

IN THE SUPREME COURT OF TEXAS

No. 99-0169

HORIZON/CMS HEALTHCARE CORPORATION D/B/A HERITAGE WESTERN HILLS
NURSING HOME, PETITIONER

v.

LEXA AULD, ADMINISTRATRIX OF THE ESTATE OF MARTHA HARY, DECEASED,
RESPONDENT

ON PETITIONS FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued on November 17, 1999

JUSTICE HANKINSON filed a concurring and dissenting opinion, in which CHIEF JUSTICE PHILLIPS, JUSTICE BAKER, and JUSTICE O'NEILL joined.

I join the Court's opinion and judgment on all issues except prejudgment interest. As far as I can tell, at best all the Court has done is cap prejudgment interest from 1985 to 1995, for the few plaintiffs that may be left with unresolved claims whose injury was severe enough to cause nonmedical damages exceeding the cap. At worst the Court creates an unnecessary conflict between article 4590i and article 5069-1.05, the prejudgment-interest statute, and an internal conflict between the article 4590i's cap and its new prejudgment-interest provision. I would hold that prejudgment interest is not subject to article 4590i's cap, and that in accord with the mandate of article 5069-1.05, section 6(a), Martha Hary's estate is entitled to its full and uncapped measure of prejudgment interest.

First, the Court’s reading of article 4590i ignores the context and history of article 4590i and the prejudgment-interest statute. As the Court appears to agree, the Legislature could not have intended to include prejudgment interest in the cap on medical-malpractice damages when it enacted article 4590i in 1977 because at that time, prejudgment interest was not considered part of damages at common law. Prejudgment interest was not recoverable as damages in personal-injury actions until 1985, when this Court decided *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). Plainly the Legislature could not have intended to include in the cap an element of damages not recoverable at the time it enacted the cap. Likewise, our decision in *Cavnar* could not have changed the meaning of article 4590i, or in any way changed what the Legislature intended to include in the cap when it drafted article 4590i eight years before we decided *Cavnar*. Even if prejudgment interest were subject to the cap once it became available as common-law damages under *Cavnar* in 1985, the Legislature changed the law when it added section 6 to the prejudgment-interest statute in response to *Cavnar* two years later in 1987.

In article 5069-1.05, section 6, the Legislature mandated that all “[j]udgments in wrongful death, personal injury, and property damage cases must include prejudgment interest.” TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(a). The Legislature could not have made its directive more plain. *Judgments* in wrongful death, personal injury, and property damage cases *must include* prejudgment interest. The Legislature did not exempt judgments in medical-malpractice cases from this statute. It also did not express any intent to exempt medical-malpractice judgments or to cap prejudgment interest on medical-malpractice judgments when it amended article 4590i several times after enacting the prejudgment-interest statute. Indeed, the Court cites part of the legislative history

of the prejudgment-interest statute, but then refuses to give effect to the statute's clear mandatory language.

My conclusion that prejudgment interest should not be capped is further supported by the Legislature's 1995 enactment of article 4590i, subchapter P, entitled "Prejudgment Interest," which mandates that a health-care liability judgment "must include prejudgment interest on past damages found by the trier of fact, but shall not include prejudgment interest on future damages found by the trier of fact." TEX. REV. CIV. STAT. ANN. art. 4590i, § 16.02. Although that section does not apply to this case because the claim at issue accrued before its enactment, that section does confirm that prejudgment interest is not subject to the cap or surely the Legislature would have mentioned or referred to the cap in that new subchapter. Moreover, in section 16.02, the Legislature specifically mandates prejudgment interest on past damages, but forbids it on future damages. TEX. REV. CIV. STAT. ANN. art. 4590i, § 16.02(b). This distinction further suggests that the Legislature did not intend to uncapped previously capped prejudgment interest, but rather, working from the basis that prejudgment interest is fully available, determined to limit it to past damages. The Court's application of the cap in this case unnecessarily casts doubt on the provision's effect despite its clear language, and creates an inconsistency within article 4590i despite the Legislature's apparent efforts at careful drafting.

The Court's view that my reading of the statutes somehow "freezes" the common law is incorrect. The Court cites cases permitting a mother to recover damages from the birth of a stillborn fetus and permitting plaintiffs in varying relationships to an injured person to recover for loss of consortium. None of the cases (other than *Cavnar*) were followed by the Legislature's enactment of a statute mandating awards of those kinds of damages. Moreover, these cases seem to recognize

or extend types of claims, not establish new elements of common-law damages. My disagreement with the Court is not over whether prejudgment interest was subject to the cap as an element of common-law damages once *Cavnar* issued in 1985. My disagreement is with the Court's refusal to follow the mandatory language of the prejudgment-interest statute that governs this case.

Second, the Court's reliance on the canons of statutory construction is misplaced because they can be used to support either result in this case. While the Court concludes that article 4590i is more specific than the prejudgment-interest statute, one could just as easily argue that the prejudgment-interest statute is more specific because it mandates a specific type of interest on judgments for specific types of claims. Moreover, Government Code § 312.014(a) directs that if statutes "are irreconcilable, the statute latest in date of enactment prevails." TEX. GOV'T CODE § 312.014(a). The prejudgment-interest statute was enacted ten years after 4590i was enacted, and two years after prejudgment interest became available under *Cavnar*. Thus the canons of construction are of little help in resolving this case, and cannot outweigh the context and history of these statutes when attempting to divine and follow legislative intent. As Justice Frankfurter cautioned, canons of construction cannot "save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947). In this case, the Court sacrifices that balance in favor of rote recitation, while I would look to a larger frame of reference in an effort to reconcile the statutes for all claims and to comport with the legislative intent of both article 4590i and the prejudgment-interest statute.

If the statutes are reconciled as I propose, the Legislature's overriding goal of keeping health-care liability damages reasonably determinable and predictable in an effort to ameliorate the costs of the health-care system is still met. If one knows the amount of damages to be awarded under the cap and the prejudgment-interest rate, one can simply calculate the amount of prejudgment interest owed. Damages remain capped as dictated by article 4590i, section 11.02, but prejudgment interest can also be awarded as dictated by article 5069-1.05, section 6(a).

Finally, I must agree with Auld's counsel that the Court has in effect granted a third motion for rehearing in *Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990). Prejudgment interest was awarded by the court of appeals in that case, and in its application for writ of error, the hospital's counsel, the same attorney who represents Horizon in this case, made the same argument that prejudgment interest had to be capped. The hospital explicitly repeated its argument that prejudgment interest had to be capped in its two motions for rehearing following this Court's opinions in *Rose*. Although the argument was not addressed by the Court in *Rose*, it was implicitly rejected by the Court's judgment that the plaintiffs "shall each recover from Doctors Hospital Facilities . . . prejudgment and postjudgment interest thereon at the legal rate."

Thus, instead of harmonizing article 4590i and the prejudgment-interest statute so as to give effect to both, the Court's reading at best ignores the mandatory language of the prejudgment-interest statute and at worst creates an unnecessary conflict between that statute and article 4590i, and an internal conflict between article 4590i's cap and its new prejudgment-interest section. If prejudgment interest is not included in the cap, all parts of both statutes can be given full effect for all claims; actual damages remain capped under article 4590i, and prejudgment interest is awarded

on the judgment, with no violence done to the Legislature's express purpose and language in article 4590i. Accordingly, I dissent from the Court's resolution of the prejudgment-interest issue.

Deborah G. Hankinson
Justice

OPINION DELIVERED: August 24, 2000