

IN THE SUPREME COURT OF TEXAS

=====
No. 96-0584
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STAN PRAESEL AND LOUISE HERBERT, PETITIONERS

v.

RAYMOND JOHNSON, M.D., ET AL., RESPONDENTS

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
=====

Argued on November 5, 1997

JUSTICE ENOCH, concurring.

I join parts I and II of the Court's opinion and the Court's judgment in this case. I write separately because I disagree with the Court's narrow holding and discussion in part III.

At the outset, I am troubled by the Court's conclusion that the doctors owed no duty because "the risk that a seizure may occur while driving and the potential consequences should be obvious to those who suffer from epilepsy." ___ S.W.2d at ___. First, this conclusion is based upon an assumption that is wholly unsupported in the record. This Court does not know what epileptics are supposed to know about whether they should ever drive a car. Second, inherent in the Court's assumption is the premise that epileptics are *per se* negligent if they have a seizure while driving that results in an accident. The Legislature, however, doesn't share this view. As the Court concedes, ___ S.W.2d at ___, epileptics are specifically permitted to drive automobiles in Texas.

This case should not be decided on the basis that epileptics should know not to drive without being told by a doctor. Even if the Court is correct in making this assumption, it is unwarranted on this record and will have unforeseen effects in cases involving other medical conditions.

My greater concern, though, is how the Court anguishes over whether the doctors had a duty to warn. The Court makes it clear that the Praesels do not claim that the doctors should have warned them; rather, they claim the doctors should have warned the patient. In short, the Praesels are

bringing a third-party claim for breach of the doctors' duty to the patient. We have rejected these types of claims time and time again. In fact, the Court today cites the seminal cases that hold that a health care professional's duty is to the patient, not to a third party. ____ S.W.2d ____ (citing *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 79 (Tex. 1997), and *Bird v. W.C.W.*, 868 S.W.2d 767, 770 (Tex. 1994)).

Edinburg and *Bird* should dispose of the issue. But the Court engages in an extended discussion about whether these doctors have a duty to warn. So I must point out that the duty to warn, if there is one, is to warn the third party directly, not the patient. Small wonder then that courts wrestle over whether such a duty exists when the third parties are not known. *See Limon v. Gonzaba*, 940 S.W.2d 236, 240 (Tex. App.—San Antonio 1997, writ denied) ("If the victim is not identifiable, then who is the physician to warn?"); *see also Tarasoff v. Regents of the University of California*, 551 P.2d 334, 335 (Cal. 1976), explained in *Thompson v. County of Alameda*, 614 P.2d 728, 734 (Cal. 1980)(holding that, under *Tarasoff*, a duty runs only to "readily identifiable" third parties).

Also, the Court cites *Gooden v. Tips*, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ). *Gooden* stands for the proposition that a doctor may be liable to third parties injured by the conduct of a patient when the doctor failed to warn the patient about the effects of a drug that the doctor prescribed. *See id.* at 369-70. When stripped of its duty-to-warn language, *Gooden* simply holds that a physician owes a duty to a third party to not negligently treat a patient. In light of our holdings in *Edinburg* and *Bird*, *Gooden* cannot be good authority and we should make that clear to the courts of this state.¹

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As we have held more than once, a doctor's duty is to the patient, not a third party. I join

¹ I concede we noted *Gooden* in *Bird*, but we neither applied its reasoning nor considered whether it was a correct statement of the law. *Bird*, 868 S.W.2d at 770. On the other hand, I agree with the Court that *Gooden* is very close to the facts of this case. Consequently, I think the Court should not merely cite *Gooden*, but address whether it expresses a correct rule of law.

parts I and II of the Court's opinion and the Court's judgment. Because I cannot join part III of the Court's opinion, I respectfully concur.

Craig T. Enoch
Justice

Opinion Delivered: April 14, 1998.