OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JANE M. ROBERTS, GUARDIAN FOR WANDA Y. JOHNSON, Petitioner v. GALEN OF VIRGINIA, INC., FORMERLY DBA HUMANA HOSPITAL-UNIVERSITY OF LOUISVILLE, DBA UNIVERSITY OF LOUISVILLE HOSPITAL

CASE NO: 97-53 C.2

PLACE: Washington, D.C.

DATE: Tuesday, December 1, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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JANE M. ROBERTS, GUARDIAN :
FOR WANDA Y. JOHNSON, :
Petitioner :
v. : No. 97-53
GALEN OF VIRGINIA, INC., :
FORMERLY DBA HUMANA HOSPITAL- :
UNIVERSITY OF LOUISVILLE, :
DBA UNIVERSITY OF LOUISVILLE :
HOSPITAL :

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Washington, D.C.

Tuesday, December 1, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JOSEPH H. MATTINGLY, III, ESQ., Lebanon, Kentucky; on behalf of the Petitioner.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of

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the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 97-53, Jane M. Roberts v. Galen of Virginia, Inc.

Mr. Mattingly.

ORAL ARGUMENT OF JOSEPH H. MATTINGLY, III

ON BEHALF OF THE PETITIONER

MR. MATTINGLY: Mr. Chief Justice, and may it please the Court:

This case comes to this Court on the claim of Wanda Johnson, a Kentucky resident, who claims that the respondent hospital violated the antidumping provisions of the Emergency Medical Treatment and Active Labor Act passed by Congress in 1986.

Ms. Johnson's claim was dismissed by the district court on summary judgment. That dismissal was upheld by the court of appeals on the sole issue of whether or not the statute requires proof of an improper motive on the part of the offending hospital as a prerequisite for recovery. This Court granted certiorari on that specific issue and that specific issue only.

The respondent in this case has conceded that it can no longer defend the rationale of the lower courts, that the statute cannot be read as requiring proof of an

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improper motive. Therefore, this case is ripe for reversal and remand to the trial court. This Court could make that decision and say very little more.

QUESTION: Mr. Mattingly, do you contend that this statute, this emergency medical care statute, incorporates some kind of substantive standard of medical care?

MR. MATTINGLY: Justice O'Connor, the statute provides, number one, a duty on the part of the hospital to provide an appropriate medical screening examination, and it does, by definition of some of the key terms, refer to an obligation on the hospitals not to transfer patients if that transfer would cause a substantial deterioration in a patient's condition. So, arguably, yes, it does create a minimum standard.

However, if we think about what that standard is -- hospital, you cannot transfer a patient if that transfer is going to be the cause of material deterioration in a substantial condition of that patient -- I can't imagine that any State standard would be lower than that. You can't transfer if that transfer is going to be the cause of deterioration.

QUESTION: Well, it says -- it doesn't really talk about deterioration. It says that the hospital can't transfer until there's been -- until the condition has

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been stabilized. Is that it?

MR. MATTINGLY: That's correct, Your Honor. However, the -- the definition of -- of stabilized and to stabilize indicate that, within reasonable medical probability, no deterioration would occur to -- to a condition that the patient had at the time of transfer.

QUESTION: Now, in -- in -- in this situation, if Ms. Johnson had been stabilized at the time she was initially admitted to the emergency room, could she then have been transferred?

MR. MATTINGLY: Your Honor, again, if -- if --

QUESTION: I mean, is -- doesn't this statute really focus on what happens in the emergency room and the stabilization there? Could she at that point have been admitted to general admission in the hospital or sent elsewhere?

MR. MATTINGLY: Justice O'Connor, in my opinion no. Unfortunately, that's not an issue that --

QUESTION: No.

MR. MATTINGLY: -- that the parties have had an opportunity to fully brief --

QUESTION: I just wondered what your view of it was because on the surface it would appear that this statute just addresses itself to emergency room care.

MR. MATTINGLY: I would disagree with that

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analysis for a couple of reasons, Your Honor.

First of all, there is -- there -- there are several places in the statute that restrictions are imposed upon hospitals and those restrictions are not confined to emergency rooms. For example, if you review the transfer provisions of the statute, those provisions refer to transfer from a facility, which in my view is a much broader term than simply transfer from an emergency room. As a matter of fact, subsection (a) of the statute refers to the obligation to provide an emergency medical -- excuse me -- an appropriate medical screening examination in the emergency room or in other --

QUESTION: Well, presumably this argument would be open in any event on remand if -- if we agree with you that there's no improper motive requirement.

MR. MATTINGLY: Honestly, Justice O'Connor, it would be our argument at the district court that that entire argument was waived. It was -- it -- there was no cross appeal filed in this case, and those issues were never raised. The time for filing dispositive motions in the trial court had already passed, and so it would be our argument to the district court that any of those types of arguments were waived by the hospital at the district court level.

QUESTION: I know that this doesn't enter into

our decision at all, but where is Ms. Johnson today? Is she still hospitalized?

MR. MATTINGLY: No, Justice O'Connor. Ms. Johnson resides in Bardstown. She is disabled. She lives in an apartment in that city and -- and has -- has substantial disabilities.

QUESTION: With respect to the response you just gave that it would be your position that these points were waived, but going in, there was a solid precedent of the Sixth Circuit that the district court was obliged to follow. So, why would there be any occasion as long as that precedent stood --

MR. MATTINGLY: Justice --

QUESTION: -- to -- to bring up things? But looking down the road, maybe the Supreme Court will overturn the Sixth Circuit's precedent, and then do you have an alternate argument? I think that you'd have to -- you have a -- quite an uphill argument to make for waiver.

MR. MATTINGLY: Justice Ginsburg, I think that you are correct, that there is Sixth Circuit precedent that would support an argument that -- that the obligations of this statute apply outside of an emergency room, and that I believe is the reason that the hospital didn't raise this issue from the very beginning of the

case because it was pretty clear that -- that the precedent in our circuit is that it's not limited to -- to emergency room treatment.

The Thorton case is a case that's not cited by the respondent hospital, but clearly says in that case -- that involved a patient who was transferred from an emergency room first to intensive care and then actually to a regular hospital bed. That's not the case in Wanda Johnson' situation. She was -- she never left critical care.

QUESTION: But she was there for some weeks. And what is the point -- does it go on for months? In her case she was hospitalized for months. When does -- when does this obligation end?

MR. MATTINGLY: Again, Justice Ginsburg, that is -- that is an issue that unfortunately didn't get fully briefed. But my opinion would be that there is a very sound reading of the statute that would impose actually three separate and distinct obligations on hospitals, not a -- an obligation that begins and somehow stops once the patient arrives in the hospital and leaves the emergency room. If you look at section (a), there is a clear obligation --

QUESTION: Section what?

MR. MATTINGLY: Section (a) of the statute.

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QUESTION: 8?

MR. MATTINGLY: (a).

QUESTION: (a)?

MR. MATTINGLY: Yes. The first section of the statute provides a duty on hospitals that have emergency rooms or that provide emergency services to undertake to provide this appropriate medical screening examination when an individual, any individual, comes to the emergency room.

If you then look at section (b) of that same statute where obligations are -- are imposed on hospitals, if they determine that such a condition exists, it does not refer anyplace in section (b) to the patient having come to the emergency room.

Then you look at section (c) and the introductory sentence of section (c) is also different. And that section, the section that specifically prohibits transfers where a patient is not stabilized, refers to a patient at a hospital. It doesn't say that when a patient comes to a hospital and the hospital has determined that this condition exists. It simply says if you are at a hospital and you have an emergency medical condition, as defined in the statute, and that condition has not been stabilized, then you can't transfer that patient. So --

QUESTION: I guess (a) certainly envisions

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hospitals that don't have emergency departments. Right? Because it begins in the case of a hospital that has a hospital emergency department. So, it envisions hospitals without emergency departments. And if (b) only applies to emergency departments, hospitals without emergency departments, they're simply off the hook entirely.

MR. MATTINGLY: No, I would not agree with that, Justice Scalia. I think --

QUESTION: I'm trying to help you. I thought that that would strengthen your --

(Laughter.)

QUESTION: I thought that that would strengthen your case.

MR. MATTINGLY: I would welcome your help.

QUESTION: But you're free to disagree.

MR. MATTINGLY: I believe that section (a), the requirement that -- that a hospital conduct an appropriate medical screening examination, would apply to any hospital that holds itself out as providing emergency services whether they have a departmentalized emergency room, whether it's a -- for example, a psychiatric hospital that --

QUESTION: What hospital doesn't provide emergency services? Is there -- is there a hospital that doesn't provide emergency services?

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MR. MATTINGLY: I'm not familiar with a hospital in Kentucky who does not.

QUESTION: I'd hate to think there is one.

(Laughter.)

QUESTION: In which case, (a) doesn't make any sense when it says in the case of a hospital that has a hospital emergency department. I mean, it obviously envisions hospitals that don't have emergency departments, whatever that is. And you say that that means just treating emergency conditions. So, you think it envisions a hospital that doesn't treat emergency conditions.

MR. MATTINGLY: Section (a)?

QUESTION: Yes.

MR. MATTINGLY: No.

QUESTION: Okay. Then it -- then it must envision hospitals that have emergency departments.

MR. MATTINGLY: Correct.

QUESTION: Okay.

MR. MATTINGLY: Section (b), it would appear to me, is a much broader scope. It would include hospitals that have emergency services. It would also -- it would also include hospitals that perhaps don't provide emergency services, if there are such hospitals.

QUESTION: The very point I was making.

MR. MATTINGLY: Mm-hmm. And --

QUESTION: And without that, all you had to do to -- to evade the apparent intention of the statute is simply not to open an emergency department.

MR. MATTINGLY: Absolutely, Your Honor, and that's why section (b) in my view is a broader -- a broader section of the statute than section (a) because if there are hospitals that don't provide emergency services or close their emergency departments, section (b) still provides some obligation on that hospital. If, within the capacity or the capabilities of that hospital, they recognize the existence of this emergency medical condition, then they still have obligations. To the extent that they can provide treatment, they are obligated to do so.

Their further obligation is to try to arrange a transfer of that patient to a hospital that possibly can provide more care or better care for that particular condition.

Section (c) simply states that if a patient is at a hospital, and in section (c) there is no -- there is no obligation that you can read from that section (c), if you interpret (a), (b), and (c) as being separate and distinct, that the patient enter through the emergency room or that the hospital provide emergency services at all.

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So, it would be our view that -- that there is a very viable reading of the statute that would impose three separate and distinct duties under sections (a), (b), and (c) of that statute.

QUESTION: The State causes of action were -- were dismissed?

MR. MATTINGLY: Not all of the State causes of action. In this case the Sixth Circuit and the district court determined that the surgical resident, the medical -- medical school student who signed the discharge of Wanda Johnson, was not the agent of the hospital. Therefore, under Kentucky law where the hospital would normally be held liable vicariously, the hospital could not be held liable for that medical student's negligence.

EMTALA, on the other hand, imposes direct liability on hospitals and would provide a cause of action against the hospital whether the -- the medical student who signed the discharge was the hospital's agent or not.

QUESTION: So -- so, the Federal law has a respondeat superior theory that the State law does not?

MR. MATTINGLY: It would appear that the statute imposes direct liability.

Now, Kentucky does recognize --

QUESTION: Well, for -- for anybody's acts?

MR. MATTINGLY: Anyone's acts who have a

substantial impact on the decisions that the hospital is required to make under the statute. For example, if -- because the statute does not impose these obligations on, for example, physicians to impose liability on hospitals, a private citizen does not have a cause of action under the statute against a physician who makes -- who may violate the statute. That -- that remedy is available only to the Department for Health and Human Services.

So, even though Kentucky does, in some circumstances, recognize a hospital's liability vicariously for the acts of -- of certain physicians, in this particular case the Sixth Circuit determined that these medical students were not the hospital's agents, and therefore EMTALA would actually provide a broader remedy than State law would against hospitals for that conduct.

The -- the statute would not -- would not create a situation where every -- every possible medical malpractice claim that occurs in a hospital setting turns into a Federal EMTALA claim like the hospital claims in this case that it does, and the reason for that is that EMTALA is -- is not focused on the entire spectrum of hospital care. EMTALA looks to the beginning of that care where it requires these hospitals to provide an appropriate medical screening examination and then focuses at the end of that hospital care toward the transfer of

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that patient and making sure that the transfer is not the cause of a material deterioration in the condition.

Now, in the middle of that spectrum, there is going to be very much medical care that's provided and many medical procedures that may be provided. And some of those procedures and some of that care may be negligent, may cause damage, and may create causes of action under States' medical malpractice laws, but those are not going to create Federal EMTALA violations because EMTALA is not focused on that interim care. EMTALA is focused on the requirement that the hospitals conduct the medical screening examination and focused at the end of that hospitalization at -- at whether the transfer itself is a cause of a material deterioration.

If there are no other questions, I would like to reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Mattingly.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

I'd like to address two points. First, I'd like to address the question on which the Court granted

certiorari which is whether an improper motive must be shown in an EMTALA subsection (b) case. Second, I'd like to address the reasons why, given the respondent has conceded the question presented -- the reasons why this Court should not reach the additional issues that respondent has raised for the first time in respondent's brief on the merits.

Now, with respect to the question of --

QUESTION: When you say raised for the first time in respondent's brief on the merits, Mr. Feldman, you mean they were not raised in the lower courts or that they were -- that was the first time they were raised in this Court?

MR. FELDMAN: They -- it was certainly the first time they were raised in this Court. Whether they were raised in the court of appeals or the district court is a -- probably a more complicated question. It depends on certain specific references to the briefs. Actually I think it's doubtful that at least the second question was raised at all in the litigation given what respondent stated in its brief where it claimed that it raised that question. It doesn't seem to have done so to me. But in any event, at least for the first time in this Court.

With respect to the question of bad motive, there's nothing in the language of the statute that

suggests or permits an inference that bad motive must be shown.

QUESTION: You're referring to section (b).

MR. FELDMAN: Right.

QUESTION: And the case that the court of appeals relied on came up under section (a), did it not?

MR. FELDMAN: That's correct. And in fact, we -- in our view, even subsection (a) doesn't -- doesn't suggest that bad motive is required, but certainly there's nothing in subsection (b) that would --

QUESTION: There's no requirement in subsection (b) that there be an appropriate medical screening.

MR. FELDMAN: They don't -- it doesn't use the word appropriate. In fact, that was my other point, that in a subsection (b) case the standard, the substantive standard of care, is fairly clearly written right in the terms of the statute. The hospital's basic obligation is to stabilize the patient under subsection (b). Stabilization is defined as assuring, within reasonable medical probability, that the patient's condition will not deteriorate during or because of a transfer.

Now, it seems to us that that reasonable medical probability standard is a familiar one and essentially answers the question of the standard of care. It's not a motive-based, subjective standard. It's an objective

standard, a reasonable medical standard, that's not unfamiliar from other areas of law and that Congress adopted as a minimum floor that hospitals must satisfy under subsection (b).

That conclusion is supported by several other operative sections of the -- of the statute that also embody reasonable medical type standards, both in the definition of what an emergency medical condition is, in the -- in the doctor's obligations of what the doctor must do if the doctor wants to --

QUESTION: Well, what was the basis of Congress' legislative jurisdiction here -- legislative authority?

MR. FELDMAN: The constitutional basis?

QUESTION: Yes.

MR. FELDMAN: I think it was both the Spending Clause and the Commerce Clause. It's important that EMTALA is not a law that operates per se on all hospitals in the country. It's a part of the Medicare Act, and what Congress said is, if hospitals want to participate in the Medicare Act, which they generally find it beneficial to do, they have to undertake this obligation under EMTALA.

QUESTION: So -- so, it isn't -- it doesn't apply to a hospital just by virtue of the fact that the hospital might be dealing in interstate commerce.

MR. FELDMAN: That's correct. That's correct.

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It's only as a part of the Medicare.

And actually that was the other point I wanted to get to which was in addition to the language of the statute, the Secretary has -- of HHS, who has authority to issue regulations under the Medicare Act and who administers part of the Medicare Act generally and EMTALA in particular -- the Secretary has also stated that no improper motive be found. And it's our view that that statement is entitled to deference, and that should settle the question, if there were any doubt, about the statutory language on that point.

Now, the lack of any -- of a motive requirement in EMTALA is sufficiently clear that respondent's in its brief on the merits conceded it. In our view, the Court should not reach any question in the case, especially the two -- in particular the two questions that respondent raised.

I am authorized to inform the Court this morning that the Secretary of HHS intends to institute a rulemaking, in part as a result of this case and in part as a result of generally looking at the situation under the statute, to try to work out some of the other issues under the statute. And I -- I think it would be -- the Secretary would like to be able to do that, to apply her expertise in the area, and look at the question, in

particular some of the questions that have been raised regarding how far a hospital's obligation extends and how long it extends under EMTALA.

QUESTION: Does the Secretary currently have no position on a case like this where the stabilization, according to the plaintiff, takes weeks, even months to occur?

MR. FELDMAN: The -- there is no position.

I would -- maybe it might help, though, because you used the term stabilized, to point out that under the statute, there really are two kind of polar ways of looking at it. One is if you look at the definition of stabilization, it's defined in terms of assuring that there's no deterioration of the -- of the patient's condition during the transfer. And that suggests that the term stabilization is not -- and the Secretary has said this -- is not a medical term under the statute. It's a defined statutory term and it doesn't really make sense necessarily to talk about somebody being stabilized outside of the context of a particular transfer that's contemplated. So, under that view, which I think is probably petitioner's view, that duty operates at the end of the hospital stay pretty much no matter how long it was.

There would be another view I think that -- that

in order for the stabilization requirement to apply, the hospital must determine that there's an emergency medical condition. And I think another possible reading of the statute would be that if the hospital at some point determines that there's no longer an emergency medical condition, that that would terminate the hospital's obligations.

So, I think there's at least those two polar ways of looking at the statute and there's probably some in-between cases too, and the Secretary would like the opportunity to institute a rulemaking and look at the question thoroughly and develop a view on the statute.

So, for that reason, as well as the belated nature of respondent's presentation of the issues and the fact that there probably are some unresolved factual disputes on which the -- these other two issues are premised, the Government believes that the Court shouldn't reach those issues in this case.

If there are no further questions, that completes my argument.

QUESTION: Thank you, Mr. Feldman.

Mr. Phillips, we'll hear from you.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE RESPONDENT

MR. PHILLIPS: Thank you, Mr. Chief Justice, and

may it please the Court:

It seems to me that this is a classic illustration of a case that -- where the result is in search of the appropriate legal theory.

As we made plain in our -- in our brief in -- before this Court, we do not defend the actual motive test adopted by the Sixth Circuit because it's reasonably clear to us that there is no basis in the text or the context of this particular statute to justify that particular analysis. And we do think as hospitals that there are certainly certain situations where there are absolute obligations that are imposed upon us, for instance, in providing some form of a screening examination where an inquiry into the hospital's motive is simply not an appropriate inquiry, and on that basis alone, it's easy for us to set aside the actual motive test.

QUESTION: Well, now, the theories, though, that you do put forward were not ones that were aired in the court below I take it.

MR. PHILLIPS: That's correct, Justice O'Connor, although --

QUESTION: That makes it awfully hard for us to deal with because they aren't even well briefed here I think.

MR. PHILLIPS: Well, I hope at least in part

they're well briefed.

QUESTION: Well, maybe one side.

(Laughter.)

QUESTION: But certainly not the other. We just have to -- by that I mean the petitioner certainly didn't address it in the first instance, and you brought something up. But then they have a reply brief and that's about all. And the lower court didn't address them. So, it makes it awfully hard for this Court to deal with.

MR. PHILLIPS: To be sure, and -- and -- and the question really is, is this a proper instance in which the Court ought to exercise its discretion to resolve a -- a pure question of law. And I do think the question of when EMTALA ends is a pure question of law that the Court can address pretty readily by looking at the statute.

I guess what I'd -- you know, in terms of why the issue wasn't raised previously, if the Court were to adopt a categorical rule that says the failure to bring this up in the Sixth Circuit somehow prohibits us or should preclude us from being allowed to bring it forward, here would have had us be required to make arguments in support of a judgment below in a case where it seemed quite clear that the Sixth Circuit law was categorically in our favor as Justice --

QUESTION: But, Mr. Phillips, there's one

question of what you could do on remand and the other, what you can do here. And I was struck by your position that your new arguments could be responded to in a reply brief, but then the Government, whose views are of interest to this Court, is only an amicus and has no right to file a reply brief.

MR. PHILLIPS: Well, there's no question about that, Justice Ginsburg. On the other hand, it is reasonably clear to me that had the Government filed a motion for leave to file a reply brief in the circumstances of this case, that that motion would most likely have been granted. I have as a private litigant on occasion filed at the -- an amicus brief at that stage in the process or at the respondent stage even though I was supporting the petitioner, and the Court has authorized it in circumstances in which new issues have been put forward in a particular case.

So, I don't doubt that if the Solicitor -- and we certainly would not have opposed the Solicitor General briefing the issue if he had chosen to do so. And I assume the reason he chose not to do so is that he can't seem to categorically decide what he thinks the term stabilize means within --

QUESTION: Mr. Phillips, as I understand, Mr. Feldman's point is that this area is under review by the

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Secretary who's contemplating regulations and so forth. Would you comment on whether you agree that those regulations might be helpful in addressing the issues that you have raised?

MR. PHILLIPS: I -- I think on -- on the two particular questions that we're talking about, we would almost certainly be in what I would regard as a Chevron One world where Congress has spoken quite specifically to the particular problems, the two questions being, does EMTALA end when a hospital admits the patient for -- for treatment of -- of the emergency medical condition?

It seems to me quite clear that the definition of stabilized at -- at the appendix to the petitioner's brief at A8 which talks about significant deterioration from or during the transfer clearly has in mind the discussion of a transfer arising at the time of the entry into the emergency medical setting and not just any transfer that might take place down the road.

And so, I would argue that if the Secretary were to enact a regulation that extends a generalized duty along the lines that is obliquely referred to in the Solicitor General's brief, that extends months later after care is being given, that that would violate Congress' clear command.

QUESTION: Well, let me ask you how you read

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subsection (b) as opposed to (a) of section 1395.

MR. PHILLIPS: Subsection --

QUESTION: I'm looking at 42 U.S. Code, section 1395d(b), which is examination and treatment for emergency medical conditions and women in labor.

MR. PHILLIPS: Right.

QUESTION: Subsection (a) refers to a medical screening requirement in the case of a hospital that has an emergency department.

MR. PHILLIPS: Correct.

QUESTION: (b) says in general if any individual comes to a hospital and the hospital determines the individual has an emergency medical condition, the hospital must do blah, blah, blah.

MR. PHILLIPS: Yes. I don't --

QUESTION: Now, does that kick in in the situation of a patient who's already in the hospital and develops an emergency condition? What is (b) for? Or is it addressed to hospitals that don't have emergency departments? How do you read this?

MR. PHILLIPS: No. I read this all as a -- as a single -- as a seamless web, and I think it's the way the Solicitor General's brief describes it, which is that the statute (c) doesn't deal with independent sets of duties, it deals with sequential sets of duties. And so, the

first question is, do you have -- do you have an emergency room? If you don't have an emergency room, then the statute does not apply.

QUESTION: The statute doesn't apply at all.

MR. PHILLIPS: Correct. There's no -- yes. Congress did not mean to require very small institutions in rural communities to create emergency rooms if they didn't have the resources to do that as a condition to the acceptance of Medicare funds. So -- and there are such facilities, Justice Scalia. I know you asked that question. So, you don't have that obligation.

But then the question is if you do have an emergency room and an individual is presented to you, you have, one, an immediate obligation to provide an appropriate screening examination, and then two, if at the end of the appropriate screening examination you conclude that the individual has an emergency medical condition, then one of three courses follow from that.

Either you admit the patient, and I would submit, given the statutory scheme, we're done at that point.

Or, two, you decide you're going to transfer the patient to somewhere else and you're going to provide that patient with stabilizing treatment, realizing that that's designed simply to get the patient from facility A to

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facility B without a significant deterioration in the -- in the patient's condition during that -- just during that period. And that's all the statute is designed to get at.

Or three, if you cannot provide stabilizing care for whatever reason and you still believe that the transfer has to be done, then you have to go through the sequence of events under subsection (c), and that's what I think this statute is designed to get at. That's why it's called emergency -- the Emergency Treatment Act, and that is precisely the limitation of why it ought to be resolved.

And so, that's the first element, and I think that's -- that's a clear question of law, Justice Stevens.

QUESTION: Is it a worthy question of law at this point? I mean, is there -- is there a split on -- on the -- the issue that you've raised?

MR. PHILLIPS: Every court of appeals that has addressed this issue to date has embraced our -- well, no, that's true. There is a split actually. There is dicta. It's not a holding of the Sixth Circuit, but there is some considered dicta in the Thorton case that petitioner's counsel referred to that says that the obligations of EMTALA go on beyond the emergency room setting. But every other court that has analyzed the question since then, the Fourth Circuit, the Tenth Circuit specifically, have

concluded that this is a question that EMTALA's obligations end when you're admitted and that that issue -- and if the court of appeals had rendered a decision precisely on that question in this case, we would still be here today arguing about this.

And so then the only real issue is, does the briefing of the case in some sense make the Court reluctant to resolve the issue? And I think it's a reasonably clear legal question that the Court can resolve --

QUESTION: But, Mr. Phillips, we're told -- we were told this morning that the Secretary is planning to have a rulemaking, and doesn't prudence dictate that we -- we await that full development at the agency level before attempting to -- I mean, it's extraordinary for this Court to take a first view of an issue rather than to serve as a court of review.

MR. PHILLIPS: Well, obviously the announcement this morning was as much a surprise to me as it presumably was to the Court. I don't disagree that an act of -- that prudence might suggest that -- with respect to this particular issue, the -- the Court may want to hold off.

I did not hear Mr. Feldman make any reference, however, to the question of what determines means within the -- within the statute, and that's a separate issue

that has been fully briefed as well. There's not even a question as to whether that has been preserved in the courts below. We certainly referenced that argument.

And there is no question here that -- that the hospital at the time of this -- of this transfer, even though I don't think it's subject to the act, nevertheless, the hospital clearly did not determine that she had a -- an emergency medical condition at the time of that transfer. So, I would at least --

QUESTION: No, but isn't it true --

MR. PHILLIPS: -- ask the Court to resolve that question.

QUESTION: Isn't it true, Mr. Phillips, that the -- there is an issue of fact as to whether the patient had ever stabilized? Isn't there?

MR. PHILLIPS: Well, I don't know what stabilized means in that context.

QUESTION: Well, maybe that's part of the problem.

MR. PHILLIPS: But that's not the statutory language that's relevant here. The question is whether she was in an emergency medical condition at that point, not whether she's stabilized.

QUESTION: Well, is there an issue of fact as to whether she continued to be in an emergency medical

condition?

MR. PHILLIPS: I don't know that there is a -- no, there's not a shred of evidence in this record -- and it would be the plaintiff's burden to bring forward the evidence -- that demonstrated that she was in an emergency medical condition at the time of this transfer.

There is a factual question -- and I don't dispute this and we conceded it in the courts below -- that, quotes, whether she was stabilized at the time is -- is an open issue. I don't know what the -- what the parties or the court --

QUESTION: But are you suggesting --

MR. PHILLIPS: -- thought stabilized meant in that context.

QUESTION: Is it your legal position that even if she was not stabilized at the time, she could have been transferred because she was not in an emergency medical condition? Is that what you're saying?

MR. PHILLIPS: Yes, because I believe that it being an emergency medical condition is a precondition to any of the other obligations with respect to a transfer.

QUESTION: And stabilized has a meaning other than the termination of the emergency medical condition.

MR. PHILLIPS: That's correct, Justice Stevens. If you look at the appendix to the petitioner's brief at

A8 and you analyze the definition of stabilizing treatment and to stabilize, it talks very precisely about assuring that the emergency medical condition does not deteriorate from or during the time of the transfer. It is a remarkably narrow and focused definition, very unlike what you might ordinarily expect, and particularly unlike what you would expect if Congress had intended to impose a much broader set of -- of obligations on a hospital arising anytime there happens to be a transfer.

In that regard, it's worth noting, of course, that the -- that the -- you know, transfer includes discharge. So, you're talking about every patient who comes into the emergency room is eventually going to leave the hospital -- God willing -- and in that situation, you are going to have an EMTALA --an EMTALA claim arising potentially because you've released the patient. And they'll have a fight over whether they're, quote, stabilized or what the condition of the patient was.

And you would expect for that kind of a -- of an enormous sea change in the relationship between Federal and State law in an area that's traditionally been regulated by the States, medical malpractice, to be something that Congress would at least have made some kind of specific references to. And yet, you know, the legislative history talks in terms of a -- of filling the

gap, providing duties that otherwise wouldn't exist as a matter of State law. And here you're talking about discharging a patient after providing 2 and a half month -- months of treatment. Clearly, State law provides duties that would arise in that setting.

QUESTION: I -- I thought hospitals just didn't provide 2 and a half months of treatment anymore, that the idea was a hospital was a place where you went for, you know, some sort of serious surgery, and you know, they got you out of there in about 3 days.

MR. PHILLIPS: Well, to be sure, Mr. Chief Justice, that -- that is the -- the effort that's usually put in. Obviously, Ms. Johnson was in horrible condition as she came into the -- into the emergency room, and I think the University of Louisville did what its mission has been to do for hundreds of -- for a hundred years, which is it took the patient into the emergency room. It immediately admitted her, and it immediately provided her with extraordinary and extensive care and then continued to care for her in an intensive care setting and then in a step-down intensive care setting.

Realize, this hospital has 17 intensive care beds, and this is one of the largest hospitals in the State of Kentucky.

QUESTION: What -- what is it exactly that you

-- as I read the statute -- let's see if I'm right -- that a person comes to a hospital and the hospital -- that person has an emergency medical condition. It's a very bad condition let's say.

MR. PHILLIPS: Okay, Justice Breyer.

QUESTION: Now, what you have to do as a hospital is you have to keep that person there until the person stabilizes. Is that right?

MR. PHILLIPS: No. I don't -- I don't read the statute --

QUESTION: Well, it says you have to give such treatment as may be required to stabilize the medical condition --

MR. PHILLIPS: The only -- my only objection --

QUESTION: -- or --

MR. PHILLIPS: The next subsection also says --

QUESTION: -- or -- or transfer to another facility in accordance with (c).

MR. PHILLIPS: Right.

QUESTION: And (c) says unless the person agrees or unless the doctor says it's going to -- she's going to be better off in that other place, in the absence of those two things, the person has to be stabilized.

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MR. PHILLIPS: Right.

QUESTION: It says -- so -- so, I take it here you haven't got a doctor who's going to say she's better off, and the person hasn't agreed, and so you have to keep her unless she's stabilized. And the definition of stabilized and to stabilize means basically that you have to certify that moving her or discharging her isn't going to make her significantly worse. So, it sounds -- the literal language is that you have to keep this person who had an emergency condition until you're certain or reasonably certain, absent consent, absent better place elsewhere, but until you're reasonably certain that the transfer won't make her significantly worse off.

Now, if I'm right -- and tell me if I'm not -- I want to know what precisely you think this Court should hold about that.

MR. PHILLIPS: Well, you're not right. So, I don't know what to say about the second question.

QUESTION: Well -- no, then fine. I'm trying to get at what exactly -- which is the part I'm not right?

MR. PHILLIPS: What the statute says is that if -- if you don't make a decision to admit her --

QUESTION: Yes.

MR. PHILLIPS: -- you decide you're going to transfer her, you have to follow one of two courses.

QUESTION: Right.

MR. PHILLIPS: You have to provide her stabilizing care, that is, care that within a reasonable medical probability is designed to ensure that her emergency medical condition will not deteriorate during or from the transfer.

QUESTION: Yes.

MR. PHILLIPS: That's the care you provide, and then you transfer her.

QUESTION: Yes.

MR. PHILLIPS: If, on the other hand, you decide you can't do that for whatever reason and you transfer her anyway, then you have to go through (c) which requires consent and the certification and all the rest of the process that follows from that.

So, I don't -- I don't --

QUESTION: All right. Now, what is it you want us --

MR. PHILLIPS: -- was that I have to keep her in some sense.

QUESTION: No, no. What is it now? I've got that. I -- I've adjusted my statement of it accordingly. Now, given that, what is it you want us to hold precisely?

MR. PHILLIPS: Okay. First I would like for the Court to hold that when the hospital admitted her at that

point to provide her with the treatment for her emergency medical condition, that satisfied any obligations it -- it had under EMTALA, and EMTALA is not a statute that rises --

QUESTION: How could we --

MR. PHILLIPS: -- from the ashes after it's been satisfied.

QUESTION: How could we hold that if the statute says you have to give her treatment to stabilize the condition or she has to have been stabilized before you can transfer her without her consent? How could we hold that if she hasn't stabilized?

MR. PHILLIPS: Because the -- the question is what are the three -- what are the options that are available under this statute to the hospital: to transfer her and what you have to do in order to do that -- and there are two different ways you can proceed with respect to transfer -- or you can admit her. If you admit her and provide her with care, State law kicks in and all of the obligations of State law are then applied. And there is no need for the Federal statute at that point and the statute ends at that point.

That's -- and -- and you know, you can read the words out of context to say that you have some overarching duty to stabilize any medical condition during the time of

a -- of hospitalization that kicks in at the point of discharge or transfer. But I don't think that's the fair reading of this statute in context. What it's talking about is what you do in the emergency medical --

QUESTION: Because -- because (b)A in particular, when it says that the hospital must provide either within the staff and facilities for such further medical examination and such treatment as may be required to stabilize the medical condition, the word stabilize there has a very technical meaning, doesn't it?

MR. PHILLIPS: That's correct, Justice Scalia.

QUESTION: As defined, it means to assure no deterioration during transfer.

MR. PHILLIPS: Specifically during the period of transfer. That's correct.

QUESTION: So, it's not the normal meaning that you'd -- you'd attribute to stabilize.

MR. PHILLIPS: Right. It's not the term we hear in the -- in the evening news that the patient is in stable condition. I don't think that term and this term have any resemblance to each other, although there's a tendency I think, because it's a term we -- we hear a lot, to assume that it has, you know, an ordinary meaning. But it doesn't have an ordinary meaning, and that's -- that's the very point of our argument in this --

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QUESTION: After admission of the patient, can an -- a new emergency condition arise, I mean, absent her falling or something like that?

MR. PHILLIPS: I -- I don't believe, Justice Kennedy, that this statute would come back in under those circumstances because you're in the hospital, you're not being -- you're not -- because it talks about coming to the hospital. That's the triggering event.

QUESTION: Comes to a hospital.

MR. PHILLIPS: Right. Well, if she's in the hospital, she's not coming to a hospital. So, I would assume that the statute is not meant to deal with that problem. It clearly is not aimed at that situation, and there would be no need for Federal law to impose duties on a -- on a hospital to respond to a patient in an emergency condition who has been admitted and is under care at the hospital whether she fell out of bed or for whatever reason.

QUESTION: Because State law provides adequate remedies.

MR. PHILLIPS: Absolutely, Justice Kennedy, I believe State law does provide remedies.

QUESTION: What in your view, Mr. Phillips, is the office of (c) which says that there are two conditions under which you could transfer? One is on the -- on

consent and the other on the physician certifying that the risk of staying where she is is greater than the risk of sending her someplace else.

MR. PHILLIPS: Right. Justice Ginsburg, (c) arises in the situation where the condition has not been stabilized, and presumably that's because the -- the hospital has made a basic determination that it's simply not capable of providing whatever care is necessary within reasonable medical probability to ensure against the potential deterioration. And in that situation, you have to go to these additional procedures.

And it makes sense because let's think about the situation we're dealing with here. We're talking about a situation where a patient comes to the hospital, is determined to have an emergency medical condition, and you are shipping that person out without providing him or her with any care. That -- that is the classic situation that ought to -- ought to raise red flags, and so Congress protected against that precise situation by saying, we're going to expect you to go through some additional hurdles if you -- if you decide to go down that particular path. And that's -- that is I think what subsection (c) is designed --

Indeed, I think if -- if you accept the narrow interpretation of the term stabilized as -- as -- as it's

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written in the statute and understand it in that context, the statute actually begins to make a whole lot more sense. A lot of the difficulties in trying to make any kind of sense out of this -- out of this provision comes from the fact that you have these ongoing duties that I don't think Congress ever intended to apply.

QUESTION: Can you -- can you maybe try it once? Can you -- can you give me an example? Suppose the woman has been in a serious accident, near death, and she's in the hospital, admitted, and each day the doctors look at her and examine her and treat her for 3 or 4 months. And each day they say, could we move her to a different hospital, and each day the doctors say, I think she's in too bad condition to trust taking her in the car over to the other hospital. Now, in that situation, imagine that situation and then suppose, you know, after 4 months somebody transfers her anyway and she's hurt. Has the statute been violated?

MR. PHILLIPS: No, I don't believe the statute has been violated.

QUESTION: All right. Now, what are the words in the statute that have to be interpreted so there would be no violation in that instance because it sounds, reading it, as if she's never been stabilized in -- as the way the statute defines it.

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MR. PHILLIPS: Well, except that the -- well, I suppose that you're right in the sense that the stabilized with respect to the car ride would itself cause her a particular problem. I mean, the -- the -- the -- you know, the truth is there -- the statute doesn't specifically say that the obligations of EMTALA end at this particular point in time.

QUESTION: What it does say is that stabilized means that no material deterioration of the condition is likely to result from or during the transfer. And so, each day we've had a doctor there saying that there is some risk that the transfer will hurt the woman, and -- and therefore that definition wouldn't seem to have been satisfied. And that could, I guess in principle, extend for years. But -- but if it does extend for years, isn't it true that each day that definition of stabilize was not satisfied and therefore the hospital cannot transfer the woman?

MR. PHILLIPS: I don't dispute that -- that there is a technical reading of the statute that would support that particular outcome, but it is -- but the -- but it is so counter both to State law and to -- to intuitive judgment about what a hospital would do that I don't think it's within intendment of this particular statute. I mean, I don't disagree that you can interpret

the definition of stabilize.

But I think the -- the more natural reading of that term in context is designed to say what we're going to focus on is that immediate transfer out of the emergency medical condition, and that this is not a statute that remotely suggests what you do once you -- you place the entire arm of State tort law and malpractice law around the patient by admitting the patient into the hospital.

And that's where I think this statute clearly is intended to draw the line, which is why even though you could read the language of stabilized out of context to apply to that situation, it's clear to me Congress didn't mean it and Congress wouldn't have needed it because if you have a patient who's getting hospital orders to stay in the hospital, I mean, there are more State law violations arising out of the transfer of that patient than you can shake a stick at. And -- and it's clear to me that Federal law doesn't need -- the Department of HHS and -- and two different private cause of action in order to deal with that kind of a problem. That's -- you know, there's nothing in this statute that remotely suggests that Congress meant to significantly alter the relationship between Federal and State law in this setting.

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And it's not a provision, as I said, that goes away at some point and then resurfaces. There's nothing in the language that -- that justifies that kind of -- of an interpretation.

I think I've exhausted the Court's questions, if not the Court.

(Laughter.)

MR. PHILLIPS: If there are no further questions, I urge the Court to affirm.

QUESTION: Thank you, Mr. Phillips.

Mr. Mattingly, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF JOSEPH H. MATTINGLY, III

ON BEHALF OF THE PETITIONER

MR. MATTINGLY: Thank you, Mr. Chief Justice, and I would like to point out just a few things.

First of all, the interpretation of the statute that is proposed by the hospital is focused strictly at -- at patient dumping from the front end of the hospital, basically the stories where hospitals turn patients away. Its interpretation totally ignores situations that are equally reprehensible, and that is the dumping of patients at the other end of the spectrum, patients that are hospitalized and for whatever reason the hospital makes a decision that this patient is going to be transferred.

QUESTION: But that may not be the focus of

Congress' intent in this act. It may well have been enacted to focus at the front end of the emergency, the woman in labor who's turned away --

MR. MATTINGLY: That may --

QUESTION: -- that sort of thing. That's the indication anyway.

MR. MATTINGLY: Yes, that -- that may be true, Justice O'Connor, that that was the primary focus of Congress.

Wanda Johnson's situation is -- is a perfect example of why Federal law was needed in this circumstance. As we -- as we discussed earlier, the Sixth Circuit decided that under State law Wanda Johnson had no cause of action against the hospital because this medical student who made this decision, even if that decision was negligent and the subject of -- of State malpractice law, did not create a cause of action against the hospital. So, if in fact Wanda Johnson was dumped from the transfer end, without this statute Wanda Johnson has no cause of action against the hospital, only against a medical student who made a decision to invoke a transfer of this patient.

I would point out also that even if the Court were to accept any of the arguments that are made by the hospital in this case, there still exists substantial

factual issues that would -- would compel this Court to reverse the case and send it back down for review by the lower courts. Contrary to what the hospital argues, there is a clear factual issue as to whether or not an emergency medical condition existed with Wanda Johnson when she was transferred.

The only evidence that the hospital cites is the testimony of Dr. Miller who is the only physician who speaks in terms of an emergency medical condition, and Dr. Miller quite candidly admits in his deposition that he was on vacation during the entire month when Wanda Johnson was transferred and that his decision was based on his review of the medical records.

On the other hand, Dr. John Stuy, who was Wanda Johnson's treating physician in Indianapolis, testified at length in this case, and his testimony can be read to the effect that Wanda Johnson did suffer an emergency medical condition. Now, he doesn't come right out and say, I've read the statute and she suffered an emergency medical condition. But he says she needed the availability of treatment that hospitals provide and because she was outside of the confines of those people who could provide that treatment, her condition got substantially worse.

So, there -- there are factual issues that would have to be resolved even if any of the arguments that the

hospital makes in this case were adopted and accepted by the Court.

Finally, I would point out to the Court that there is at least one other -- that one other interpretation of the -- the definition of a determination by a hospital. The section (b) of the statute does say if a hospital determines that this condition exists, and the hospital would argue that that is synonymous with actual knowledge, and I'm not sure that that is necessarily the interpretation that could be placed upon that -- that section of the statute. I think it would be very reasonable to assume, considering the context that it's placed in, that that would also include situations where the hospital was intentionally ignorant of important facts that would have borne on that determination.

QUESTION: Congress would have said determines or should have determined, wouldn't it?

MR. MATTINGLY: If Congress means determines or -- or should have determined --

QUESTION: Yes. What you're saying is should have -- is Congress meant should have determined as well as determined.

MR. MATTINGLY: Well, Mr. Chief Justice, actually what I mean is -- is if -- if the plaintiff can prove even a higher standard than that. Maybe the --

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maybe Congress didn't mean should -- only should have determined, but if the -- if the hospital was reckless in its determination.

QUESTION: How would that fit under determine? I mean, determine sounds like a decision made by the person to whom the verb is directed.

MR. MATTINGLY: Mr. Chief Justice, I agree that there are several interpretations of that section of the statute, and I point that out only to -- to again argue to the Court that those kinds of issues that are raised for the first time now have not been adequately briefed by anybody.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mattingly.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 97-53

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BY Ann Marie Federico

(REPORTER)