they - say you get this value and the fixed assets of the partnership, you may be denied basically an income if the clients you used to have stay with their old law firm and you have no clients, you may have some typewriters and computers and copiers, but does that accurately measure the loss of an excluded partner?

MR. MACON The answer is yes, I believe it is because it's ... let's talk about two separate things. One, it was clear that Dr. Rafati got his share of all profits that occurred while he was there, so he was not excluded from any part of the cash that had come into ... Secondly, as this Court has said in *Nell v. Nell* and many cases since then, that there are - there is some portions of goodwill that are personal, that are not part of the ongoing entity, and I guess perhaps the biggest flaw in the income-based method is that - how can it be an ongoing entity?. The fact that, number one, we know in this case they didn't use the same thing, but let's suppose that the Chicago Bulls were a five-person partnership and Michael Jordan decides that he's going to retire and he said "well, hey, we made \$20 million last year and we had 70 wins this year, so I want my ...

GONZALEZ Sixty-nine, so far. Tonight at 7:00.

MR. MACON And he says "I want my partnership share based upon 69 or 70 wins". That's not right. Well, of course it's not because it is not the same entity without Michael Jordan as it is with Michael Jordan. The partnership, even if it had gone by the same name as Radiology Associates, is not the same entity without Dr. Rafati as it is with.

OWEN But you, in response to these questions, you are assuming that there was a wrongful expulsion. Isn't there a difference in expulsion from a partnership as opposed to dissolution of the partnership entirely?

MR. MACON Justice Owen, you are 100% right and that was the point. In my mind, just to digress for a second, that's the problem in this case is that the trial court allowed initially for it to be tried as a wrongful expulsion case and the Fourth Court saw that that was wrong. This - 38.1 deals with dissolution pursuant to the agreement, and you're 100% right that ...

GONZALEZ Excuse me, just to digress for a moment, and I'll let you answer her question, but dissolution according to agreement, there was no provision in the agreement for this type of a termination.

MR. MACON You're exactly right, but it's not ... you're 100% right, Justice Gonzalez, I was in error. The distinction is whether or not it's wrongful or whether or not it is not inconsistent with the agreement, I suppose is the way. And this was not wrongful and the Fourth Court held it was not wrongful, that there was nothing wrongful about it, and so going ... Justice Owen, you're right, going back to Justice Cornyn's ..., that's the best response is "hey, he wasn't thrown out". The law provides that if there is no

provision for dissolution, then what happens is that any one of the partners may by their express will say "we're calling it quits" and that's not wrongful expulsion.

CORNYN What happens when one partner says - gets together with the other partner and says "hey, we're going to kick out X here and, you know, all ... any one of us have an absolute right to dissolve the partnership by saying it no longer exists." Shouldn't there be some remedy to two partners ganging up on a third partner and dissolving the partnership and saying "you can take your x-ray machine and your typewriter with you, but that's all you get"?

MR. MACON No, there shouldn't be. A partnership is a voluntary association and if there is going to be protection, if there's going to be some way where a partner is going to get something pursuant to a voluntary dissolution of it, it should be written into the original agreement. If it's not written in, then 38.1 provides that all you do is you divide up the existing property. You don't value it, you don't look at the income, you divide up the existing property and that is what we're talking about.

BAKER Mr. Macon, is the correct statement is that there was one CPA that was an expert for the doctor who, and he valued the partnership without attributing any value to the goodwill attached to the person of each individual partner. Is that correct?

MR. MACON That's correct.

BAKER And then is it correct that in the record his expert testimony was the only testimony that had a dollar figure on it?

MR. MACON That's not correct, Your Honor. There was also the testimony of another CPA, Mr. _____, who said that if you take the hard assets pursuant to the Partnership Code, then the value of those assets are about \$7500 and one-third share is \$2500.

BAKER So, the record would support, at least on one hand, a low of \$7500 but the other expert testified that in his view the value was the range of a million and 766 to 2 million 940.

MR. MACON That is correct, based upon an income evaluation which assumes an ongoing business, and I think that's the biggest hole, and that is, this is not an ongoing business under any set of circumstances.

GONZALEZ Any other questions? Thank you counsel.

MARSHAL May it please the Court, Mr. Oscar J. Pena, Sr. will present argument for the respondents.

MR. PENA What my client was told was something to the effect that "look, here's the way we dissolve partnerships. You go, we stay, we continue operating, milking this business that you built up, and you don't get anything at all."

GONZALEZ Did he not continue to operate under the same name, isn't that correct?

MR. PENA They changed it slightly, it was Radiology Associates, and as I recall, they changed it to Associates in Radiology, or something like that. But they kept the personnel, they kept, which by the way, they had very good personnel. They had about ten employees in the office who were very knowledgeable in this business. They knew all about insurance forms and billing and typing out reports and things of that nature. They kept all of that, but the most important, they kept the benefit of this relationship that had been built up with the hospital over fifteen years, you see.

CORNYN How many hospitals are there in Laredo?

MR. PENA There's two very small ones that had maybe ten or fifteen percent of the business and then there's Mercy Regional Medical Center which services the Laredo population, maybe about 220,000, services Nuevo Laredo, population of about 400,000, and services the surrounding areas. They were servicing - the hospital was servicing something like 600,000 - 700,000 people, and most people who get sick have to go to that hospital and therefore the source, the tremendous source of business from that hospital. Now, and saying that aside from the personal skill, knowledge, ability of the members, there was something there of great value. There was this organization which had highly trained personnel not only in the office that they had outside there next to the hospital but also in the hospital there were highly skilled technicians in the hospital who while they were employees of the hospital were subject to directions by these partners. They would take the x-rays, they would perform all of the necessary work in the x-ray facilities, and so that the findings to the doctors for their observations and it was not anywhere like the *Nell v. Nancy Truasion* where you had a sole practitioner and once that sole practitioner was gone and the valuation was based upon his personal knowledge, skills and so on - his ability to work in the future - that was not the type of situation at all.

HECHT What if Dr. Salinas and Dr. Salazar had decided that they wanted to move to Houston?

MR. PENA Well, as matter of fact, when they said that they wanted to dissolve, my client said "well, you all go ahead and I will stay behind and continue the operation."

HECHT But wouldn't you have the same damage theory that you have in this case?

MR. PENA No sir, if they had pulled out, he would have been left with this organization in place that was so important with this relationship - business relationship - that was so satisfactory both to the hospital and to Radiology Associates.

HECHT But if it hadn't been as successful - if for some reason Dr. Rafati was not able to attract as much business as the partnership had before, you could get damages against Dr. Salinas and Dr. Salazar for leaving.

MR. PENA Well, see, I have to concede that the partnership agreement didn't say that - didn't have any term - a limit - they could expect terminated at will at any time so if they did so - if they chose to pull out, they could do. I don't think that we could have sued them for that, but what they did was they took up -took over the whole operation, continued making lots of money out of it, and we didn't get anything.

OWEN You're not appealing - you're not here saying that they CA erred in holding there was no wrongful dissolution? You don't have a cross-point of error before us on that, do you?

MR. PENA No ma'am, we did not file a cross-point. As you know in the trial court the jury found that there was wrongful dissolution.

OWEN But the court of appeals turned that around and you haven't ...

MR. PENA Yes, they reversed that.

OWEN On your expert's testimony that the value of this partnership was \$1.7 to \$2 million some odd dollars, how far out in the future was that income stream calculated?

MR. PENA Well, it was not based on that. As I understood it it was based on value attributed to the

organization itself that was in place without which neither these doctors could produce the income that they were producing ...

OWEN Well, they have to have some time period over which this income stream was generated. What was the time period?

MR. PENA That - it was not a projection into the future. It was based upon what this was worth - it had commercial value. The inference from the evidence was that this structure that was in place could have been sold to any other three doctors that had wanted to buy it and it would have paid for itself in one or two years. It was producing something like \$1.8 million a year so we say that it had commercial value. It could have been sold because the setup was extremely satisfactory to the hospital and to the association.

BAKER Mr. Pena, your answer to Justice Owen, as I understand it, your argument is that the organization in place was to train the people and to contract and so forth is where the value came that the expert testified the dollar figure, is that right?

MR. PENA Yes sir.

BAKER And so, am I correct then that based on your theory, the expert's testimony was that this package - existing package - was worth between \$1,766,000 and \$2,940,000.

MR. PENA That is correct.

BAKER And that's the only way the dollar figure that's in the record?

MR. PENA Yes sir. Of course we - there was more evidence than just testimony from that expert. We had ...

BAKER But is it correct that that expert was the one who valued the asset that you say was there that your client should have gotten one-third of?

MR. PENA That is correct, yes sir.

BAKER There may have been other evidence about other, but nobody put a dollar figure on it.

MR. PENA No sir, you're right about that.

BAKER So anything above \$2 million and 940 has no value attached to it, whatever it was, under the record.

MR. PENA Right sir. Nobody else came in and said "this is worth so many dollars and cents".

BAKER So that you could get any answer from the jury above \$2,940,000 for the value.

MR. PENA The jury considered - we gave the entire history including ... but no precise specific.

BAKER The top figure is \$2 million 940, or whatever it was.

MR. PENA Yes sir.

BAKER Thank you.

CORNYN And under the court of appeals judgment, you got more than a third of that value, did you not?

MR. PENA Yes sir, the court figure ...

CORNYN I'm trying to figure out how that - those jive.

MR. PENA The court figured that the jury heard more testimony than just the expert testimony and the jury concluded that it was more than what the expert said, and the other evidence consisted of income tax reports and a description - the history of the business, how it had grown by leaps and bounds, how it was producing so much money, and how it was so very satisfactory to the hospital and to the partners.

OWEN How much of that value - the \$2.9 million or is it \$2 million 940 was on the contract with the hospital?

MR. PENA Well, the whole business that we were getting from the hospital was based on that agreement with the hospital. And if I may so - say so - I don't agree that that contract belonged to Dr. Salinas. I don't think that's what the evidence shows. What the evidence shows is that, see, originally it was Dr. Rafati, the respondent Rafati, and Dr. Grace. They started this business, and the contract was taken from the hospital by Dr. Grace for the benefit of the partnership. Then they bring in Dr. Salinas and shortly thereafter Dr. Grace dies and the hospital says "well, how should we write up the contract now" and Rafati and Salinas says "well put it under Salinas' name", but during the trial I asked Dr. Salinas, I asked him "well did you take it for yourself or did you take it for the partnership?" and he said that he took it to share it with the partnership because if he had said otherwise, if he had said "I was a partner but I went up there and got this contract that the partnership had before and I got it for myself - for my own benefit - " then that would have been a gross violation of his fiduciary duty to his partner. He was supposed to be pulling for the partnership, not for himself, and what he said at the trial was that he got it to share it with the partnership, and that's at - I can give you a page number.

ABBOTT But wouldn't you agree that those issues are not on appeal to this Court?

MR. PENA Right sir. There was no question submitted to the jury, the trial court, no dispute actually as to that.

ABBOTT I understand, but those are not issues to be decided by this Court because those causes of action are not before this Court.

ENOCH Mr. Pena, let me ask you, on the valuation of the business, clarify this for me. I was under the impression that your expert said that the value of the 1.9 and the 2.9 was really two to three times the value of the assets of the business. Am I - weren't those numbers calculated with a factor?

MR. PENA He said that there were a number of methods that he had used to arrive at a valuation and that the income produced by the business was a significant factor in determining the value thereof, but he made it very clear that he had excluded professional goodwill attached to each of these three partners. See, when we tried this case, I was mindful of what this Court said in, what was it?

HECHT *Nell*.

MR. PENA *Nell v. Nell*. And I knew that professional goodwill that attaches to an individual is not divisible, at least for divorce purposes. I knew that and he was instructed to give us a value based strictly on the basis of the business entity itself, but not ...

HECHT As you indicated earlier, if these three doctor had left, any three doctors could have come in and if they could pick up the same business would have made the same amount of money?

MR. PENA Yes sir, but here's something of interest for the Court, I hope, that even if all three had left the partnership could have continued operating and producing money for the partnership because, you see, they also had two radiologists as employees on a salary basis that were working for the partnership and producing money, so even if all three of them had left, presumably the entity that was in place could have continued operating and making money for the partnership.

OWEN Do any of these employees have employment agreement, or a set term of time?
MR. PENA I'm sorry, ma'am.

OWEN Did any of the employees, including the radiologists, did they have employment contracts that committed them to work for a set period of time?

MR. PENA No ma'am.

OWEN They were employees at will?

MR. PENA Yes ma'am.

GONZALEZ If the Court were to disagree with you with regards to the professional goodwill, what would you be left with?

MR. PENA The entity that was in place that was so indispensable to make the money that they were making ... See, once Rafati was taken out of that, his income dropped from \$425,000 a year to \$200,000 a year. You couldn't make that great income without having this entity - this organization - in place, this relationship with the hospital, this millions of dollars worth of equipment at the hospital which Radiology Associates had the use of - the technicians at the hospital - you couldn't do it without all of that - without the business entity itself separate and apart from goodwill of the individual members.

GONZALEZ Well how to we justify - what is the evidence to justify the jury verdict and the court of appeals judgment?

MR. PENA We gave a complete description - complete history of the business that showed how it was growing - the amounts that it was producing - how it was organized - how it worked, and we had the accountant come in and explain to the jury that there is different methods of valuing businesses, that he had valued businesses on many occasions for many purposes, and that he knew how to put a value on the business separate and apart from the individual goodwill of the members.

OWEN Well you keep saying "separate and apart from the individual goodwill" - this contract with the hospital was a six-month term, is that correct?

MR. PENA Yes ma'am, but it had been in place for fifteen years ...

OWEN What was to keep Dr. Rafati from bidding for that business, or trying to get a similar contract with the hospital, or any other doctor, for that matter?

MR. PENA They would not let go of it - Dr. Salinas would not let go of it.

OWEN But it takes two - he could have contracted with the hospital - he could have had the same

kind of contract with the hospital if the hospital were willing, is that right?

MR. PENA Well, the hospital would have had to take it away from Salinas and from Dr. Salazar, and here's something that I should mention to the Court. As to Dr. Salinas - all of these may be moot - I was advised recently by my client that Dr. Salinas turned over a number of properties to him. I tried to contract the bankruptcy lawyer who's handling that aspect of the case so that I can tell the Court exactly what has happened there. I was not able to do so, but my client told me that Dr. Salinas had turned over some properties to him in satisfaction, so it may be moot. I'm trying to clear that up. I'm sorry I couldn't do it before now. I've tried. I simply couldn't clear it up. I'm not a bankruptcy lawyer. I don't know very much about that.

OWEN Who is in bankruptcy?

MR. PENA Dr. Salinas went into bankruptcy shortly after we got the judgment and then in the Fourth Court of Appeals the court - before going to there we got an order saying that the appeal could proceed - an order from the bankruptcy court.

SPECTOR Was there any evidence at trial on comparable sales of a radiology practice?

MR. PENA No ma'am. I'll try to answer any questions.

GONZALEZ Any other questions? Thank you counsel.

MR. PENA Thank you so much.

MR. MACON I'll be brief and will respond to questions that were asked. Justice Gonzalez, if the Court were to find that there was no such thing as professional goodwill of - in a voluntary dissolution of a partnership, then they would be left with nothing because there were ..

GONZALEZ How about the value of the equipment - the value of the assets of the partnership?

MR. MACON Nothing more than the \$2,500 - that is the only testimony about the value of the partnership.

BAKER What about the \$8,000 advance?

MR. MACON The \$20,000 advance?

BAKER No, the eight. Wasn't it \$20,000 attorneys fees and \$8,000 loan?

MR. MACON Yes, and those are not under appeal right now. Those are becoming final. The Court did not set those points so those are final, so he has been awarded those.

BAKER So we only have the \$714,000 times two before this Court.

MR. MACON That's exactly right.

OWEN One of your points before us is that evidence should not have been submitted on a wrongful dissolution claim?

MR. MACON Yes.

OWEN That was properly pled, wasn't it?

MR. MACON It was properly pled ...

OWEN And there was no summary judgment?

MR. MACON No summary judgment. It was properly pled ..

OWEN So why was it wrong - why shouldn't the trial court have introduced evidence on that claim?

MR. MACON Because we believe that the evidence clearly showed that there was no wrongful dissolution - that as a ...

OWEN But you don't know that 'till you go through a trial ...

MR. MACON I understand that. When the issue was raised at trial we believe that the issue was shown that as - that there was done by express will - that's where all the evidence was - there was no controverting evidence and therefore we believe that that evidence should not have been admitted at that point. When the initial objection was made, hey, you shouldn't put in this evidence about wrongful expulsion - it shouldn't be allowed in because it taints, number one, and number two, the evidence is it was pursuant to the law. And so we believe that ... there was a lot of petty things that we believe in telling the jury that got them to give this award. I come back to your point, Justice Owen, number one, there is - the hospital had the right to contract with Dr. Rafati as well as - in lieu of - Salinas and Salazar. Further, the employees had the right to go to either group - they were not bound. There is no evidence that anyone stopped doing business with Dr. Rafati because of this. Justice Hecht, the - perhaps the most significant point which you raised was the damage model is not affected by whatever people or hospitals went with these people. The damage model they used would be exactly the same if the two doctors quit the business.

HECHT Multiple of past earnings.

MR. MACON Exactly. That's exactly what - they used three and one-half years of past earnings, and so it was not affected by it all, and so it doesn't make any sense to use that. The bottom line is that there was no evidence of any kind to support any finding of a million four as his third share. There's no basis whatsoever. At most he should have been awarded \$2,500.

BAKER Is this case moot?

MR. MACON No.

GONZALEZ There's a - can you enlighten us about the bankruptcy situation. Dr. Salinas took bankruptcy apparently and the court of - and the bankruptcy court allowed the appeal to continue?

MR. MACON Yes, he's doing - let me first ...

GONZALEZ There's some assets that have been paid? I mean to satisfy the judgment. Why is that not moot?

MR. MACON It's not moot as to Salazar. We want Salazar to continue with - my understanding - Salazar is still fully and if he did not take bankruptcy ...

GONZALEZ There's individual judgments for Salazar?

MR. MACON Yes sir, exactly.

GONZALEZ But it may be moot as to Salinas?

MR. MACON It may be moot as to Salinas. We will investigate. It may be moot as to Salinas, but it's not - it is not moot as to Salazar.

ABBOTT Well, wouldn't the extent of the bankruptcy be affected by any decision in this case?

MR. MACON It is an eleven - we - I need to check that. It is an eleven - it is a plan of adjustment so reorganization - it needs to be ... but it's definitely not moot as to Dr. Salazar.

GONZALEZ And he's not judgment proof?

MR. MACON He is definitely not judgment proof. Thank you very much.