No. 06-0416

IN THE SUPREME COURT OF TEXAS

IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS, SUBSIDIARY, L.P. D/B/A LAS COLINAS MEDICAL CENTER, ANTONETTE CONNER AND ANNA MATHEW,
Relators.

Original Proceeding Arising Out of the
192nd District, Dallas County, Texas
Cause No. 02-05307-K
The Honorable Merrill Hartman Presiding

REAL PARTIES IN INTEREST'S MOTION TO RECUSE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COME NOW, Real Parties in Interest, Wendy Creech, individually, as administrator of the estate of Donald Creech, Jr., deceased, and as next friend of Billie Creech, a minor, and Jeremiah Creech, Donald Creech and Janet Gifford, individually, and file this their Motion to Recuse, and would respectfully show as follows:

I.
INTRODUCTION

This motion seeks the recusal of four members of the Texas Supreme Court. Movants are the wrongful death beneficiaries in a medical malpractice case, having sued Columbia Medical Center of Las Colinas for the alleged lethal overdose of movants' decedent of the

narcotic Dilaudid. After a defense verdict, the trial court, Honorable Merrill Hartman, granted a new trial on behalf of the family. Longstanding precedent allows a trial court to grant a new trial. The Court of Appeals below, confirming this extremely well settled area of law, denied Columbia's mandamus petition. Oral argument is set in the Texas Supreme Court on September 27, 2007.

II.
STANDARDS FOR RECUSAL

An appellate judge "shall disqualify or recuse himself in any proceeding in which judges must disqualify themselves under Texas Rule of Civil Procedure 18b..." T.R.A.P. 15a.

A judge "shall recuse himself in any proceeding in which...his impartiality might be questioned." Tex. R. Civ. P. 18b(2)(a). The language of the rule is imperative and mandatory. It is neither permissive nor discretionary. The standard is objective, not subjective. *See* Justice Gammage's declaration of recusal in *Rogers v. Bradley*, 909 S.W.2d 872, 873 (Tex. 1995).

The rule does not require that the judge must have engaged in any biased or prejudicial conduct for recusal to be mandated. Recusal is required if a judge's impartiality might reasonably be questioned. Gammage declaration of recusal, *Rogers*, *supra* at 874.

Public policy demands that the judge who sits in a case act with absolute impartiality. *Pendergrass v. Beale*, 59 Tex. 446, 447 (1883). Beyond the demand that a judge *must be* impartial is the requirement that a judge *appear to be* impartial so that no doubts or

suspicions exist as to the fairness or integrity of the court. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Marshall v. Jerricho, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed. 182 (1980). The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. *Indemnity Ins. Co. v. McGee*, 163 Tex. 412, 356 S.W.2d 666, 668 (Tex. 1962).

"Fairness requires an absence of actual bias, and our legal system has always endeavored to prevent even the probability of unfairness." *Texaco v. Pennzoil*, 729 S.W.2d 768, 844 (Tex. 1987).

Without any serious question, unfairness to the movants will likely occur should Justices Jefferson, Hecht, Brister or Wainwright be allowed to hear this case.

III.
JUSTICES JEFFERSON, HECHT, BRISTER AND WAINWRIGHT ARE BIASED AGAINST TORT PLAINTIFFS

1. The Recent Study

In recent years, the Texas Supreme Court has been accused of pro-defendant bias. This perception is derived from the Court's overwhelming tendency to decide in favor of defendants in tort cases.[1]

A study of this court's alleged bias was recently undertaken and the conclusions of the study published earlier this year. 26 Rev. Litig. 1. The study is reasoned, objective and itself unbiased. Its author is David A. Anderson, a professor at the University of Texas Law

[1]Judicial Tort Reform in Texas, 26 Rev. Lit. 1, David A. Anderson.

School. The results of the study will be discussed in this motion and largely form the basis of the grounds for recusal.[2]

Professor Anderson's methodology is sound. He and his researchers (ten of his law students) performed an organized study of different aspects of the court's treatment of each of the tort cases decided with opinion by the Texas Supreme Court in the years 2004 and 2005.

The study and concluding article consist of a step by step analysis of the rulings during the relevant time period. The study first determined the true percentage of time the Supreme Court found for tort defendants. It then looked at every possible explanation other than bias for the vast disparity in the number of cases won by tort plaintiffs and those won by the defendants. It reviewed the opinions as a whole, the opinions in tort cases alone, substantive bases of the decisions, procedural bases of the decisions, and then drew conclusions from its findings as to the court's alleged bias. It did, in effect, perform a "differential diagnosis" of the disparate results. The study is discussed below.

A. *Petitions Denied*

Defendants won 87% of the tort cases decided with opinions in the Texas Supreme Court in the years 2004 and 2005. 26 Rev. Lit., *supra* at 7. Could the disparity be a result of the court having left a preponderance of plaintiff victories undisturbed by denying petitions for review? Finding that the court had left plaintiff's victories at the courts of

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[2] *Id.*

appeals alone might lead to the conclusion of neutrality of the court as a whole even given the fact that the court almost always rules in favor of tort defendants. A close review, however, shows a *defense* success rate in three out of every four petitions for review denied in tort cases filed in the year 2004. 26 Rev. Lit., *supra* at 14. This possibility must be discarded.

B. *Rogue Courts of Appeals?*

Another explanation might be that the Supreme Court is merely redressing the mistakes of intermediate courts that rule too often in favor of plaintiffs. In other words, is the Supreme Court addressing blunders of rogue courts of appeals in consistently ruling against a tort victim? The answer is no. An analysis of the opinions of "Republican" courts of appeals alone (those with a perception of being more "conservative") shows us that 83% of appeals from those courts to the Texas Supreme Court result in defense victories at the higher court. 26 Rev. Lit., *supra* at 15. A majority of those victories were reversals of cases plaintiffs had *won* in those intermediate courts in which all the judges were Republicans. 26 Rev. Lit., *supra* at 16.

C. *Tort Reform Legislation*

A third possible explanation might be that the pro-defendant decisions are the result of supreme court review of new tort reform legislation, and that defense victories might be more expected in those cases. This might account for the extreme disparity of result. Only a small fraction of the decisions analyzed, however, involved any tort reform statute. Even

if those (five) cases are excluded from analysis, defendants still won 86% of the time. 26 Rev. Lit., *supra* at 17.

D. Implementation

"The most controversial method of producing defendant victories is by holding that there is no evidence to support a plaintiff's verdict." 26 Rev. Lit., *supra* at 18. In a twelve month period in 2004-2005, the court found no evidence to support a judgment in eighteen of twenty-two cases in which a no evidence petition was presented. 26 Rev. Lit., *supra* at 19. All but three of those decisions were tort cases. Extremely striking is that in seventeen of eighteen of the "no evidence" reversals the evidence had been probative to the jury, the trial judge, and the court of appeals. 26 Rev. Lit., *supra* at 20. So at least thirteen triers of the facts (ten jurors, the trial judge and two appellate judges) had all found evidence to support a verdict in each of these seventeen cases, and the Texas Supreme Court then found *none*.

"The extent of the present court's use of no-evidence determinations appears to be unprecedented. The propriety of the standards of review being used has been questioned, and not just by the court's usual critics." Critics include James A. Baker, republican justice 1995-2002 who has written that the court's actions "cannot be reconciled with the Texas Constitution's prohibition of the Texas Supreme Court weighing evidence and judging credibility." 26 Rev. Lit., *supra* at 23.

Numerous examples of procedural decisions benefitting defendants are listed in Professor Anderson's extensive law review article. 26 Rev. Lit., *supra* 28-34. Procedural decisions have not been found in the relevant time period that are of benefit to any tort plaintiff. Most, if not all, have directly gone to further decisions denying relief to tort plaintiffs. The beneficiaries of those procedural decisions have almost always been business and insurance companies. The detriment has almost always fallen on individuals.

2. Conclusions as to Bias in the Texas Supreme Court

The conclusion of Professor Anderson's analysis is clear. "Quantitatively, defendants enjoy an overwhelming success rate in the Texas Supreme Court for which no ideologically neutral explanation is readily apparent." 26 Rev. Lit., *supra* at 17. After an analysis of the opinions themselves, it becomes clear that there is no neutral *qualitative* explanation for the court's actions either. In fact, the opposite holds true.

"In the aggregate [the researcher's] work demonstrates that the court's tort law decisions disproportionately favor defendants and...the disparity cannot be readily explained by factors other than a *determination* to limit tort liability." 26 Rev. Lit., *supra* at 7 (emphasis added).

A *determination* to limit tort liability and find for defendants is bias. "Bias" is defined as "inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a case or an issue in a certain way, which does not leave the mind perfectly open to conviction; to incline to one side; condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in a particular case." Black's Law Dictionary, Fifth

Edition. As put by Professor Anderson, "[A]dvancing an ideology by adopting congenial legal principles is one thing; advancing an anti-tort ideology simply by refusing to allow plaintiffs to succeed is quite another." 26 Rev. Lit., *supra* at 46.

Approximately nine out of ten cases that land in this court are lost by the plaintiffs. It has been proven, without doubt, that this "massive...favor [to] one side of the docket" is not even handed or neutral, and both a qualitative and quantitative analysis show bias. The family of Donald Creech should not be put to a determination of their judicial fate by justices who have been shown to have probably determined the outcome of their case already.

IV.
THE JUSTICES SUBJECT TO RECUSAL

The conclusions drawn by the article above are based, for the most part, on decisions of the Texas Supreme Court in the years 2004 and 2005. Though the article discusses the particular bent of the Court to find for tort defendants in other years and in other circumstances (Wal-Mart has won twelve times and lost none during the court's tenure from 1998-2005), this motion conservatively limits itself to requested action regarding those justices who were members of the court (and still are) during the time period of 2004 and 2005. Those justices are Jefferson, Wainwright, Brister and Hecht.[3]

[3]Justice O'Neill is the only other member of the court who was a member during the relevant time period focused upon during Professor Anderson's study. O'Neill issued or participated in a dissent six times during those two years. She is not a subject of this motion.

V.
DISSENTS

Movants have performed a review of the dissenting opinions of the justices at issue as well. The purpose of this review is to reveal whether the justices at issue were dissenters in any of the opinions in the relevant tort cases in 2004 and 2005. A dissent in a case pouring the plaintiffs out, sort of speak, might mitigate against any perception that the justice was biased.

Strikingly, three of the justices – Hecht, Brister and Wainwright – have *never* dissented (at least during the relevant years) in any tort case in which the underlying plaintiff was denied relief. Only Justice Jefferson has dissented in any of those cases, and then only once. Dissenting opinions, then, are no reason to preclude the conclusion of bias as to these justices.

VI.
PROCEDURE FOR DETERMINATION

"Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting *en banc*. The challenged justice or judge must not sit with the remainder of the Court to consider the motion as to him or her." Tex. R. App. P. 16.3.

VII.
CONCLUSION

Given the overwhelming evidence that the "probability of unfairness" exists should Justices Jefferson, Wainwright, Brister and Hecht participate in this case, movants respectfully request that they be recused. *Texaco, supra* at 844. Certainly their recusal is required as their "impartiality [has been] reasonably...questioned." *Rogers, supra* at 874.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that on the _____ day of September, 2007, a true and correct copy of the foregoing document was served by certified mail, return receipt requested on the following counsel listed below:

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