

NO. 08-0398

In the
Supreme Court of Texas

JERRY GURKOFF, D.O.

Petitioner

v.

ROSEMARY JERSAK

Respondent.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEALS AT FORT WORTH, TEXAS
CAUSE No. 02-07-00101-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

Hilaree A. Casada
Texas State Bar No. 24027676
Michael Hurst
State Bar No. 10316320
HERMES SARGENT BATES, LLP
901 Main Street, Suite 5200
Dallas, Texas 75202
Telephone (214) 749-6000
Facsimile (214) 749-6100

**Attorneys for Petitioner
Jerry Gurkoff, D.O.**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Jerry Gurkoff, D.O. (“Dr. Gurkoff”) submits this Reply in Support of Petition for Review and respectfully shows the Court the following:

SUMMARY OF THE ARGUMENT

The issue at hand is simple and the answer clear — upon dismissing the plaintiff’s claims based on her failure to file an expert report, the trial court was required to award attorneys’ fees against someone. The Act required that either the claimant or her attorneys be sanctioned through dismissal and an award of fees against them for failing to meet the requirements of the Act. Dr. Gurkoff maintains that Mrs. Jersak’s attorneys were the appropriate parties to sanction because it was the attorneys’ decision not to submit an expert report, it was the attorneys’ gamesmanship that needlessly prolonged the litigation, and a judgment against the estate would be uncollectible. By advocating for that result, Dr. Gurkoff’s attorneys did not rob the court of its discretion. On the contrary, the trial court was required to award fees against someone. The trial court’s refusal to do so and the appellate court’s approval of this outcome are erroneous and, if not corrected, will provide attorneys with a shield from the threat of sanctions and with incentive to file frivolous suits.

SUPPLEMENTAL STATEMENT OF FACTS

Dr. Gurkoff presents the following supplemental statement of facts to address certain misstatements made by Respondent Grey Pierson (“Mr. Pierson”) in his Response.

Dr. Gurkoff has not admitted liability

Mr. Pierson's contention that Dr. Gurkoff admitted that he operated on the wrong digit is incorrect. Dr. Gurkoff has consistently denied liability and provided evidence to the trial court establishing that he operated on the correct finger. (CR 45-71, 100-102, 200; 6 RR Ex. 27; 7 RR Ex. 4). That evidence showed that Mrs. Jersak initially saw Dr. Gurkoff regarding problems she was having with her right index finger (the finger operated on) and her right long finger. (CR 48-49, 54). Further, the evidence conclusively established that Mrs. Jersak initially decided to have surgery performed on her long finger but changed her mind on the day of surgery. (CR 49-51, 54, 61). Specifically, on the day of surgery, she asked Dr. Gurkoff to operate on the index finger rather than the long finger and signed a consent form confirming that decision. (CR 49-51, 62-64). The evidence was undisputed that Mrs. Jersak's decision to have the procedure on her index finger rather than her long finger was her own, individual decision, was made before she signed the consent form and before any anesthesia was administered, and resulted in an operation on the finger she requested. (CR 48-50, 54, 62-63, 67-68).

***Mr. Pierson and Pierson Behr acted as counsel of record
before and after Mrs. Jersak's death***

Mr. Pierson and his law firm, Pierson Behr, were at all times Mrs. Jersak's attorneys. Mr. Pierson signed the Attorney-Client Agreement with Mrs. Jersak on behalf of Pierson Behr. (CR 278-279). Moreover, prior to Mrs. Jersak's death, Mr. Pierson signed Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, appeared on Mrs. Jersak's behalf at the September 2, 2004 hearing on Plaintiff's Motion for

Reconsideration, and was the only attorney to present argument on Mrs. Jersak's behalf at that hearing. (CR 131, 139-140; 3 RR 4-17, 23-25, 27-28).

Following Mrs. Jersak's death, Mr. Pierson then appeared on behalf of George Jersak in written submissions as well as on the record at the resulting hearings, insisted on mediating the case following Mrs. Jersak's death, and even went so far as to tardily seek an extension of time to file the expert report. (CR 218-224, 248-253, 267, 282; 4 RR 5-7, 13-26, 30, 34-38, 40-42, 47). That request was made even though the case law definitively stated that no extension could be granted because plaintiff's counsel had failed to request the extension before the first hearing. Any contention that Mr. Pierson and his law firm played no role in the decisions made on behalf of Mrs. Jersak and Mr. Jersak is false. Pierson Behr consistently represented both Mrs. Jersak and her husband, as Mrs. Jersak's representative, throughout the course of this litigation, and Mr. Pierson himself was counsel through most, if not all, of this litigation, first for Mrs. Jersak and then for her husband. (*Id.*). These facts illustrate why the attorneys, including Mr. Pierson and his law firm, were the appropriate parties to sanction in this case.

The question of collectibility was presented to the trial court

It is undisputed that Mrs. Jersak's estate has no assets. (CR 218, 224). Accordingly, Dr. Gurkoff would likely not be able to collect on a judgment against the Estate and would be forced to spend additional money and time seeking to execute on the judgment. Contrary to Mr. Pierson's assertion, this issue was raised in the trial court in written pleadings as early as September 20, 2005 in the first motion filed by Dr. Gurkoff after learning of the lack of assets, as well on the record, and provides additional support

for ordering the fees against the attorneys rather than the plaintiff. (CR 228-229, 283-284; 4 RR 12, 18, 28, 34; 5 RR 16).

Mrs. Jersak's claims were at all times healthcare liability claims

The Original Petition did not include a claim of *res ipsa loquitor*. (CR 2-8). That pleading was consistent with the demand letter sent by Pierson Behr to Dr. Gurkoff pre-suit that notified him of Mrs. Jersak's "health care liability claim," stated that the letter was sent pursuant to Texas Revised Civil Statutes Article 4590i, § 4.01(a), and confirmed that demand was made pursuant to section 4.01(d) of the Act. (CR 8). Mrs. Jersak's counsel also included a statement in both the Original Petition and the First Amended Petition that this statutorily-required demand had been made. (CR 4 at ¶ 5A; CR 80 at ¶ 4A). Yet, Mr. Pierson insinuates (without citation to the record) that the expert report was not filed because Dr. Gurkoff "admittedly operated on the wrong body part." (Resp. at 3). Counsel's own demand letter and pleadings establish that the attorneys themselves contended this was a healthcare liability claim all along. (CR 4-5, 8, 80, 86). Moreover, had only the *res ipsa loquitor* claim remained, plaintiff would have still been required to file an expert report. *E.g. Ruiz v. Walgreen Co.*, 79 S.W.3d 235, 239 (Tex. App.—Houston [14th Dist.] 2002, no pet.); (CR 190-192; 3 RR 17-22). The appropriate inference to draw from this evidence is that Mrs. Jersak's attorneys took an ill-advised risk and made a conscious decision to not file an expert report. That decision, as well as the decisions to seek reconsideration prior to Mrs. Jersak's death and to insist on mediation and tardily seek an extension of time to file an expert report after her death, further supports sanctioning the attorneys rather than the Estate.

ARGUMENT

I. The law required the trial court to award Dr. Gurkoff his attorneys' fees.

Simply put, the trial court was required to award reasonable attorneys' fees to Dr. Gurkoff and to order those fees against someone (either Mrs. Jersak or her attorneys) once it dismissed the plaintiff's claims for failing to provide an expert report. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e); *Walker v. Gutierrez*, 111 S.W.3d 56, 65 (Tex. 2003); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877, 878 (Tex. 2001). The trial court's decision and the court of appeals' opinion appear to focus on the result desired (to avoid sanctioning an attorney) rather than the action required by the Act. In reaching this results-oriented conclusion, both courts usurped the plain language of the statute and punished a defendant who made every effort to follow the rules prescribed by the Act in order to recover fees he had personally paid to defend a frivolous lawsuit.

The lower courts' actions also improperly turned a mandatory sanction into a discretionary sanction. There is no support for the proposition posited by Mr. Pierson and accepted by the appellate court that Mrs. Jersak's death and Dr. Gurkoff's request that fees be awarded against Mrs. Jersak's attorneys somehow made the award of fees discretionary. Dr. Gurkoff's counsel were duty-bound to advocate for the best possible result for their client. Here, obtaining a ruling after more than two years of waiting was a necessary goal, as was obtaining a judgment that would ultimately be collected. The Act, as well as other rules providing for sanctions such as Rule 13 and Rule 215, permit an attorney to be sanctioned when the attorney's decisions or conduct caused the harm. It

was appropriate for Dr. Gurkoff to seek fees from the plaintiff's attorneys because they made the decisions at issue that caused Dr. Gurkoff to incur fees.¹ However, Dr. Gurkoff's request for fees from the attorneys did not and could not take away the trial court's discretion to order fees against the plaintiff, and did not give the trial court discretion to deny fees altogether. In fact, the opposite is true. The trial court was required to award Dr. Gurkoff his fees. By refusing to do so, the trial court left a statutory violation unpunished.

More broadly, these decisions provide incentive for attorneys to pursue frivolous claims without fear of repercussion. The appellate opinion dictates that a defendant may not determine against whom he seeks fees, even though the Act provides that the defendant's motion controls the award of fees. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e). This limitation forces the defendant to risk receiving an uncollectible judgment from a judgment-proof plaintiff or receive no award of fees at all. It is imperative that this Court make clear that an award of fees is mandatory, and that a defendant may pursue fees against the claimant or her attorneys without waiving his right to fees.

¹ See the discussion of Mr. Pierson's and his law firm's conduct on pages 2-4 above. Dr. Gurkoff does not seek sanctions against Chris McHam because he, unlike Mr. Poster and Mr. Pierson, was never lead counsel for either Mrs. Jersak or her husband. Rather, Mr. McHam had been licensed less than a year when these issues arose and it can be presumed that he did not make decisions of the file but, instead, was assigned to work on the file by others, such as Mr. Pierson, the attorney who signed the contract for the Firm with Mrs. Jersak. Mr. Pierson is a name partner in the law firm hired by Mrs. Jersak to represent her and he signed the representation agreement on behalf of the firm and should be deemed ultimately responsible for the case. (CR 278-279). Although Mr. Pierson did not sign the Original Petition, Pierson Behr represented Mrs. Jersak based on the representation agreement signed by Mr. Pierson. Moreover, Mr. Pierson actively sought to overturn the initial dismissal ruling as counsel of record at hearings and in written pleadings. (CR 131, 139-140, 218-224, 248-253, 267, 282; 3 RR 4-17, 23-25, 27-28; 4 RR 5-7, 13-26, 30, 34-38, 40-42, 47). His actions, as well as those of Mr. Poster and Pierson Behr, caused the harm to Dr. Gurkoff. The trial court was required to award fees against someone and one or all of the attorneys should have been sanctioned.

II. Mr. Pierson's analysis of Rule 151 is not only flawed but also inapplicable.

Dr. Gurkoff maintains that the jurisdictional arguments raised in the trial court were nothing more than a smoke screen designed to mask the basic truth of the case — that Dr. Gurkoff was entitled to an award of attorneys' fees. Rule 150 clearly states that a suit shall not abate due to the death of a party and the court may proceed to judgment. TEX. R. CIV. P. 150. Moreover, the jurisdictional arguments should be deemed moot because the trial court determined that it had jurisdiction over the case and acted accordingly. If the trial court had determined that it had no jurisdiction, it could not have ruled on Dr. Gurkoff's motion. However, the court did rule. The trial court dismissed plaintiff's claims based on the failure to file an expert report and, thus, assumed jurisdiction over those claims. By doing so, the trial court was required to also award Dr. Gurkoff his attorneys' fees.

In addition, Mr. Pierson's jurisdictional arguments are flawed. Mr. Pierson's argues that Dr. Gurkoff was required under Rule 151 to plead and prove that no administration was pending or necessary in order to obtain an award of fees. Tellingly, even the cases relied on by Mr. Pierson confirm that the opposite is true. The decedent's heirs, administrator, or executor, not the defendant, are required to plead and prove that no administration is pending or necessary if the heirs, administrator, or executor wish to pursue the decedent's claims on her behalf. *Bluitt v. Pearson*, 7 S.W.2d 524, 525 (Tex. 1928); *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 433 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Moreover, if an heir answers a *scire facias* and appears on behalf of the decedent but fails to plead that an administration is neither pending nor necessary, the

court is not barred from taking further actions in the case. Rather, the court is only barred from taking action on the heir's claims for affirmative relief. *Trevino v. Lerma*, 486 S.W.2d 199, 200 (Tex. Civ. App.—Beaumont 1972, no writ). Dr. Gurkoff is not Mrs. Jersak's heir, is not seeking affirmative relief on her behalf, and is, in fact, not seeking affirmative relief from the court at all. *See Palacios*, 46 S.W.3d at 878 (request for sanctions does not constitute a claim for affirmative relief). Moreover, by issuing *scire facias* on all known heirs, Dr. Gurkoff took all necessary steps to obtain a ruling from the court on his motion to dismiss. Mr. Pierson's reliance on Rule 151 is nothing more than a red herring that should be disregarded.

Mr. Pierson's reliance on *Gracey v. West* is similarly misplaced. Mr. Pierson cites *Gracey* for the proposition that the trial court had discretion to dismiss the case but award "no affirmative relief." (Resp. at 16). That analysis is flawed in two respects. First, *Gracey* involved a dismissal for want of prosecution, not a dismissal under section 13.01(e). *Gracey*, 422 S.W.2d at 914-915. As such, it is factually and procedurally inapplicable. Second, Dr. Gurkoff's request for fees does not constitute a request for affirmative relief. *See Palacios*, 46 S.W.3d at 878. At most, *Gracey*, like the other cases cited by Mr. Pierson, stands only for the proposition that a plaintiff's heir may not seek affirmative relief from the court unless the heir proves that no administration is pending or necessary. *Gracey* provides no support for the trial court's actions here.

PRAYER

Petitioner Jerry Gurkoff, D.O. respectfully prays that the Court grant this Petition for Review and award him the relief requested therein.

Respectfully submitted,

HERMES SARGENT BATES, L.L.P.

By: _____

HILAREE A. CASADA

State Bar No. 24027676

MICHAEL HURST

State Bar No. 10316320

901 Main Street, Suite 5200

Dallas, Texas 75202

Telephone: (214) 749-6000

Facsimile: (214) 749-6100

ATTORNEYS FOR PETITIONER

JERRY GURKOFF, D.O.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Petition for Review has been sent to the following counsel of record and parties as follows on August 22, 2008:

VIA CERTIFIED MAIL RRR

Grey Pierson
Pierson Behr, Attorneys
301 West Abram Street
Arlington, Texas 76010

VIA EMAIL (per Mr. Poster's request)

Jeffrey C. Poster
Jeffrey C. Poster, P.C.
801 Findlay Drive
Arlington, TX 76012-2709
jeffposter@sbcglobal.net

Hilaree A. Casada