NO. _____

IN THE SUPREME COURT OF TEXAS

HEATHER KUTYBA,
Petitioner

v.

ASHLEE E. WATTS, D.V.M. AND TEXAS A&M UNIVERSITY,
Respondents

On Appeal from the Tenth District Court of Appeals at Waco
No. 10-18-00168-CV

PETITION FOR REVIEW

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to section 22.001(a) of the Texas Government Code.

This is a statutory-construction case of first impression with regard to section 101.021 of the Texas Tort Claims Act, which governs tort liability of governmental units. The Court's resolution of the statutory-construction issue is important to the jurisprudence of the state because it governs when a governmental unit in the state (such as a state university hospital) may or may not be liable to a claimant for the death of an animal patient.

ISSUE PRESENTED

Section 101.021(2) of the Texas Tort Claims Act states that a governmental unit in the state is liable for "death" so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Did the court of appeals misconstrue the plain language of Section 101.021(2) in holding that "death" does not apply to the death of animals even though the death of an animal is otherwise actionable according to Texas law?

STATEMENT OF FACTS

This case arises out of allegations of veterinary malpractice at Texas A&M University's ("TAMU") Veterinary Medical Teaching Hospital. In August 2015, Ms. Kutyba brought her horse, Dazzle, to the hospital for treatment of a minor injury. CR. 104-105. Dr. Ashlee Watts, D.V.M., oversaw Dazzle's care. CR. 105. According to Ms. Kutyba's allegations, the following tangible personal property was used in a manner that injured, and eventually resulted in the death of, Dazzle: farrier equipment, glue-on shoes, radiological equipment and images, harnesses and other safety devices, stalls, medication, and video cameras for monitoring. CR. 107-125. As a result of this treatment, Ms. Kutyba incurred significant expenses, and Dazzle had to be humanely destroyed. CR. 102.

On August 11, 2017, Ms. Kutyba sued TAMU and Dr. Watts, asserting a range of negligence-based claims. CR. 4.

On November 1, 2017, TAMU filed a motion to dismiss and urged the court to dismiss Dr. Watts because, TAMU asserted, she was an "employee" as that term is understood under Section 101.106(e) of the TTCA. CR. 65-68. On February 5, 2018, the trial court granted the motion to dismiss. 2d Suppl. CR. 8-9.

On February 26, 2018, TAMU filed a plea to the jurisdiction, arguing that the TTCA does not waive immunity under these facts because "there was no operation or use of a motor-driven vehicle or motor-driven equipment that waives

sovereign immunity." CR. 174. This plea did not address whether the TTCA's waiver of immunity for a "condition or use of tangible personal property" (TCPRC § 101.021(2)) applied to the facts. CR. 174. In her response, Ms. Kutyba argued that the court should read the TTCA as waiving immunity under these circumstances so as to not categorically free TAMU veterinarians from all potential liability when treating animals, when veterinarians in private practice are liable under the same circumstances.

At the hearing on this plea, the trial court judge advised that it would grant the plea, but suggested that Ms. Kutyba take this up on appeal:

> I encourage you-all to take this up because I think it's a very novel question because especially in our community where there is a facility that treats every kind of animal imaginable, the State would argue that if you want to be the worst veterinarian and never have any reason to worry about your liability, come work for us. That's what this invites.... I invite you, ma'am, very vigorously to take this up.

III R.R. at 5:17-25. On April 17, 2018, the Court entered an order granting TAMU's plea. CR. 195.

Ms. Kutyba timely appealed the order granting TAMU's motion to dismiss and the order granting TAMU's plea to the jurisdiction. *See* Suppl. CR. 11-12. In a memorandum opinion, the Court of Appeals for the Tenth Circuit affirmed, holding that the TTCA does not waive immunity for the death of an animal caused by a condition or use of tangible personal or real property. App. C.

Ms. Kutyba timely files this petition for review. In this petition, Ms. Kutyba only challenges the court of appeals' affirmation of TAMU's plea to the jurisdiction, and not the motion to dismiss Dr. Watts.

SUMMARY OF ARGUMENT

This is a statutory construction case on an issue of first impression. Ms. Kutbya asks this Court to review the case to ensure that veterinarian doctors at state hospitals are held to the same standard of care as veterinarians in private practice, or equivalently, medical doctors at state hospitals. There are no reasonable policy justifications that should afford a veterinarian at a state animal hospital the special status of being forever immune from liability.

The plain language of the statute supports Ms. Kutbya's proposed interpretation. Simply put, the term "death" under the TTCA may apply to a person *or* an animal. A different construction (such as proposed by the court of appeals) leads to the absurd result identified by the trial court, namely that, otherwise, a state veterinary hospital may hold out a sign: "If you want to be the worst veterinarian and never have any reason to worry about your liability, come work for us…" III R.R. at 5:17-25.

But the State of Texas has evidenced a consistent policy, through statutes and case law, to hold veterinary doctors – including those at state clinics – to a reasonable standard of care, generally the same standard as medical doctors.

Animal owners should be entitled to sue for negligence when warranted. And this policy should be reflected in this Court's construction of the TTCA. This Court has reviewed other important cases related to animal care. *E.g., Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013). For all these reasons, review of this case is warranted.

ARGUMENT

I. The court of appeals misinterpreted the plain language of the statute.

In construing statutes, a court's primary objective is to give effect to the Legislature's intent. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Courts "rely on the plain meaning of the text as expressing legislative intent" unless a different meaning is apparent from the context. *Id.* To determine a statute's plain meaning, Texas courts follow the fundamental interpretive rule that statutory words are given their ordinary, common meaning. *See* Tex. Gov't Code § 311.011(a) (stating that words shall be construed according to "common usage"). It is appropriate to "consult dictionaries to discern the natural meaning of a common-usage term not defined by [the] statute." *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011).

To determine whether Texas A&M University could be held liable for the death of Ms. Kutyba's horse, Dazzle, the court of appeals' interpretation should have begun with the plain language of the Texas Tort Claims Act (TTCA). Section

101.021(2) of the Act authorizes lawsuits against governmental units like TAMU for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code § 101.021(2).

The TTCA waives sovereign immunity here because the waiver is "effected by clear and unambiguous language." *See* Tex. Gov't Code § 311.034. Texas courts have been clear that "personal injury" and "death" are two specific and separate areas of liability for which a governmental entity may be held liable. *See Scott v. Prairie View A&M Univ.*, 7 S.W.3d 717, 719 (Tex. App.—Houston [1st Dist.], pet. denied).

First, to waive immunity, the TTCA requires a "death." Tex. Civ. Prac. & Rem. Code § 101.021(2). Ms. Kutyba has alleged that Dazzle died as a result of her treatment at TAMU. CR. 102 (¶ 2), 116 (¶ 49). Rules of statutory construction require courts to "construe the statute's words according to their plain and common meaning . . . unless a contrary intention is apparent from the context . . . or unless such a construction leads to absurd results." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). The plain and common meaning of "death" is "[t]he ending of life; the cessation of all vital functions and signs." Black's Law Dictionary (10th ed. 2014) (definition of "death"). Texas courts have regularly

used and understood this term when discussing causes of action based on the "death" of animals, including horses. *See, e.g.*, *Gabriel v. Lovewell*, 164 S.W.3d 835 (Tex. App.—Texarkana 2005, no pet.).

Further, the TTCA does not limit the word "death" to the death of a person, and no "contrary intention is apparent from the context." *See* Tex. Civ. Prac. & Rem. Code § 101.021(2). And for the reasons outlined below, construing "death" to include the death of animals like Dazzle leads to the most reasonable result, and construing the statute to exclude the death of animals would lead to an absurd result. *See id.*

Second, to waive immunity, the TTCA requires an alleged death to be "caused by a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code § 101.021(2). Ms. Kutyba's petition satisfies this requirement, too, because she alleges Dazzle's death was caused "by a condition or use of tangible personal or real property," including the condition or use of diagnostic devices, including farrier equipment, glue-on shoes, radiological equipment and images, harnesses and other safety devices, stalls, medication, and video cameras for monitoring. CR. 120-122 (¶ 57).

Finally, even with the two conditions above met, the TTCA only waives sovereign immunity "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code §

101.021(2). Ms. Kutyba also satisfies this condition. Importantly, under Texas law, Ms. Kutyba's allegations would support a negligence claim against TAMU and Dr. Watts, were they private persons. *See Gabriel*, 164 S.W.3d at 849 (affirming jury finding of negligence based on death of a horse); *Rollins v. Williams*, No. 99-07446-J, 2001 WL 1519328 (191st Dist. Ct., Dallas County, Tex. Jan. 15, 2001) (jury verdict for plaintiff based on veterinary negligence causing death of horse).

Indeed, at least one court of appeals has held that facts similar to those alleged here supported a negligence claim against a veterinarian. In *Pruitt v. Box*, 984 S.W.2d 709, 711 (Tex. App.—El Paso 1998, no pet.), a plaintiff presented expert testimony to support allegations that a veterinarian's misuse of a product to repair a horse's hoof increased the horse's chance of death. After the trial court granted the veterinarian summary judgment, the plaintiff appealed. The appeals court reversed. The appeals court concluded the plaintiff's expert testimony created a genuine issue of material fact as to whether the veterinarian's misuse of the hoof-repair product increased the horse's chance of death. *Box*, 984 S.W.2d at 712. Ms. Kutyba alleged that Dr. Watts, who TAMU claims is an employee, misused farrier equipment and glue-on shoes on Dazzle's hooves, which increased the chance of Dazzle's death. The *Box* case illustrates that these limited facts would suffice to create a jury issue regarding TAMU's liability if it were a private person.

Thus, that condition of the TTCA is also satisfied. If the governmental unit were a private person under the facts of this case, it could be sued.

The court of appeals erred when it held that Ms. Kutyba had failed to plead a "death," which is understood according to its plain and common meaning to include the death of an animal, sufficient to qualify for the TTCA's waiver of sovereign immunity. The court of appeals also ignored that the governmental unit could be sued if it were a private person. This Court should review this case and reverse the court of appeals.

II. The court of appeals' interpretation leads to the absurd result that veterinarians at state hospitals can never be sued for their negligent acts—despite the fact that private veterinarians can be sued, as can medical doctors at state hospitals.

The trial court pointedly recognized that the "worst veterinarian" could work at a state hospital if he or she wanted to be shielded from liability. III R.R. at 5:17-25. By contrast, in reaching its conclusion, the court of appeals did not discuss or consider accepted tools of statutory construction; specifically, it did not consider the consequences of its construction. *See* Tex. Gov't Code § 311.023(5) (stating that a court, in construing a statute, may consider the "consequences of a particular construction"). Waiver of sovereign immunity is warranted here because failing to apply the plain meaning of "death" creates absurd results that could not have been intended by the legislature.

a. Private veterinarians may be sued for negligent acts, and there is no reason to shield state-employed veterinarians under the TTCA.

As explained above, Ms. Kutyba would have been able to sue the veterinarian and the hospital had the same facts of this case taken place in the context of a private veterinary practice. *See, e.g.*, *Gabriel*, 164 S.W.3d at 849.

Further, the core services provided by a veterinarian do not include operating a motor vehicle. *See* Tex. Civ. Prac. & Rem. Code § 101.021(1)(A). It would be absurd to suggest, as the Defendant-Respondent did in proceedings below, that the only way TAMU or its veterinarians might be sued would be if they injured or killed their animal patients by using a motor vehicle in the scope of their employment. *See id.*; *In re Seizure of Gambling Proceeds & Devices*, 261 S.W.3d 439, 445 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("Courts should not read a statute to create an absurd result."). Veterinarians are not at risk of killing their patients with a motor vehicle in the operating room, and no lawsuit has ever been brought under such far-fetched facts. But that interpretation is the result of arguments by TAMU. The court of appeals provided no policy reasons for its interpretation of the law, which has the effect of shielding state-employed veterinarians from liability.

b. Medical doctors at state hospitals may be sued under the TTCA.

Under the TTCA, physicians employed by the state of Texas may expose the

state to liability when their acts cause the death of their patients. *See, e.g., Tex. Tech Univ. Health Scis. Ctr. v. Mendoza*, No. 08-01-00061-CV, 2003 Tex. App. LEXIS 2370, at *14 (Tex. App.—El Paso Mar. 20, 2003, pet. denied) (mem. op.). Had the "death" been of a person at a state hospital, instead of the "death" of an equine, then the medical doctor at the state hospital could be held accountable for wrongdoing. The effect, therefore, of the court of appeals' holding is to grant a veterinarian working for a state hospital the special privilege of being immunized from lawsuits alleging negligence. Again, there is no reasonable policy justifying this special status, which is not imparted to other veterinary practitioners, their medical counterparts, nor any other medical service provider licensed and regulated by this State of Texas.

c. The policy in this state is to hold veterinarians to reasonable standards of care, substantially the same standard of care as medical doctors.

As discussed below, statutes, regulations, and caselaw reflect a strong policy in this state to hold veterinarians to the same or a substantially similar standard as their medical doctor counterparts. Reading the TTCA to exclude a waiver of immunity for veterinary negligence at state hospitals, besides being inconsistent with the statute's plain language in Section 101.021(2), creates the absurd result of granting veterinarians at state hospitals a special status under the law—one in which they can be immune from liability.

As one example of this policy as made clear by the legislature, the Texas Education Code expressly requires TAMU to indemnify "a member of the medical staff or a student" for certain "medical malpractice claims" and requires the Attorney General's approval of such settlements. *See* Tex. Educ. Code § 59.08(a), (e). The Code defines "Medical staff or students" to include "medical doctors, doctors of osteopathy, dentists, ***veterinarians***, and podiatrists" employed by TAMU. Tex. Educ. Code § 59.01(1) (emphasis added). "Medical malpractice claim" is defined as "a cause of action for treatment, lack of treatment, or other claimed departure from accepted standards of care which proximately results in injury to or death of the patient." Tex. Educ. Code § 59.01(2). "Patient" is left undefined.

Because veterinarians are included in the Code's definition of "Medical staff," and veterinarians' *only* patients are non-human species, the term "patient" in the Texas Education Code must include non-human species. *See* Tex. Educ. Code § 59.01(2); *see also* Tex. Admin. Code § 573.20(a) (in rules governing veterinarians, referring to the animal as the patient); Tex. Health & Safety Code § 481.002(32), (39) (defining "patient" as a human or an animal being seen by a "practitioner"; defining "practitioner" to include both physicians and veterinarians). And because the Texas Education Code expressly recognizes that TAMU's veterinarians might be held liable for causes of action arising out of the

death of their patients, it follows the legislature expected that both TAMU and TAMU veterinarians might be sued. But the only way for a veterinarian employed by TAMU to be sued would be if the TTCA's waiver applies.

As an example of standards of care, veterinarians employed by governmental entities are subject to the same licensing requirements in the Veterinary Practice Act as those in private practice. And in an early Attorney General Opinion, JM-339 (August 1985), the Attorney General's office made clear that just because a veterinary doctors works for a governmental body, those veterinarians still must follow the same licensing requirements under the law: "A veterinarian who works for governmental bodies is not [an] exception." The state of Texas has generally taken licensing requirements for veterinarians very seriously, and in another AG opinion, DM-498 (December 1998), made clear that private companies practicing veterinary medicine may only do so if all of the company's owners are in fact veterinarians.

Further, outside of the regulatory context, courts have addressed veterinary negligence in a variety of contexts. Courts typically apply the same legal standards to veterinary negligence and medical malpractice cases. *Gonzalez v. S. Tex. Veterinary Assocs., Inc.*, 13-12-00519-CV, 2013 WL 6729873, at *3 (Tex. App.—Corpus Christi Dec. 19, 2013, pet. denied) (mem. op.) ("[W]e apply the medical standard of negligence to a claim of veterinary negligence."); *McGee v. Smith*, 107

S.W.3d 725, 727 (Tex. App.—Fort Worth 2003, pet. denied) ("[V]eterinarian negligence cases are to be analyzed under the same standard applied to physicians and surgeons in medical malpractice cases."); *see also Simpson v. Baronne Veterinary Clinic, Inc.*, 803 F. Supp. 2d 602, 608 (S.D. Tex. 2011) ("Texas courts have applied the same standard of care to medical negligence cases as to veterinary negligence cases.").

Also courts have rejected attempts by practicing veterinarians to challenge Texas State Board of Veterinary Medical Examiners Rule 573.22, which establishes a standard of care. *Bridges v. Texas State Bd. of Veterinary Med. Examiners*, 03-18-00010-CV, 2019 WL 639151, at *1 (Tex. App.—Austin Feb. 15, 2019, no pet. h.).

These above sources evidence the expectation and policy that veterinarians at state clinics do not—and should not—have special status under the law. Excluding TAMU and its employed veterinarians from accountability in cases of veterinarian malpractice undercuts the state's strong policy governing the standard of care owed by all veterinary medical providers. For reasons of statutory construction and public policy, state veterinary medical providers should be subject to liability for negligent acts. If the Court were to rule otherwise, it would undercut the strong policy articulated under Texas law and inject the interpretation and enforcement of the case law and statutes referenced above with uncertainty. Such

a scenario is foreseeable unless this honorable Court exercises its discretion to hear this case and correct this error of great importance to our state's jurisprudence.

The court of appeals failed to discuss or analyze the unjust results of their interpretation of the TTCA. Under both the plain language of the Act, and in light of the above policy considerations, immunity should be waived for TAMU veterinarians who cause the "death" of an animal if the other conditions for waiver of immunity apply.

III. The suit brought by Ms. Kutyba to seek redress is the only legal recourse available.

The Texas Constitution open court's provision "assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts." *Yancy v. United Surgical Partners Intern., Inc.*, 236 S.W.3d 778, 783 (Tex. 2007). This guidepost is relevant here, where Ms. Kutyba's legal remedies with regard to her negligence claims are limited. The Occupation Code, § 801.501, in fact, disallows veterinary malpractice or negligence claims under the Texas Deceptive Trade Practices Act, underscoring the limited options available to the owners of animal patients. The open courts guarantee indicates that Ms. Kutyba's negligence claim against the State should not be unreasonably restricted.

Ms. Kutya wishes to have her day in court related to the death of her horse. TAMU would lead the courts to believe that veterinarians practicing medicine at

state affiliated hospitals are not only unable to define "death" in patients beholden to their care, but they can and should escape liability for their medical actions and negligence. These are unreasonable restrictions.

For all these reasons, this Court should grant review.

PRAYER

Ms. Kutyba respectfully requests that this Court grant the petition and reverse the judgment of the court of appeals.

Respectfully submitted,

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