

IN THE SUPREME COURT OF TEXAS

No. 02-0894

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS,
PETITIONER,

v.

DONNA LOUTZENHISER, AS NEXT FRIEND OF STEPHEN LUKE LOUTZENHISER,
A MINOR, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued January 7, 2004

JUSTICE O'NEILL, joined by JUSTICE SCHNEIDER and JUSTICE SMITH, concurring.

The only issue properly before us is whether a plaintiff's failure to comply with the notice requirement of section 101.101 of the Tort Claims Act deprives a trial court of subject-matter jurisdiction. I agree with the Court that it does not. But having determined that notice is not jurisdictional – meaning the trial court's ruling on whether the notice requirement has been met is not reviewable on interlocutory appeal – the Court proceeds to decide the very substantive issues that it concludes the court of appeals can't reach. Because the Court's opinion goes beyond the discrete jurisdictional issue presented, I concur in the Court's judgment.

The Court holds that Stephen Loutzenhiser was required to give notice of a claim within six months of his birth and failed to do so. ___ S.W.3d at ___. But whether a governmental entity had actual notice is often, if not always, a factual inquiry. *See Tex. Dep't of Crim. Justice v. Simons*, ___ S.W.3d ___, ___ (Tex. 2004).¹ That determination should be made first by the trial court on a record informed by our decision in *Simons* and not in the context of an impermissible interlocutory appeal.

The consequence of the Court's holding that the notice requirement is not jurisdictional is that the substantive issues the trial court decides are not immediately reviewable. As the United States Supreme Court has recognized, there are good reasons that interlocutory appeals

are the exception, not the rule. . . . An interlocutory appeal can make it more difficult for trial judges to do their basic job – supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Tyson Johnson v. Houston Jones, 515 U.S. 304, 309 (1995).

I agree with the Court that “having correctly concluded that the Medical Center’s notice arguments are not jurisdictional, the court of appeals did not have interlocutory appellate jurisdiction to affirm th[e] portion of the trial court’s order” striking the Center’s plea to the jurisdiction. ___ S.W.3d at ___. But the Court itself exceeds the parameters of our own jurisdiction by proceeding to decide the substantive issues. While I largely agree with the Court’s analysis of those issues,

¹ I join the Court’s opinion in *Simons* defining “actual notice” because the issue is, in my view, sufficiently related to the central jurisdictional question for decision.

I cannot join the Court's opinion to the extent it ventures beyond deciding the jurisdictional question presented.

Harriet O'Neill
Justice

OPINION DELIVERED: July 9, 2004.