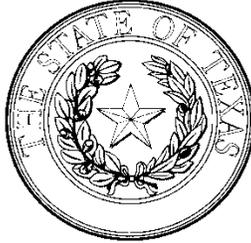


Opinion on rehearing issued March 31, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00570-CV

GEOFFREY ZIMMERMAN, M.D., Appellant

V.

**WENDY GONZALEZ ANAYA, INDIVIDUALLY AND A/N/F
CHRISTOPHER GABRIEL HERNANDEZ, DECEASED, AND
JOSE HERNANDEZ, INDIVIDUALLY, Appellees**

**On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2006-14198**

MEMORANDUM OPINION ON REMAND ON REHEARING

Wendy Gonzalez Anaya, individually and as next friend of Christopher Gabriel Hernandez, deceased, and Jose Hernandez (collectively, Gonzalez Anaya) have moved for rehearing. We grant rehearing, withdraw our opinion and

judgment of November 10, 2010, and issue the following in their stead.¹ Our disposition of the case remains unchanged. Geoffrey Zimmerman, M.D., challenges the trial court's order denying his motion for summary judgment on the health care liability claims against him by Gonzalez Anaya. Following a remand from the Texas Supreme Court, we consider Zimmerman's contention that his affirmative defense of official immunity bars Gonzalez Anaya's negligence claims. We reverse and render.

Background

Gonzalez Anaya sued Zimmerman for alleged negligence during the delivery of her son which caused him to suffer personal injuries and death. Zimmerman moved for summary judgment on immunity grounds, asserting that, as a resident of Baylor College of Medicine who provided publicly-funded health care at Ben Taub General Hospital, he is entitled to immunity under section 101.106 of the Texas Civil Practice and Remedies Code because Gonzalez Anaya made an irrevocable election to sue Baylor first and is thus barred from suing him. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (Vernon Supp. 2010).

Zimmerman's contention rests on the assumption that Baylor qualifies as a governmental unit under section 312.007 of the Texas Health and Safety Code, making him an employee of a state agency for purposes of immunity under the

¹ We also grant Gonzalez Anaya's motion for extension of time to file motion for rehearing.

Tort Claims Act. Following our own precedent in *Klein v. Hernandez*, we granted Gonzalez Anaya’s motion to dismiss Zimmerman’s appeal on the ground that section 51.014(a)(5), which allows for interlocutory appeal of the denial of a summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state, did not apply. 315 S.W.3d 549, 551–52 (Tex. App.—Houston [1st. Dist] 2008), *rev’d*, 315 S.W.3d 523 (Tex. 2010) (citing *Klein*, 260 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2008), *rev’d*, 315 S.W.3d 1 (Tex. 2010)).

The Supreme Court reversed our judgments in both *Klein* and *Zimmerman*. The Court explained that Ben Taub is “a part of the Harris County Hospital District, a political subdivision of the State.” *See Klein v. Hernandez*, 315 S.W.3d 523, at *1 (Tex. 2010) (citing TEX. HEALTH & SAFETY CODE § 281.002(a) and TEX. CONST. art. IX, § 4)). The delivery of Gonzalez Anaya’s son took place at Ben Taub, where Zimmerman practiced as a resident physician with the Baylor College of Medicine. Baylor is a “supported medical school” that “has contracts with the Texas Higher Education Coordinating Board and receives state funding specifically allocated for training physicians who provide medical care at public hospitals such as Ben Taub.” *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 312.002(6)).

Considering the funding sources, functions, and relationship among the State, the hospital district, and the medical school, the Court declared that

a supported medical school, like Baylor, “is a state agency,” and a resident of a supported medical school, such as Zimmerman, “is an employee of a state agency” for two purposes: (1) obtaining indemnity under Chapter 104, Civil Practice and Remedies Code, which requires the state to indemnify employees in certain circumstances based on acts or omissions in the course and scope of/ employment, and (2) determining liability, if any, for acts or omissions while engaged in the coordinated or cooperative activities of a supported medical school.

Klein, 315 S.W.3d at *6; *Zimmerman*, 315 S.W.3d at 524. Thus, for purposes of section 51.014(5) when, as here, the underlying litigation arises from a residency program coordinated through a supported medical school, the resident is entitled to bring an interlocutory appeal like any other state employee. *Klein*, 315 S.W.3d at *8.

Discussion

We review a trial court’s summary judgment de novo, taking as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and

that the trial court should grant a judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment based on an affirmative defense, such as immunity, must conclusively establish each element of that defense. *Sci. Spectrum, Inc.*, 941 S.W.2d at 911.

We therefore consider whether Zimmerman conclusively established that Gonzalez Anaya, having irrevocably elected to sue Baylor first, is barred from suing him. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (Vernon Supp. 2010). The record shows that Gonzalez Anaya named Baylor as the sole defendant in her original petition. Plaintiffs first named Zimmerman in their second amended petition. Baylor is a “governmental unit” for purposes of the Tort Claims Act, and, as a result, has sovereign immunity. *Klein*, 315 S.W.3d at *7 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)).

On rehearing, Gonzalez Anaya contends that she did not bring suit against Baylor under the Tort Claims Act because she did not allege any facts showing a waiver of immunity. Because the pleading, on its face, demonstrated a lack of subject matter jurisdiction, she claims it was a nonevent and does not bar her suit against Zimmerman.

Shortly after Gonzalez Anaya moved for rehearing, the Texas Supreme Court issued its decision in *Franka v. Velasquez*. No. 07-0131, 2011 WL 182198

(Tex. Jan. 21, 2011). *Franka* specifically rejects Gonzalez Anaya's contention. The Court confirmed the established rule that "any tort claim against the government is brought 'under' the Act for purposes of section 101.106, even if the Act does not waive immunity." 2011 WL 182198 at *4. After reviewing section 101.106(f)'s language in the context of the Tort Claims Act as a whole, the purpose of the election of remedies provision, the legislature's intent in enacting the 2003 amendments that included section 101.106(f), and the problems that would result from application of the intermediate appellate court's construction, the Court held "that for section 101.106(f), suit 'could have been brought' under the Act against the government regardless of whether the Act waives immunity from suit." 2011 WL 182198 at *11.

Under *Klein*, Zimmerman is an employee of a state agency for the purpose of determining whether he is subject to liability for any acts or omissions while engaged in the coordinated or cooperative activities of a supported medical school. 315 S.W.3d at *6. Gonzalez Anaya's live pleading alleges that Zimmerman acted negligently in the delivery of her son. These allegations do not involve conduct that strays outside the scope of Baylor's coordinated or cooperative activities at Ben Taub through Baylor's residency program.

Section 101.106 of the Civil Practice and Remedies Code provides that "[t]he filing of a suit under this chapter against a governmental unit constitutes an

irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a). We hold that Zimmerman met his summary judgment burden to show that section 101.106(a) bars Gonzalez Anaya’s suit against him.

Conclusion

The trial court erred in denying Zimmerman’s motion for summary judgment. We therefore reverse the judgment of the trial court and render judgment dismissing Gonzalez Anaya’s claims with prejudice.

Jane Bland
Justice

Panel consists of Justices Keyes, Higley, and Bland.