ORAL ARGUMENTS - 10/07/97

96-1224

BROWN V. SHWARTS, ET AL

LAWYER: There are two issues in this case. First, whether or not article 4590(i) and the survival statute mean what they say. And second, whether examination, testing, telling a patient to call back for the results counts as treatment. Those are two separate causes of action. The first having to do with the estate claim, the second having to do with the wrongful death claims. And I will take them in that order.

The court is well aware of the facts in this case. As the court may recall on Dec. 4, 1991, Mrs. Brown reported to the Navarro Regional Hospital: she complained of headache; coughing; and, she explained that she had been wetting her pants. They performed a sonogram. Dr. Shwarts administered a hepatitis test: told her to call back on Dec. 9 for results. She went home and two days later, he got the results of his tests. On Dec. 8, she returned to the hospital with basically the same complaint and also complained of head and pelvic pain. She was admitted to the hospital at that point and on Dec. 8, she gave birth to a child, Dillon, who died the next day, Dec. 9. He died as a result of complications occasioned by the rupture of the amniotic sac. In fact she had not been wetting her pants, and instead was losing amniotic fluid. As a result of that, he developed complications, and died. He died on Dec. 9. Sometime later, Dec. 1, 1993, article 4590(i) notice letters were sent out and suit was filed on Feb. 18, 1994.

In response to defendant's motions for summary judgment on both wrongful death and the estate claims, the TC granted summary judgment, and in a published opinion the CA affirmed.

Now with regard to the estate claims, our position is that the estate claims are not time barred. Article 4590(i), §10.001, the limitations period states: that no health care liability claim may be commenced unless filed within 2 years from the occurrence of the tort or the date of last treatment or hospitalization, provided that minor shall have until their 14th birthday in which to file. Now a health care liability claim is defined by the statute. And the statute defines that as a cause of action for injuries which result in the injury or death of a patient. In this instance, Dillon Brown was not a patient until he was born.

ABBOTT: Was Dillon Brown ever a patient?

LAWYER: Yes, sir. Dillon Brown certainly had a health care liability claim within the meaning of the statute, because his injuries were occasioned by that health care providers. Our allegations are that it was negligence.

ABBOTT: But his injuries were allegedly caused before he was born?

LAWYER: Correct.

ABBOTT: But after he was born, he was never a patient was he?

LAWYER: Correct.

ABBOTT: But after he was born, he was never a patient was he?

LAWYER: I think he was certainly a patient within the meaning of the statute. I don't know how one could argue that a child born into a hospital, who was cared for in that hospital, who was provided services in that hospital does not count as a patient. And clearly, he does.

HECHT: Why does it make any more sense to say that a fetus becomes a patient later on and can make a claim for what happened to him before, or that a fetus has a claim at some point that if gets to liability if he's actually born, then he can assert? Why should limitations run from one date or the other?

LAWYER: I think that the reason that it does not is because of this court's prior holdings in Wittey, Lyall, and in Youndell. I mean this is entirely consistent with the court's prior holding. For instance, as the court may recall in the Baby Woodey case, the lady is pregnant, she trips and loses the child as a result of her injuries. She attempts to bring both an estate claim and a wrongful death claim, and this court said that the wrongful death claims are barred because the survival act merely allows a cause of action for the injuries to survive to the estate of the deceased, and precludes such action where there is no live birth.

Now the converse of that is logically and legally true. If the child does survive, then they do have those causes of action, those rights. In the Lyall case, a unanimous court opinion written by Judge Steakley, declared that there is a cause of action for prenatal injuries.

BAKER: Whose cause of action is it?

LAWYER: In Lyall, he says, that it is a wrongful death case. But if you look at the footnotes that he cites, it sounds suspiciously like an estate case. In Yandell v. Delgado this court said that it is the child's cause of action. In that case, a child was injured while in utero. She lives, and sometime later, she files suit for the injuries that occurred to her while she was in the womb. This court did not require a brand new cause of action to rise on the date that she was born. This court allowed those causes of action for her injuries even though they occurred months before when she was still in utero.

ABBOTT: Woody didn't involve 4590(i), correct?

LAWYER: Your right.

ABBOTT: What about that problem and that is, that in Woody and in the other cases that you are talking about there was not a strict two-year time limit, that does apply here with 4590(i)?

LAWYER: I'm not sure that there is a strict two-year time limit for baby Dillon's causes of action. The statute is pretty clear and this court has consistently held that when it says: Provided that minor shall have until their 14th birthday in which to file.... In Weiner v. Wallson this court decided that that means what it says. And baby Dillon, had he lived, would have had until his 14th birthday or some further date perhaps in which to file. And so, I don't think that ...I mean as you read the statute and as this court reads the statute literally and unambiguously, he had a longer period of time within which to file suit.

While Witty and Lyall and Youndell do not involve 4590(i) claims, the reasoning of those opinions applies in this case. The same reason that the child did not have a cause of action in Witty is the same reason the child did have the cause of action in Youndell, and the same reason that Dillon had that cause of action the day he was born.

Under the survival statute when Dillon Brown passed away, those rights passed onto his estate. And this court has long recognized that rights which passed from a decedent on to the estate may be prosecuted by the representatives of the estate. That is certainly the opinion in the Engersoll Rand case.

HECHT: The parents could have waited until the child would have been 14 or later to bring the cause of action?

LAWYER: I do not know whether or not that would have been appropriate in this case. The court never has to reach that point.

ABBOTT: Wouldn't it be two years after death?

LAWYER: Arguably, it's two years after death. But this court has said that sometimes the cause of action starts the clock running. Sometimes it's the death. In this case arguably it is the date of the cause of action, which is the date of the alleged negligence, which is Dec. 4.

ABBOTT: Put it this way, if he had lived more than a day, if he had lived to be 14 or 18, or whatever, he would have had up until the age of 14 to bring a lawsuit. If he had lived to be 5, that lawsuit could have been brought on his behalf at age 1, 2, 3, 4, certainly more than 2 years after the date of the injury causing event; is that correct?

LAWYER: I believe that's correct your honor.

ABBOTT: But the thing that cuts this off, of course, is the death, when he dies. So shouldn't it be two years after he dies?

LAWYER: That is certainly a possible reading of the statute. And if read that way, then summary judgment is inappropriate in this case. Everyone agrees that if it's two years and 75 days after his death, that the suit is timely filed.

ABBOTT: Let's assume for a second that what I just said makes common sense. But tell me how that is a fair reading of what the statute says? I can't discern that from the statutory language.

LAWYER: I can't tell you that that's in the statute. The statute says that he had until his 14th birthday in which to file. And the prior case law says that he had those rights when he was born. There is no prior case law that says, "But only for two years if he should die after that." Frankly, that position has never been argued and never presented to this court so far as I can tell. I understand your position and it certainly makes good common sense. It fits within a fair reading of the statute. It is not contrary to the statute's purpose. And if that's true, then this suit is timely filed. Likewise, this suit is timely filed if the actual wording of the statute had followed given them until his 14th birthday. But the court never reaches those opinions. Never reached that position. By merely holding a summary judgment was inappropriate in this case.

ABBOTT: Let me change the facts slightly. Let's suppose that for Dillon there was never any alleged medical negligence before he was born, and he had some medical negligence committed on him when he was five years old. And as a result of it, he died when he was 6. When would his parents have to bring a lawsuit for this final action?

LAWYER: I think that under that instance his parents may have had beyond two years from his death, but frankly, I do not know. And the reason I don't know, is because that's not presented in this case. I'm not trying to dodge your question. I don't think that case has ever come up. And the closest analogy to it is probably the Domino case where they attempted to bring the wrongful death claims, and the court says, "No, you can't extend those with the survival cause of action." But I don't think that there is a clear delineation of why you only have two years, though it makes good common sense.

Reading the statute as I suggest, that is according to its plain wording makes good sense and is good law. It aborts all the policy questions that this court has struggled with in cases like the Edinburg Hospital v. Trevino, because the court is not called on to decide whether or not there was a cause of action, which could have been sued for while he was in utero. Instead, the court merely has to decide that the statute says what it did, and that when he was born, he was a patient, and all of the rights and limitations on those rights...

BAKER: Who was he a patient of when he was born?

LAWYER: I think that when he was born, he was clearly the patient of the hospital.

BAKER: What about the doctor? You said earlier, that the date of the negligent act starts the statute running. Is it true that the doctor saw the mother on Dec. 4, and that's the only time he saw her?

LAWYER: That's correct.

BAKER: And so, the doctor says that's when the statute starts as to me. If I understand what you said in your response in the TC, it didn't start till the Dec. 8, because there was a continuing course of the treatment. You haven't argued why there's a continuing course of treatment when you've already said that there was a specific act of negligence on Dec. 4?

LAWYER: I think that the specific act begins the continuous course of treatment. Remember, on Dec. 4, he sees her. On Dec. 6, he gets the test results. He's clearly working on his differential diagnosis.

SPECTOR: Did he ever contact her, or did she contact him about the results of the tests?

LAWYER: She never made it that far. She was told to call him the 9th. She came back on the 8th, and was admitted to the hospital, had given birth on the 8th, and Dillon died on the 9th.

SPECTOR: No, I mean when he got the results?

LAWYER: He did not call her.

SPECTOR: He did not immediately call her?

LAWYER: No, because he had told her that our next phone call was going to be on the 9th. And I think that that's a fair reading of the facts and certainly continuing course of treatment. If you are getting test results for a patient, if you are telling a patient to come back in a couple of days or call in a couple of days, it's _____.

SPECTOR: I think what I trying to find out is, did the test results show that perhaps he had been negligent earlier?

LAWYER: The test results should have alerted him that he had made a misdiagnosis earlier.

BAKER: So your claim is misdiagnosis on Dec. 4?

LAWYER: Yes, sir.

BAKER: And the fact that he didn't contact her to tell her what the results of the test is a separate and distinct cause of action?

LAWYER: I think it could be viewed that way. But in this context, it's probably better understood as a continuing misdiagnosis. According to the testimony that we have in the record, he is still working on his differential diagnosis.

BAKER: But the first time you made it then was Dec. 4?

LAWYER: Yes, sir.

BAKER: And it didn't change?

LAWYER: You are right.

BAKER: And nothing else was done?

LAWYER: That's incorrect. There were other things done.

BAKER: But not by him.

LAWYER: On Dec. 6, he gets the test results back. He also anticipates that she's going to call him on Dec. 9th, per his instructions. Now, I can't tell you whether or not he actually read the test results. I think a fair reading of the record indicates that he did. I can't tell you whether or not he was waiting by the phone on the 9th. I don't think that's in there anywhere. But certainly continuing to perform services and getting test results, reviewing test results, that is a continuing course of conduct, a continuing course of treatment.

BAKER: Would it then be correct to say that whether you win or lose on the limitations question as to the doctor depends on whether there in fact is a continuing course of treatment that's covered by 4590(i)?

LAWYER: I think that's true for the wrongful death claims. I do not think that's true for the estate claims.

BAKER: But isn't your argument because he was not a patient under existing law on Dec. 4, that he became a patient on Dec. 8, when he was born?

LAWYER: Yes, sir.

BAKER: But nothing was done by that doctor on that child when he became a patient from that day forward. So how can you make that jump?

LAWYER: The reason I make that jump is because this court made the jump. In Lyall and Youndell this court declared that a child who was born alive has rights that date back...

BAKER: But when did the rights accrue? When the act of negligence occurred as to him on the survival action doesn't it?

LAWYER: No, sir.

BAKER: Why not?

LAWYER: The rights accrue according to Lyall and Youndell when the child is born alive. According to Woody those rights don't accrue until the child is born.

BAKER: That's exactly my point. Your assertion is, he doesn't have a cause of action. He can raise it because he's now a patient on Dec. 8, but the act he complains of is Dec. 4?

LAWYER: With regard to him, that is true your honor.

BAKER: So what is the nature of the survival action what he can recover if had lived?

LAWYER: He could have recovered for his pain and suffering. He could have recovered for the funeral bills and the medical bills that are occasioned by the malpractice, which occurred on Dec. 4, in utero, just like the child in Youndell, the child in Lyall could have recovered for those bills for prenatal injuries.

ABBOTT: Can you show me in your brief where you discuss the continuing course of treatment?

LAWYER: I don't think that it is explicitly in there. I will confess that that is not our strongest point. And I strongly believe of presenting my strongest points to this court. This court saw fit to grant writ on that point of error. We are happy to brief. It was preserved all the way through. But, I think that, the central issue is the estate claim. I think that in order for respondent's to avail, they should have to explain how a child can prosecute and why a child can prosecute a cause of action.

ABBOTT: I understand that. You say it was preserved all the way through. But would it not be arguably true, that it is not preserved here?

LAWYER: No doubt respondent will make that assertion. I think that a fair reading of the points of error and a fair reading of the briefing indicates that it is preserved and this court granted writ on that point. If the court wanted to find that there was no preservation of error there, I don't think it would have granted writ.

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RESPONDENT

STOLLEY: I am Scott Stolley representing Dr. Shwarts. Mr. Keith represents the hospital. The premise of the Brown's argument is that Dillon was not a patient until he was born. Therefore, they conclude that no cause of action accrued and limitations didn't run until he was born and became a patient. The flaw in this premises that it completely deprives the Browns of any cause of action. We know from this court's decision in St. John v. Pope, that a medical malpractice cause of action is premised on a doctor/patient relationship. If Dillon was not a patient while he was in utero there could not be a cause of action for his prenatal injuries, because there was no doctor/patient relationship while he was in utero.

GONZALEZ: You're saying that a fully-formed baby here, about to be born, had no cause of action even though the doctor had a misdiagnosis?

STOLLEY: I'm not making that assertion. I am simply following the thread of their argument, which is he...

GONZALEZ: I am asking the question, did the child in utero have a cause of action? The obvious answer is no, right?

STOLLEY: Under current law, that's correct.

GONZALEZ: So if the child did not have a cause action how can limitations begin to run before the child is born?

STOLLEY: Because the legislature says that the cause of action begins when the breach occurs. The breach occurred before the child was born. The problem of course that that arises is the fetus is under a legal disability at that time. How can the fetus under a legal disability bring a lawsuit? In my mind this is just like a minor. When a minor is born, a minor child until 18 is under a legal disability. The legislature has provided for tolling for that disability. This court has said that disability is a legislative creature, the legislature can create disabilities, the legislature can remove disabilities, the legislature can toll the statute during the period of disabilities.

ABBOTT: So why would there not be tolling until he died?

STOLLEY: There may very well be tolling while he's in utero. There certainly is tolling for the day that he was alive.

ABBOTT: And with that being the case then why would the cause of action not begin to run or the time within which they had to file a lawsuit not begin to run until the day he died?

STOLLEY: I think it would if they had asserted tolling. But they never asserted tolling in the TC. This court held last spring in Diaz v. Westphal that the doctor only has to negate tolling doctrines that the patient asserts. In this case, it was never asserted. So as a consequence any tolling that may have applied whether in utero, or for the day that the child lived, that tolling goes by the wayside and we go back to the day the breach occurred, which was Dec. 4. Under the statute they sued more than 2 years and 75 days after that date.

GONZALEZ: Wasn't it your burden in classic limitations case, which this is, to prove that limitations had in fact run? It was the doctor's burden not the Brown's burden.

STOLLEY: It was the doctor's burden to prove when the limitations period started, and to prove that the suit was filed after the limitations period is _____.

GONZALEZ: So is it your position, the limitations began before the child was born?

STOLLEY: Yes, it is.

GONZALEZ: Even though the child had no cause of action?

STOLLEY: Yes.

GONZALEZ: So your argument is, limitations began to run before the child had a cause of action?

STOLLEY: Yes, because the legislature has said that. But the legislature has also provided for tolling during that period of disability. Unfortunately for the plaintiffs, they didn't raise that tolling argument. So I think the legislature has anticipated this kind of problem.

HECHT: Where is the tolling for the in utero period?

STOLLEY: In 4590(i), §10.01, the tolling says, "That minors under the age of 12 may have the tolling."

ABBOTT: But how can you have tolling for someone who cannot assert a cause of action at all? That would be someone who is not yet born. In other words, this is I think the point of Justice Hecht, that the tolling obviously would begin to apply on the day that Dillon was born; however, there is no legal provision as I can read it that applies tolling to someone who is not yet born.

STOLLEY: It depends on the meaning of the term "minors."

ABBOTT: Has a minor ever been defined to be someone who is not yet born?

STOLLEY: Not that I am aware of.

ABBOTT: So if tolling does not apply to someone who's not yet born, then it's immaterial whether or not the plaintiffs raised tolling in the TC?

STOLLEY: Well, then, we don't even get into tolling, we get back to the fact that the cause of action arose on the date of the malpractice Dec. 4, and they sued more than 2 years and 75 days from that date.

ABBOTT: And Dillon was not a patient on Dec. 4?

STOLLEY: That' correct, under their argument.

ABBOTT: What about under your argument?

STOLLEY: Under my argument, this court has held that if the baby is born alive the cause of action may be asserted. If a cause of action may be asserted, I think logically that has to mean that a duty was owed to the child when in utero. And a duty can be owed only if there's a doctor/patient relationship. So there had to have been a doctor/patient relationship before the child was born.

ABBOTT: But can there be a doctor/patient relationship with a fetus?

STOLLEY: I think logically, yes, there has to be. If the fetus is born alive and can bring a lawsuit, that means to relate back to the date of the tort, there has to have been a duty. If there isn't a duty, the fetus cannot even bring a lawsuit. A duty is a mandatory prerequisite to being able to bring the lawsuit.

ENOCH: Do I understand that the plaintiffs in this case filed their claim one date late according to what you understand they should have brought the claim, and irrespective of tolling while fetus or not a fetus, the child did live one day, and you concede it would have tolled the statute one day?

STOLLEY: Yes.

ENOCH: So, doesn't that make this timely filed?

STOLLEY: No.

ENOCH: Because of the issue that when you argued the statute of limitations applied, they failed to say that it was tolled for the one day?

STOLLEY: That's correct. Under this court's statement in Diaz v. Westphal that the

doctor doesn't have to negate any tolling provisions unless raised by the other side.

ENOCH: So your position is, but for having argued, taking all of your position as being what the law is, the result in this case is simply that they should have pointed out to the court that the child had lived one day, and therefore, under any circumstance the statute would had been tolled one day, it would have been filed on time?

STOLLEY: That's correct. The plaintiffs have basically brought a self-defeating argument by saying that the baby wasn't a patient until born. If he wasn't a patient before birth, there can't be a doctor/patient relationship and there can't be a duty. And there was not doctor/patient relationship after birth because Dr. Shwarts didn't see the baby or the mother after birth.

GONZALEZ: In response to your question to Justice Enoch, did I hear you say that the doctor was not aware that the baby was born?

STOLLEY: I don't know whether the doctor was or not.

HECHT: He was not attending at birth?

STOLLEY: Dr. Shwarts did not see the baby or the mother after the baby was born. Only one time on Dec. 4 did he see the mother.

GONZALEZ: Your position is, the first time he found out was when the lawsuit was filed?

STOLLEY: I don't know.

GONZALEZ: Isn't that your position?

STOLLEY: I don't have a position. I can't say when Dr. Shwarts knew whether the child was born.

GONZALEZ: Well for limitations purposes, you said he was not on notice?

STOLLEY: I guess I am confused because I'm not sure what notice has to do with it. I don't know of what the record says whether he was aware of the child's birth. All I know is he saw the mother on Dec. 4.

ENOCH: In the practice of medicine, just my very limited knowledge it seems to me, you have doctors who treat the mother for the birth of the child, and then you have doctors who treat the child from the day born forward. Accepting that as the scenario, it would be possible for a doctor to have treated a mother in such a way that it would cause injury to the fetus, the child will be born, and the doctor never ever sees the baby from the point forward that the baby would ever be a patient

as you conceive it to be. But there is no cause of action for the injury to the child until the child is born. But the child is not the patient of the doctor even forward. Would the child regardless of being born ever have a cause of action against the doctor?

STOLLEY: That's why I say the plaintiffs are making a self-defeating argument, because the child wouldn't have a cause of action against the doctor under the scenario. He was never a patient of the doctor before birth, the doctor never saw him after birth.

OWEN: Your arguments I take it is to the survival claims not to the wrongful death claims?

STOLLEY: I would think they could apply to the wrongful death claims as well. Turning just briefly to the continuous course of treatment argument, that was not raised in this court. A reading of their application for writ of error shows it was not raised. It was never argued not even in a point of error. Furthermore, the continuous course of treatment argument only applies if the date of the tort is unascertainable. The legislature put that in the statute to help plaintiffs who cannot ascertain when the tort occurred. Here, it's ascertainable Dec. 4.

Finally, I will point out that the CA made the right call when they said, the stuff about the hepatitis test and calling back about the hepatis test is inconsequential to the claim, because the claim is Dr. Shwarts malpracticed on Dec. 4, and that that is what caused the death of the baby.

ABBOTT: His malpractice was misdiagnosis, correct?

STOLLEY: Correct. Failure to understand and appreciate that this woman's membranes had broken and apparently she was in labor.

ABBOTT: But would it not be necessary for him to have learned the results of those tests to fully inform his decision-making process?

STOLLEY: He had already made the decision, and apparently stuck with it. As far as I know, the record reflects that's the facts.

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KEITH: My name is Kevin Keith on behalf of Navarro Regional Hospital. Our alleged liability in this matter is indirect for vicarious for the acts of Dr. Shwarts on Dec. 4. There was no allegations of negligence or any wrongdoing of any kind with respect to the Dec. 8, hospitalization, which continued on into Dec. 9.

I think it's important here to recognize that the statute of limitations that we're

dealing with, 10.01, does not tie the commencement of limitations to the accrual of the patient's cause of action as the predecessor statutes did to 10.01, and as the current general tort statute of limitations does. I think because this court has held that a fetus is not a person until it's born alive, we've got that body of law, but we've also got a statute from the legislature in which they have unequivocally expressed the intention that there is to be a two-year statute of limitations for all health care liability claims, whether they are survival actions, wrongful death actions, or simply a personal injury actions. That two-year statute of limitations is absolute and it's based on one of three triggering elements, and a plaintiff is not entitled to select which of those three elements because this court has held that if that specific date of the breach of the tort is ascertainable, then the statute of limitations commence to run from that date of the breach of a tort. Now that doesn't mean the cause of action accrues or doesn't accrue on that date. Because that statute of limitations, 10.01, is no longer tied to the accrual of the cause of action. So this court is free to give separate analysis to when does the cause of action accrue, and it may be when the fetus becomes a person, that's the final element for that cause of action accruing, by legislative mandate a different analysis for when the statute of limitations commences to run for that cause of action.

ABBOTT: Doesn't that make the law look silly in a way in the sense that limitations begins to run on a cause of action before a person could file a lawsuit?

KEITH: It does. And it would beg for some legislative response. There's no question in my mind the legislature did not envision this unusual factual scenario when it sought to provide protection for health care providers in establishing an absolute two-year statute of limitations. And it may also raise the question of duty which was not the basis of the summary judgment motions in the TC as to whether or not an emergency room physician who is treating a woman for what he believes to be flu like symptoms and a cough, is establishing by happenstance or inadvertence a doctor/patient relationship with one or more fetuses that that woman may be carrying at that time.

GONZALEZ: The court's already answered the question, No, the doctor can do anything and kill the baby, and _____ fully term, and there's no duty to that baby. That has been decided.

KEITH: In this case, the motion for summary judgment was based on limitations based on the bright line test of this court under Kimball v. Brothers, that the statute of limitations commences to run on all of these health care liability claims on the date of the breach of the tort and since Dr. Shwarts only treated either the woman or the fetus on Dec. 4, that is the date of breach of tort if there was one in this case.

HECHT: Do you agree with the doctor's counsel that there is a tolling for the period in utero?

KEITH: No, we do not.

ENOCH: Do you agree that there is a tolling of at least one day when the child is born?

KEITH: I'm troubled with that, too, because I know under Sacks v. ___ this court has held that tolling period and the obligation of the minor to file suit at age 14 is unconstitutional. The tolling seems unnecessary because the survival action isn't brought by the child. It's brought by guardians, parents, what have you. I don't think they need a tolling provision for the one day of the child's life. In this case, as opposed to most torts, the plaintiff's, the parents had more than 2 years to file suit. They had two years and 75 days to file an action, which from a fairness standpoint, that seems to have been accommodated. It's only because of inefficiency in bringing this action that you're being asked to change the law that applies to a case like this to make an exception. We don't think one is justified under the case law that this court has created either for continuous course of nonnegligent treatment, or in determining when your ascertainable date of the breach of the tort is when a health care provider has only provided treatment on the one specific date.

ENOCH: If the child had lived a year, you certainly wouldn't argue that during that one year the statute of limitations would have been tolled would you? Or would you say, Well if the child dies at any point within two years after being born, the parents should have brought the lawsuit within two years of the cause of action? Would that be your argument?

KEITH: I think there's an argument under Morrison v. Chan that no one is guaranteed the full statute of limitations period. Under Morrison v. Chan, they had from the time they discovered the cause of action 18 months instead of two years and 75 days to bring the action. I think if there's a single day of treatment if you're talking about when does limitations commence to run, the two year statute commences to run on that date of treatment. Because that's the date the breach of the tort occurred if at all.

ABBOTT: So what you're saying is that if Dillon had died one day before a second birthday, the parents would have to rush out and go hire a lawyer, and file a lawsuit that day or at least send to their notice letter that day?

KEITH: That's true. And that may seem like a harsh law and the statute of limitations can create harshness when applied to every single instance. It was the purpose of the statute of limitations to provide protection for the health care industry at a time when it needed it most. And so, there can be some inequitable applications of this statute. But that's for the legislature to deal with.

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REBUTTAL

LAWYER: It is respondent's position that limitations begin to run before there's a cause of action. It's respondent's position that there is a doctor/patient relationship while in utero, though no one can assert that cause of action. And it's some of respondent's position that there is some tolling involved. But not everyone agrees with that.

Respondent urges the court to look at the statute for determining when the cause of action arises, that is from the date of the alleged malpractice, but to ignore the rest of the statute that says, "Children have until their 14th birthday." Instead respondent wants to characterize that portion of the statute as some sort of tolling provision, which it is clearly not.

In Diaz v. Westphal this court cited to some examples of tolling provisions which need to be negated or asserted at the TC level in response to summary judgment. Those tolling provisions are things like: the open courts doctrine; the due process doctrine, the Sacks v. Vaultler, and Nelson v. Kruegen, those sorts of causes of action and those sorts of defenses. But certainly a clear legislative statement which says in the very section of the statute that creates the time limits where it says children have until their 14th birthday is hardly a tolling provision within the meaning of Diaz v. Westphal.

HECHT: Well the child has that now. How do the parents have that?

LAWYER: The parents have that only through the child.

HECHT: But only as long as the child is alive. That statute does not suggest that the parents have then two more years from the time that the child dies within that period?

LAWYER: The statute is silent on that. What the statutes say is that the parents succeed to the rights of that, or the state succeeds to the rights that the decedent had, and all the limitations but the full measure of rights that the decedent had. Not just some of them. The statute clearly says that Dillon Brown had until his 14th birthday to file suit. And this court has consistently held that his estate inherited all of those rights.

HECHT: So your argument is, the parents then have until when he would have been 14 to file suit?

LAWYER: I do not know if that would be true in this case, and the court need not reach that.

HECHT: Your argument is that they get everything he had, and that's what he had, and so that's what they get, or not?

LAWYER: I think that is a fair reading of the statute. Frankly, we don't reach that because we are only talking about one day. And your questions point out the easiest course in all of this. The easiest course to all of this is not to decide whether or not the statute is both the creation of the limitations and the tolling provision, it's not to decide when a patient/physician relationship is created in utero, it's not to dissect the statute and kind of turn it on its head nor is it to create silly law and hope that the legislature is going to ride to our rescue and straighten out this _____. A far simpler way to solve those questions and a far better way to avoid having to revisit Edinburg v.

Trevino and that whole _____, that this court has struggled with is to write a short opinion that says: The CA should look at the estate claims in light of Lyall in light of Woody, in light of Yondell and make that decision. This is not a complicated case where we have to decide whether it's fair to allow parents 14 years after the death of their child. And this is not a complicated case where we have to decide whether or not a doctor/patient relationship exist and someone can assert it prior to their birth. Instead, the court need only decide to look at 4590(i) and §10.01, and read the plain language of the statute in light of this court's prior holdings, in light of the survival statute, and declare that Dillon's parents succeeded to all of his rights.

OWEN: That's what we're trying to pin down. What were "all of his rights?"

LAWYER: Under the statute, which this court has upheld his rights were to file suit by the time he reached 14.

OWEN: So you are necessarily saying that his parents succeeded to those rights?

LAWYER: I think that it is a fair reading, that his parents under your opinions, succeeded to those rights. But you need not reach that question, here. You need not decide whether he had 13 more and 364 more days to assert those causes of action. There may be arguments, equitable arguments, that the parents' causes of action or that the survival cause of action does not extend that far. Those aren't briefed, those aren't reached in this case. The only question is whether or not he had that one day.