IN THE SUPREME COURT OF TEXAS

==========

NO. 97-0028

==========

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,
PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED,
RESPONDENTS

==========

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

==========

Argued on November 4, 1997

JUSTICE ABBOTT, joined by JUSTICE SPECTOR, dissenting.

The Court concludes that "the use and condition of the doors were too attenuated from Roger's death to be said to have caused it." In doing so, the Court's analysis ignores the traditional proximate cause elements of cause in fact and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Instead, the Court focuses only on immediacy. Because I disagree with the standard applied by the Court and because application of the traditional standard compels a conclusion that a fact issue exists with regard to proximate cause, I dissent.

"Cause in fact" means the act or omission was a substantial factor in bringing about the injury and, without it, harm would not have occurred. *Travis*, 830 S.W.2d at 98. "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers his or her negligent act created for others. Foreseeability does not require that the person or entity who creates the dangerous situation anticipate the precise manner in which the injury occurs. *Id*. An intervening

act of a third party will not excuse the first wrongdoer if such act should have been foreseen. *Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.).

The summary judgment evidence raised a genuine issue of material fact on the foreseeability of Roger Bossley's suicide that included: (1) Bossley was being treated because he had attempted suicide; (2) he still exhibited suicidal tendencies and threatened to kill himself upon his release from the facility; (3) the doctors decided he was of sufficient danger to himself that he should not be released and needed a more restricted environment; (4) Bossley knew that his transfer from Hillside was likely to result in his being committed to the state hospital; (5) he expressed fear of going to the state hospital; (6) on the morning of his suicide, the Dallas MHMR employees discussed the fact that Bossley had a great fear of going to the state hospital and he might elope to avoid being transferred; (7) MHMR's policy was to lock both front doors to keep inside any patient about to be transferred to a more restricted facility; (8) Angela Jones knew that the front door was supposed to be locked to prevent patients from "running out in the street" to harm themselves.

The summary judgment evidence also raised material fact issues concerning whether the use or condition of the doors was the cause in fact of Bossley's suicide: (1) Bossley was not constantly monitored; (2) Jones knew that because the inner (self-locking) door was opened, someone could run out the outer door when she opened it; (3) Jones opened the outer door without determining Bossley's location; and (4) Bossley escaped through the open door.

While it is true that the doors did not injure Bossley by actually physically striking him, that is not the test. The test is simply whether the doors were a proximate cause of Bossley's injury. Fact issues clearly exist concerning whether the use or condition of the doors was a substantial factor in bringing about Bossley's injury. Absent the use or condition of the doors, Bossley would still be in the hospital — he would have never escaped and would not have had the opportunity to jump in front of a truck.

The Court's claim that the suicide was too attenuated from the use or condition of the doors

is weak, at best. It is not as if the suicide occurred later in the day or would not have occurred but for some intervening cause. As the Court notes, after Bossley escaped through the doors:

> Hillside staff members chased Roger about half a mile to Interstate Highway 30, where he attempted to hitchhike a ride with passing motorists, first on one side of the freeway and then on the other. As Roger was approached by Hillside personnel and police who had by then joined in pursuit, he leaped into the path of a truck and was killed.

Before, during, and after Bossley burst through the doors, he seemed fixated on one end: suicide. As previously noted, Bossley was at the facility because he had attempted suicide; he still exhibited suicidal tendencies while at the facility; and he threatened to kill himself upon his release from the facility. When the use or condition of the doors provided Bossley the opportunity to act on his threats, he took it. In a fast-paced and continuous sequence, the suicide occurred directly and shortly after Bossley eloped through the doors. It seems that he killed himself with the first available instrumentality of death. Under these circumstances, a court cannot say — as a matter of law — that the use or condition of the doors was not a proximate cause of Bossley's death. At a minimum, a fact issue exists on proximate cause.

The non-doctor Petitioners claim that a finding of proximate cause in this case

> [W]ould set a precedent leading to ridiculous results. For instance, claims would exist for Bossley's use of the roadways and the freeway to get to the location of the suicide; for the use of the floor of the facility, upon which Bossley and Ms. Jones walked; for the "use" of the phone, which helped to secret his escape; for use of the keys Ms. Jones "used" in the door; for the clothing Ms. Jones wore, which Bossley grabbed in an attempt to overpower her, among other [things].

The non-doctor Petitioners' concerns are unfounded. There is no evidence in the record that use of the roadway, the floor, the phone, the keys, or Ms. Jones's clothing was a foreseeable cause of injury to Bossley. Conversely, foreseeable injury resulting from the use or condition of the doors is almost established as a matter of law. The very reason the special doors existed was to prevent the high risk of elopement and potential suicide. In contrast, the facility obviously did not contemplate using special floors, phones, etc., to deter elopement and suicide.

Also, the non-doctor Petitioners disingenuously argue that the use or condition of the Hillside doors could not be the proximate cause of Bossley's suicide because suicide is an intervening cause

as a matter of law. *See* TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). The Petitioners omit the remaining portion of section 93.001(a)(2) which states that suicide shall not be an affirmative defense if the suicide was "caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard." TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). As this Court made clear in *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), this section is no defense if the health care workers failed to comply with the standard of care, and their failure was a cause of the patient's suicide. *Id.* at 12. Summary judgment is improper because there is a genuine issue of material fact concerning whether the defendants complied with the applicable legal standard of care.

_____
GREG ABBOTT
JUSTICE

OPINION DELIVERED: April 14, 1998