

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 PETITIONER'S BRIEF ON THE MERITS

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.

IDENTITY OF PARTIES AND COUNSEL

Parties to the Trial Court's Judgment

The trial court's judgment in this case included orders granting Dr. Gurkoff's motion to dismiss Plaintiff's claims for failure to file an expert report as required by Article 4590i, § 13.01(e), denying Dr. Gurkoff's corresponding request for mandatory monetary sanctions under that statute, and dismissing the claims of Plaintiff Rosemary Jersak and Plaintiff George Jersak, as representative of the Estate of Rosemary Jersak, with prejudice. As such, the Parties to the affirmative relief contained in that judgment are as follows:

Petitioner/Defendant

Jerry Gurkoff, D.O.

Plaintiffs

Rosemary Jersak

George Jersak as the Representative of the
Estate of Rosemary Jersak

Parties with an Interest in the Order Denying Dr. Gurkoff's Request for Attorneys' Fees

In addition to the Parties to the trial court's judgment listed above, the following have an interest in the outcome of this proceeding because Dr. Gurkoff sought from the trial court a joint and several award of attorneys' fees against each of the following counsel, and the denial of that request is the subject of Dr. Gurkoff's Petition for Review:

Trial Counsel for Plaintiffs

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

Trial Counsel for Plaintiffs

Grey Pierson
PIERSON BEHR, ATTORNEYS
301 West Abram Street
Arlington, Texas 76010

Former Trial Counsel for Plaintiff Rosemary Jersak

Jeffrey Poster
Jeffrey C. Poster, P.C.
801 Findlay Drive
Arlington, TX 76012-2709

Of these counsel and Parties, only Grey Pierson appeared in the court of appeals and only Grey Pierson has appeared in this Court by filing a Response to Dr. Gurkoff's Petition for Review. Grey Pierson has appeared in his individual capacity.

Trial and Appellate Counsel

**Appellate Counsel for
Petitioner Jerry Gurkoff, D.O.**

Hilaree A. Casada
Michael Hurst
HERMES SARGENT BATES, LLP
901 Main Street, Suite 5200
Dallas, Texas 75202

**Trial and Appellate Counsel
for Plaintiffs Rosemary Jersak
and George Jersak**

Grey Pierson
PIERSON BEHR, ATTORNEYS
301 West Abram Street
Arlington, Texas 76010

**Trial Counsel for
Petitioner Jerry Gurkoff, D.O.**

Michael Hurst
HERMES SARGENT BATES, LLP
901 Main Street, Suite 5200
Dallas, Texas 75202

**Appellate Counsel
for Grey Pierson, Individually, and
Pierson Behr**

Grey Pierson
PIERSON BEHR, ATTORNEYS
301 West Abram Street
Arlington, Texas 76010

**Former Trial Counsel
for Plaintiff Rosemary Jersak**

Jeffrey C. Poster
Jeffrey C. Poster, P.C.
801 Findlay Drive
Arlington, TX 76012-2709

**Appellate Counsel
for Jeffrey C. Poster, Individually**

Jeffrey C. Poster
Jeffrey C. Poster, P.C.
801 Findlay Drive
Arlington, TX 76012-2709

STATEMENT REGARDING THE PARTIES

In the court of appeals and in this Court, Dr. Gurkoff has maintained the style of the case as reflected by the trial court style and each court's docket sheet. The legal effect of a pleading is not determined by its style or name, but by its substance and purpose. *Guerrero v. Standard Alloys Mfg. Co.*, 598 S.W.2d 656, 657 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.). Further, the filing of a notice of appeal “invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from.” TEX. R. APP. P. 25.1(b). Dr. Gurkoff has served Mr. Pierson and Mr. Poster with all appellate filings and made clear in his briefing that he seeks sanctions against Mr. Pierson, Mr. Poster, and Pierson Behr. (E.g. Petition for Review at i, 10-15; Brief on the Merits at i; 14-20, 28-31). Dr. Gurkoff also made clear in the his briefing that Mr. Pierson, Mr. Poster, and Pierson Behr are parties with an interest in the order denying Dr. Gurkoff's request for attorneys' fees. (E.g. Petition for Review at i; Brief on the Merits at i). Accordingly, Dr. Gurkoff maintains that it is unnecessary to change the style of the case on appeal. However, Dr. Gurkoff would not oppose a revised style incorporating Mr. Pierson, Mr. Poster, and Pierson Behr as Respondents should the Court determine such a revision is necessary.

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL i

STATEMENT REGARDING THE PARTIES.....iii

TABLE OF CONTENTS iv

INDEX OF AUTHORITIES vi

ISSUES PRESENTED ix

1. Does a trial court have the discretion to deny a defendant’s request for attorneys’ fees when the plaintiff’s claims are dismissed for failure to file a mandated expert report in a health care liability action? ix

2. Does the trial court alone have the discretion to decide whether to order sanctions against the claimant or the claimant’s attorneys, or does a defendant have the right to seek sanctions against the claimant’s attorneys where an award of fees against the claimant would be uncollectable and the attorneys’ failure to provide an expert report on behalf of the claimant is the basis for the sanction? ix

3. Does a party waive his right to statutorily-mandated sanctions by asking the court to order sanctions against the claimant’s attorneys rather than the claimant? ix

4. Does a trial court maintain jurisdiction over a plaintiff’s estate where the plaintiff dies during the course of proceedings in the trial court, the defendant issues *scire facias* to all known heirs, and the decedent’s spouse appears by filing an answer and seeking affirmative relief from the trial court?..... ix

STATEMENT OF FACTS..... 1

Mr. Pierson’s Role as Counsel for Mr. and Mrs. Jersak 1

Dr. Gurkoff Has Not Admitted Liability..... 4

The question of collectibility was presented to the trial court 5

Mrs. Jersak Died Testate 6

Mr. Pierson and Pierson Behr Actively Sought to Maintain Mrs. Jersak’s Claims..... 6

SUMMARY OF THE ARGUMENT	7
ARGUMENT.....	7
I. Mrs. Jersak was required to file an expert report but her attorneys chose not to do so. Dr. Gurkoff is, therefore, entitled to an award of attorneys’ fees.....	8
II. Neither Mrs. Jersak’s death nor Dr. Gurkoff’s request that fees be awarded against her attorneys rendered sanctions discretionary.	12
A. Mrs. Jersak’s death did not negate the requirement that Dr. Gurkoff be awarded his fees.....	12
B. Dr. Gurkoff did not rob the trial court of its discretion.....	15
III. The designation of “attorney-in-charge” does not dictate against whom sanctions can be awarded.	18
IV. The trial court had jurisdiction over the parties and was required to award attorneys’ fees to Dr. Gurkoff.	19
PRAYER	23
CERTIFICATE OF SERVICE.....	25

INDEX OF AUTHORITIES

CASES

<i>Abilene Diagnostic Clinic v. Downing</i> , 233 S.W.3d 532 (Tex. App.—Eastland 2007, pet. denied).....	13
<i>American Transitional Care Centers of Tex., Inc. v. Palacios</i> , 46 S.W.3d 873 (Tex. 2001)	13, 16, 23
<i>Ashbrook v. Hammer</i> , 106 S.W.2d 776 (Tex. Civ. App.—Amarillo 1937, no writ).....	22
<i>Bloodworth v. Aden</i> , No. 01-05-00796-CV, 2007 WL 1845111 (Tex. App.—Houston [1st Dist.] June 28, 2007, pet. denied).....	18
<i>Bluitt v. Pearson</i> , 7 S.W.2d 524 (Tex. 1928)	21, 22
<i>Brown v. Canal Bank & Trust Co.</i> , 141 F.2d 832 (5th Cir. 1944)	23
<i>Casilla v. Cano</i> , 79 S.W.3d 587 (Tex. App.—Corpus Christi 2002, no pet.).....	21, 22
<i>Daughtery v. Schiessler</i> , 229 S.W.3d 773 (Tex. App.—Eastland 2007, no pet.).....	14
<i>Doades v. Syed</i> , 94 S.W.3d 664 (Tex. App.—San Antonio 2002, no pet.)	13
<i>Estate of C.W. Pewthers v. Holland Page Indus., Inc.</i> , 443 S.W.2d 392 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.)	20
<i>Finlay v. Olive</i> , 77 S.W.3d 520 (Tex. App.—Houston [1st Dist.] 2002, no pet.).....	18, 19
<i>Fleming & Associates v. Newby & Tittle</i> , 529 F.3d 631 (5th Cir. 2008)	17, 18
<i>Fox v. Hinderliter</i> , 222 S.W.3d 154 (Tex. App.—San Antonio 2006, no pet.)	13, 14, 15, 22

<i>Frame v. Whitaker</i> , 7 S.W.2d 140 (Tex. Civ. App.—San Antonio 1928), rev'd on other grounds, 36 S.W.2d 149 (Tex. 1931).....	23
<i>Guerrero v. Standard Alloys Mfg. Co.</i> , 598 S.W.2d 656 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.)	iii
<i>In re Bennett</i> , 960 S.W.2d 35 (Tex. 1997)	17
<i>Jackson v. Reardon</i> , 14 S.W.3d 816 (Tex. App.—Houston [1st Dist.] 2000, no pet.).....	13
<i>Jansen v. Fitzpatrick</i> , 14 S.W.3d 426 (Tex. App.—Houston [14th Distr.] 2000, no pet.).....	21
<i>Kenseth v. Dallas County</i> , 126 S.W.3d 584 (Tex. App.—Dallas 2004, pet. denied)	21
<i>Leland v. Brandal</i> , 257 S.W.3d 204 (Tex. 2008)	16
<i>Moseley v. Behringer</i> , 184 S.W.3d 829 (Tex. App.—Fort Worth 2006, no pet.)	14, 15, 16
<i>Murphy v. Russell</i> , 167 S.W.3d 835 (Tex. 2005)	11, 12
<i>Ruiz v. Walgreen Co.</i> , 79 S.W.3d 235 (Tex. App.—Houston [14th Dist.] 2002, no pet.).....	11
<i>Sandle v. Howerton</i> , 163 S.W.3d 829 (Tex. App.—Dallas 2005, no pet.)	13
<i>Villafani v. Trejo</i> , 251 S.W.3d 446 (Tex. 2008)	16
<i>Walker v. Gutierrez</i> , 111 S.W.3d 56 (Tex. 2003)	12
<i>World Help v. Leisure Lifestyles, Inc.</i> , 977 S.W.2d 662 (Tex. App.—Fort Worth 1998, pet. denied).....	23

RULES AND STATUTES

TEX. CIV. PRAC. & REM. CODE § 74.351(b)..... 13, 22

Act approved May 18, 1995, 74th Leg., R.S., ch. 140, § 1,
sec. 13.01, 1995 Tex. Gen. Laws 985, 985-87,
repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204
§ 10.09, 2003 Tex. Gen. Laws 847, 884.....*passim*

TEX. PROB. CODE § 145(b)..... 23

TEX. R. APP. P. 25.1(b)..... iii

TEX. R. CIV. P. 13..... 16

TEX. R. CIV. P. 150..... 15

TEX. R. CIV. P. 151 20, 22

TEX. R. CIV. P. 215.1 16

TEX. R. CIV. P. 215.2 16

ISSUES PRESENTED

1. Does a trial court have the discretion to deny a defendant's request for attorneys' fees when the plaintiff's claims are dismissed for failure to file a mandated expert report in a health care liability action?
2. Does the trial court alone have the discretion to decide whether to order sanctions against the claimant or the claimant's attorneys, or does a defendant have the right to seek sanctions against the claimant's attorneys where an award of fees against the claimant would be uncollectable and the attorneys' failure to provide an expert report on behalf of the claimant is the basis for the sanction?
3. Does a party waive his right to statutorily-mandated sanctions by asking the court to order sanctions against the claimant's attorneys rather than the claimant?
4. Does a trial court maintain jurisdiction over a plaintiff's estate where the plaintiff dies during the course of proceedings in the trial court, the defendant issues *scire facias* to all known heirs, and the decedent's spouse appears by filing an answer and seeking affirmative relief from the trial court?

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Jerry Gurkoff, D.O. (“Petitioner” or “Dr. Gurkoff”) submits this Reply in Support of Petitioner’s Brief on the Merits seeking review of the decision of the Second District Court of Appeals at Fort Worth, which affirmed the trial court’s denial of Dr. Gurkoff’s request for statutorily-mandated sanctions under section 13.01(e) of former Article 4590i.¹

STATEMENT OF FACTS

Dr. Gurkoff submitted a complete statement of facts in his Brief on the Merits and incorporates those facts by reference herein. However, Dr. Gurkoff disagrees with some of the facts submitted by Respondent Grey Pierson (“Mr. Pierson”) and contends that Mr. Pierson’s statement of facts fails to include certain facts that negate some of Mr. Pierson’s arguments. Accordingly, Dr. Gurkoff presents the following statement of facts to address those discrepancies.

Mr. Pierson’s Role as Counsel for Mr. and Mrs. Jersak

In his brief, Mr. Pierson leaves the Court with the impression that he was not counsel for Mrs. Jersak until after her death. (Brief at 3-4).² First, he discusses Mr. Poster’s role in the case but fails to tell the Court in his statement of facts that Mr. Pierson himself appeared in the case on September 2, 2004. (Brief at 3-4). Although he

¹ Since this case was filed prior to September 1, 2003, it is governed by the terms of The Medical Liability & Insurance Improvement Act of Texas (hereinafter referred to as “Article 4590i” or “the Act”). See Act approved May 18, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01, 1995 Tex. Gen. Laws 985, 985-87, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204 § 10.09, 2003 Tex. Gen. Laws 847, 884.

² Dr. Gurkoff will refer to Mr. Pierson’s Brief on the Merits as “Brief.”

does state on page 11 that he signed Plaintiff’s Brief in Opposition to Motion to Dismiss, Mr. Pierson tellingly omits any reference to his appearance at the September 2, 2004 hearing and his other actions before and after Mrs. Jersak’s death. (Brief at 11-12). The transcript confirms that Mr. Pierson appeared on behalf of Mrs. Jersak at the September 2, 2004 hearing on Mrs. Jersak’s Motion for Reconsideration, and that he was the only attorney who presented argument on her behalf at that hearing. (3 RR 4-17, 23-25, 27-28). Indeed, he stated on the record at that hearing that he was “[o]ne of the attorneys for the Plaintiff, Rosemary Jersak.” (3 RR 4).

Mr. Pierson made the following appearances and took the following actions on behalf of Mrs. Jersak prior to her death:

DATE	ACTION
2/17/03	Signs Attorney-Client Agreement on behalf of Pierson Behr. (CR 278-279).
9/2/04	Signs Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss (CR 131, 139, 140)
9/2/04	Appears on behalf of Mrs. Jersak at hearing on Plaintiff’s Motion for Reconsideration and is the only attorney to present argument on Mrs. Jersak’s Behalf. (3 RR 4-17, 23-25, 27-28). States on the record that he his “One of the attorneys for the Plaintiff, Rosemary Jersak.” (3 RR 4).

Following Mrs. Jersak’s death, Mr. Pierson then appeared on behalf of George Jersak, Mrs. Jersak’s husband, and even went so far as to seek an extension of time to file the expert report:

DATE	ACTION
5/16/05	Signs the Original Answer to Scire Facias on behalf of George Jersak. (CR 218, 219).
6/10/05	Listed first on counsel's signature block on Plaintiff's Motion to Extend Deadline for Expert Report. (CR 221). George Jersak is listed as Plaintiff in this Motion, but the style reflects Mrs. Jersak as Plaintiff. (CR 220-221).
6/15/05	Signs George Jersak's Brief in Opposition to Defendant's Supplemental Motion to Dismiss and Motion to Reconsider and Objection to Order to Mediation. (CR 222-224).
6/6/06	Appears and presents argument on behalf of George Jersak and himself at the hearing on Dr. Gurkoff's Second Supplemental Motion to Dismiss and Request for Attorneys' Fees and cross-examines Michael Hurst regarding fees. (4 RR 5-7, 13-26, 30, 34-38, 40-42, 47).
1/30/06	Signs a letter brief on behalf of George Jersak regarding jurisdictional issues raised at the June 6, 2006 hearing. (CR 250, emphasis supplied by George Jersak; CR 253).
10/6/06	Signs the Parties' stipulation regarding George Jersak's testimony. (CR 267).
1/29/07	Signs and files a letter on behalf of himself, Pierson Behr, and George Jersak stating that they do not object "to the dismissal with prejudice of Plaintiff's claims against Dr. Gurkoff." (CR 282).

It is undisputed that Mr. Pierson signed the representation agreement with Mrs.

Jersak on behalf of the Pierson Behr law firm (“Pierson Behr”). (CR 287; Brief at 12). The reality is that Pierson Behr consistently represented both Mrs. Jersak and her husband, as Mrs. Jersak’s representative, throughout the course of this litigation and that Mr. Pierson himself was counsel throughout this litigation, first for Mrs. Jersak and then for her husband. (*Id.*).

Dr. Gurkoff Has Not Admitted Liability

Mr. Pierson also mistakenly asserts that Dr. Gurkoff admittedly operated on the wrong body part. (Brief at 2). That is incorrect. Dr. Gurkoff has consistently denied liability and even provided evidence to the court, in the form of a consent form signed by Mrs. Jersak and his own affidavit, showing that Mrs. Jersak, prior to the surgical procedure in question, consented to the operation on the specific finger upon which Dr. Gurkoff actually performed the procedure. (CR 100, 101-102, 189, 200; 6 RR Ex. 27; 7 RR Ex. 4).

Moreover, Dr. Gurkoff provided uncontroverted 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 was made before any anesthesia was administered, and resulted in an operation on the finger she requested. (CR 48-50, 54, 62-63, 67-68). The April 8, 2002 note relied on by Mr. Pierson simply refers to Mrs. Jersak's post-surgery complaint to Dr. Gurkoff that she believed surgery had been performed on the wrong finger. (CR 50-51 ¶¶ 9-11, 61, 111).

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 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 if awarded against the Estate. Contrary to Mr. Pierson's assertion, collectability of the judgment 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). Moreover, Dr. Gurkoff was not required to prove collectability through affirmative proof. It is common sense that Dr. Gurkoff has a greater chance of collecting a judgment from a law firm that has existed for 15 years or from a gainfully employed attorney than from an asset-less Estate. See <http://www.piersonbehr.com/profiles.htm>, last visited on January 2, 2009 (showing that Mr. Pierson has been in business as a name partner since 1983).

Mrs. Jersak Died Testate

It is undisputed that Mrs. Jersak died testate. (CR 270-276). George Jersak stipulated that his wife's Last Will and Testament ("Will") was in effect at the time of her death, and the Will was submitted as an exhibit to the Parties' stipulation regarding George Jersak's testimony. (CR 267, 270-276). Mrs. Jersak appointed George Jersak as her Independent Executor, and devised and bequeathed her entire estate to George Jersak. (CR 270, 271). The Will also states that "no other action shall be had in the Probate Court in relation to the settlement of my estate other than the probating and recording of my Last Will and the return of an inventory, appraisal and list of claims of my estate." (CR 271).

Mr. Pierson and Pierson Behr Actively Sought to Maintain Mrs. Jersak's Claims

Prior to Mrs. Jersak's death, her attorneys filed a Motion for Reconsideration of the trial court's letter ruling granting Dr. Gurkoff's Motion to Dismiss, filed a brief in opposition to the Motion to Dismiss, and requested a hearing on the Motion for Reconsideration where they presented argument seeking a continuation of the case. (CR 115, 131; 3 RR 4-17, 23-25, 27-28). Following Mrs. Jersak's death, her attorneys insisted on mediating the case, filed an Original Answer to Scire Facias on behalf of George Jersak, filed a section 13.01(g) motion for extension of time to file an expert report, filed a brief in opposition to Dr. Gurkoff's Supplemental Motion to Dismiss and Motion to Reconsider and Objections to Order to Mediation, and then filed letter briefs with the trial court that contended that Dr. Gurkoff had to take further action to bring each of Mrs. Jersak's heirs into this litigation. (CR 175, 186, 218, 220, 222, 248).

Moreover, counsel argued fervently against not only the award of fees in this case, but also the trial court's jurisdiction to rule on the Motion to Dismiss itself. (See generally volumes 3, 4, and 5 of the Reporter's Record). Counsel even enlisted the assistance of a probate attorney. (4 RR 7). The Jersaks' counsel took these steps even though George Jersak maintained that he had no interest in pursuing the litigation on behalf of his late wife and Dr. Gurkoff agreed not to seek fees from the Estate. (CR 218).

SUMMARY OF THE ARGUMENT

The sanctions of dismissal with prejudice and an award of attorneys' fees and costs are mandatory sanctions under article 4590i, section 13.01(e). Here, the trial court, after numerous delays and multiple hearings, ultimately dismissed Mrs. Jersak's claims with prejudice pursuant to that statute, but refused to award the statutorily-mandated fees and costs. The court of appeals, in turn, affirmed that decision. That affirmance is not supported by case law or the plain language of the Act. Rather, the court of appeals interpreted the word "shall" completely out of the Act and appended additional restrictions onto the courts and parties seeking relief under the Act. These decisions deprived Dr. Gurkoff of statutorily-mandated property rights and thwarted the purpose of the Act's expert report requirements. The decision should be reversed and judgment should be rendered in Dr. Gurkoff's favor.

ARGUMENT

As was done in the trial court and the court of appeals, Mr. Pierson argues in this Court, again without authority, that Dr. Gurkoff's statutorily-mandated right to attorneys' fees pursuant to article 4590i is somehow trumped by the untimely death of Mrs. Jersak,

and by her husband's decision to appear in this case on her behalf but deny that an administration is not necessary. He also argues, without support, that Rule 151 estopped the trial court from imposing sanctions and somehow required Dr. Gurkoff to either plead and prove that no administration was necessary or take his request for fees to the probate court even before any fees had been awarded. He also again posits the unsupported theory that a trial court may refuse to award fees if the defendant chooses, for valid and obvious reasons, to seek fees only against the claimant's attorneys. These arguments disregard the mandatory nature of sanctions for violations of the article 4590i expert report procedures, turn this State's *scire facias* procedure on its head, and completely ignore he and his law firm's role in prosecuting this action. Throughout this litigation, Respondents have attempted to turn a simple sanctions issue that is statutorily mandated into a question of Dr. Gurkoff's standing. That is contrary to the law and unnecessarily complicates the issue before this Court.

I. Mrs. Jersak was required to file an expert report but her attorneys chose not to do so. Dr. Gurkoff is, therefore, entitled to an award of attorneys' fees.

Mr. Pierson maintains that no expert report was required in this case because "at the time the suit was filed, a line of Texas cases seemed to indicate that an expert report was not required in certain situations," including in cases alleging *res ipsa loquitor*. (Brief at 3). Mrs. Jersak's own pre-suit actions and pleadings, as well as the applicable case law, defeat this argument.

First, Mrs. Jersak's counsel presented her claims as healthcare liability claims brought pursuant to the Act. Before filing suit, Pierson Behr sent a letter to Dr. Gurkoff

in March 2003 that notified him of Mrs. Jersak’s “health care liability claim.” (CR 8). Pierson Behr also stated that the letter was sent pursuant to Texas Revised Civil Statutes Article 4590i, § 4.01(a), and that demand was made pursuant to section 4.01(d) of that Act. (CR 8). The lawsuit itself presented the same healthcare liability claim. (CR 2-8). In fact, the Original Petition did not even include a claim of *res ipsa loquitur*. (CR 2-8). Mrs. Jersak’s counsel also included a statement in the Original Petition and the First Amended Petition that this statutorily-required demand had been made. (CR 4 at ¶ 5A; 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.” (Brief at 3). However, counsel’s own demand letter and pleadings belie that contention and establish that the attorneys themselves contended all along that this was a healthcare liability claim. (CR 4-5, 8, 80, 86).

This argument also ignores Dr. Gurkoff’s denial of liability and the supporting evidence that he presented in response to Plaintiff’s Motion for Partial Summary Judgment (CR 34-71). In 2003, just five weeks after filing suit and nearly five months before an expert report was due, Mrs. Jersak’s counsel filed a Motion for Partial Summary Judgment alleging that Mrs. Jersak was entitled to judgment as a matter of law because Dr. Gurkoff allegedly performed surgery on the wrong finger. (CR 13-33). In response to that motion, Dr. Gurkoff denied liability, denied that he had operated on the wrong finger, and affirmatively asserted that Mrs. Jersak had consented to the procedure as completed and that Dr. Gurkoff had fully complied with his duties under the Act and with the applicable standard of care. (CR 34-71). Dr. Gurkoff presented affidavit

testimony of himself, Dr. David Graybill, the anesthesiologist responsible for anesthetizing Mrs. Jersak, and Gladys Colburn, a nurse who witnessed Mrs. Jersak sign the Disclosure and Consent Form, as well as documentary proof, that established that Mrs. Jersak had consented to the procedure in question and that Dr. Gurkoff performed surgery on the correct finger, i.e., the finger upon which Mrs. Jersak requested the surgery be performed and to which she consented. (CR 45-71). Dr. Gurkoff also argued in the response that summary judgment should be denied because Mrs. Jersak was required to present expert testimony to prove negligence and she had failed to do so. (CR 40-42). Thus, Mrs. Jersak and her counsel knew nearly five months before the expert report was due that Dr. Gurkoff denied liability, that Dr. Gurkoff denied that he had operated on the wrong finger, and that Dr. Gurkoff maintained that Mrs. Jersak was required to file an expert report. Mr. Pierson's statement that no report was filed because Dr. Gurkoff admitted liability is false.

Further, the argument that no expert report was required due to a claim of *res ipsa loquitor* was not raised until after the deadline to file the expert report had passed and Dr. Gurkoff had filed his Motion to Dismiss. (CR 93-95). Although a *res ipsa loquitor* claim was included in Plaintiff's First Amended Petition, also included in that petition was a statement that proper notice had been given to Dr. Gurkoff of a healthcare liability claim. (CR 80 at ¶ 4A). Yet, Mrs. Jersak's attorneys chose not to request an extension of time to file the expert report before the Motion to Dismiss was heard. The appropriate inference to draw from this evidence is that Mrs. Jersak's attorneys missed the statutory deadline and sought an argument to excuse their negligence. Alternatively, it would appear that

they took an ill-advised risk and made a conscious decision to not file an expert report and to rely, instead, on an argument that was not contained in the causes of action asserted in the Original Petition.

Second, the law relied on by Mr. Pierson does not support his contention that no expert report was required here. While it is true that at the time this suit was filed some courts did not require a plaintiff to present expert evidence at trial in a *res ipsa loquitor* case, no court had held that an expert report was not required to fulfill the procedural requirements of Article 4590i before trial. (CR 190-192; 3 RR 17-22). None of the cases cited by Mr. Pierson address the issue of whether an expert report is required to comply with Article 4590i. At the time this suit was filed, the law was clear that a plaintiff asserting a healthcare liability claim, even if the plaintiff asserted a *res ipsa loquitor* claim, was required to provide an expert report in accordance with Article 4590i. (CR 190-191); *E.g. Ruiz v. Walgreen Co.*, 79 S.W.3d 235, 239 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that plaintiffs would be required to provide expert report even if *res ipsa loquitor* applied to their claims).³ Mrs. Jersak’s counsel did not even attempt to explain, and cannot explain, why *Ruiz* and *Garcia* do not apply here. Instead, they boldly argued that no report was necessary, relying on case law that was not on point. That contention was incorrect and has since been affirmatively rejected in a *per curiam* opinion from this Court. *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005).

³ See also *Garcia v. Palestine Mem. Hosp.*, No. 14-00-01144-CV, 2002 WL192359 at ** 2-3 (Tex. App.—Houston [14th Dist.] Feb. 7, 2002, no pet.) (not designated for publication) (expert report required in *res ipsa loquitor* case).

Inexplicably, Mr. Pierson continues to assert these flawed arguments in this Court.

At the time Dr. Gurkoff filed his motion to dismiss, Mrs. Jersak had failed to comply with the requirements of the Act and failed to seek an extension of time to file the report before the motion was heard. The trial court was, thus, required to dismiss Mrs. Jersak's claims and award Dr. Gurkoff attorneys' fees. (*See* cases cited in Section II, pages 12-15 *infra*). The failure of the trial court to follow the statute was an abuse of discretion.

II. Neither Mrs. Jersak's death nor Dr. Gurkoff's request that fees be awarded against her attorneys rendered sanctions discretionary.

Mr. Pierson argues, without citation to applicable authority, 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. (Brief at 7-9, 15-17). That argument is illogical and disregards not only the plain language of the statute but also the well-established precedent holding that the statute provides for mandatory sanctions of both dismissal and an award of attorneys' fees.

A. Mrs. Jersak's death did not negate the requirement that Dr. Gurkoff be awarded his fees.

Absolutely no authority exists for the proposition that a trial court can decide not to award fees after it has dismissed the plaintiff's claims with prejudice pursuant to section 13.01(e). Indeed, the opposite is true – an award of fees is mandatory. *Walker v. Gutierrez*, 111 S.W.3d 56, 65 (Tex. 2003) (analyzing section 13.01(e) and stating that “[i]f the requirements of section 13.01(d) are not met, the court ***must*** ‘enter an order as sanctions’ dismissing the case ***and granting the defendants its costs and attorneys’***”).

fees.”) (emphasis added); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877, 878 (Tex. 2001); *Abilene Diagnostic Clinic v. Downing*, 233 S.W.3d 532, 535 (Tex. App.—Eastland August 23, 2007, pet. denied) (holding that trial court abused its discretion by refusing to award attorneys’ fees after it dismissed the plaintiff’s claims pursuant to Article 4590i, section 13.01(d)); *Fox v. Hinderliter*, 222 S.W.3d 154, 157 (Tex. App.—San Antonio 2006, no pet.) (interpreting TEX. CIV. PRAC. & REM. CODE § 74.351 and stating that “[t]he language of the statute is mandatory, and the dismissal and award of attorney’s fees and costs go hand in hand.”); *Sandles v. Howerton*, 163 S.W.3d 829, 838 (Tex. App.—Dallas 2005, no pet.) (holding that sanctions provided for in section 13.01(e) are mandatory if the plaintiff fails to comply with the Act’s report requirements); *Doades v. Syed*, 94 S.W.3d 664, 674 (Tex. App.—San Antonio 2002, no pet.) (holding that “Article 4590i **requires an award of attorney’s fees and costs of court**” if the plaintiff fails to timely provide an expert report) (emphasis added); *Jackson v. Reardon*, 14 S.W.3d 816, 818, 819 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding that attorneys’ fees were a “mandated” sanction following failure to provide expert report).

A claimant’s death during suit should not change that requirement. Although Dr. Gurkoff’s counsel has found no case law addressing the specific scenario posed here (i.e., the impact of a claimant’s death on a defendant’s then-pending section 13.01(e) motion to dismiss), an analogous situation has been addressed in Texas. Specifically, Texas courts consistently hold that a section 13.01(e) motion to dismiss and request for fees is not trumped by a plaintiff’s decision to file a non-suit after the motion to dismiss has been

filed. *E.g. Moseley*, 184 S.W.3d at 834 (holding that the sanctions provided by Article 4590i, § 13.01 must “trump the normally absolute right of a claimant to seek a nonsuit under procedural rule 162.”); *Fox*, 222 S.W.3d at 157-158 (holding that the motion to dismiss and request for fees and costs is a request for statutory sanctions and, therefore, survives a nonsuit filed while the motion was pending).

In *Moseley*, the court held in no uncertain terms that “a claimant may not voluntarily nonsuit its claim . . . while the provider’s previously filed section 13.01(e) motion is pending.” *Moseley*, 184 S.W.3d at 834. Rather, once the deadline for providing the expert report has passed, the healthcare provider is entitled to file a motion to dismiss with prejudice and, once that motion is filed, the trial court “only has two options”—dismiss the claims with prejudice and award fees or grant the claimant an extension under section 13.01(g) if such an extension has been requested. *Id.* Permitting a nonsuit after the provider has sought dismissal and fees would essentially eliminate the requirements of section 13.01(d) and 13.01(e). *Id.* Moreover, once the violation has occurred, a motion filed, and a hearing held, the sanctions are mandatory and incurable. *E.g., Moseley*, 184 S.W.3d at 834, 835; *Daughtery v. Schiessler*, 229 S.W.3d 773, 775 (Tex. App.—Eastland 2007, no pet.); TEX. REV. CIV. STAT. ANN. Art 4590i, §13.01(g) (motion for extension must be filed before any hearing on a section 13.01(e) motion to dismiss).

The same logic applies here. Mrs. Jersak was required to provide a compliant expert report on or before February 25, 2004. The moment she failed to do so, Dr. Gurkoff became statutorily-entitled to have Mrs. Jersak’s claims dismissed with prejudice

and to be awarded his reasonable attorneys' fees and costs of court. *See Moseley*, 184 S.W.3d at 834; *see also Fox*, 222 S.W.3d at 157-158. Dr. Gurkoff filed a motion to dismiss and request for fees, the court held a hearing, the court granted the motion, Mrs. Jersak's counsel filed a motion for reconsideration, and the trial court chose to reconsider its ruling. Mrs. Jersak died six weeks after the hearing on her Motion for Reconsideration while the motion to dismiss remained pending. This situation is akin to the nonsuit scenario. Just as a nonsuit filed after the provider files a motion to dismiss does not erase the claimant's prior statutory violation, Mrs. Jersak's death after the motion was filed did not erase her violation. The statutory scheme was not altered by Mrs. Jersak's death. *E.g.* TEX. R. CIV. P. 150. Rather, sanctions were mandated once she failed to provide the expert report and Dr. Gurkoff filed the Motion to Dismiss, both of which occurred months before her death. Accordingly, the trial court was required to award Dr. Gurkoff his reasonable fees and costs.

B. Dr. Gurkoff did not rob the trial court of its discretion.

By holding that Dr. Gurkoff robbed the trial court of discretion, the court of appeals disregarded counsel's duty to advocate for the best outcome allowed by law for Dr. Gurkoff and also extinguished the trial court's inherent and continuing power to order punitive sanctions.

Here, the trial court delayed ruling on the Motion because it questioned its ability to order sanctions against Mrs. Jersak's estate. (CR 254, 280-281, 297). The trial court's hesitation was directly caused by Mr. Pierson's and his law firm's baseless jurisdictional arguments. Dr. Gurkoff initially did not specify against whom attorneys' fees should be

awarded. (CR 89-90). Rather, he simply requested fees pursuant to the Act. (*Id.*). Faced with a trial court refusing to rule, an insolvent plaintiff, and opposing counsel asserting unsupported arguments and needlessly delaying resolution of the case, Dr. Gurkoff's counsel properly advocated for an award of fees against the attorneys. Indeed, Dr. Gurkoff's counsel had an obligation to zealously advocate for Dr. Gurkoff. The law and the facts supported that advocacy.

The sanctions mandated by the Act were enacted to curtail and quickly dispose of frivolous lawsuits. *Leland v. Brandal*, 257 S.W.3d 204, 210 (Tex. 2008) (J. Brister, dissenting); *Villafani v. Trejo*, 251 S.W.3d 466, 470 (Tex. 2008); *Palacios*, 46 S.W.3d at 878; *Moseley*, 184 S.W.3d at 833. Here, Dr. Gurkoff promptly took all steps necessary to obtain dismissal and an award of fees. Yet, despite his prompt action, the trial court refused to rule and a case that should have been resolved in a matter of months took more than three years to resolve. Mr. Pierson's Mr. Poster's, and Pierson Behr's actions and inactions directly caused that unfathomable delay. It was entirely appropriate for Dr. Gurkoff to seek sanctions against those attorneys. The statute specifically states that the attorneys' fees can be assessed against the claimant or the claimant's attorneys. Indeed, this Court has compared the sanctions required under section 13.01 to Rule 13 sanctions imposed for filing a frivolous lawsuit. *Palacios*, 46 S.W.3d at 878. Rule 13 sanctions can be awarded against the party or her attorney. TEX. R. CIV. P. 13. The same logic has been applied under Rule 215. In cases involving discovery abuse, sanctions should be awarded against the party who caused the harm even if that party is the attorney. TEX. R. CIV. P. 215.1(d), 215.2(b)(8); *e.g.*, *Glass v. Glass*, 826 S.W.2d 683, 687 (Tex. App.—

Texarkana 1992, writ denied) (“A party should not be punished for counsel's conduct unless the party is implicated apart from having entrusted its legal representation to counsel.”). Here, the conduct of Mrs. Jersak’s counsel, which included failing to file an expert report, failing to timely seek an extension of time to file a report, seeking reconsideration of the order granting Dr. Gurkoff’s Motion, tardily seeking an extension of time to file a report, and insisting on mediating the case after Mrs. Jersak’s death, directly violated the Act. (See pages 1-4, 6 *supra*, section IV *infra*, and Brief on the Merits at 28-31). They were, thus, the appropriate parties to be sanctioned.

Had the trial court disagreed with Dr. Gurkoff’s position that sanctions were warranted against the attorneys, the trial court could have ordered fees against the Estate. Counsel’s arguments that such a decision would have been erroneous did not and could not rob the trial court of the ability to make that erroneous decision. *See, e.g., In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997); *see also Fleming & Assocs. v. Newby & Tittle*, 529 F.3d 631, 640-641 (5th Cir. 2008) (The “parties generally cannot bargain away the court’s right to impose sanctions . . . [or] the public’s interest in ensuring compliance with the rules of procedure.”). Simply put, the trial court was required to award fees against someone. While Dr. Gurkoff maintains that the only appropriate persons to award fees against were Mrs. Jersak’s attorneys, the fact remains that an award was required against either the Estate or the attorneys. The trial court’s failure to award fees was an abuse of discretion.

III. The designation of “attorney-in-charge” does not dictate against whom sanctions can be awarded.

Mr. Pierson raises the novel argument that only the “attorney-in-charge” as defined by Rule 8 may be sanctioned under the Act. (Brief at 10-13). Mr. Pierson cites no authority to support this proposition and Texas law does not support it. (*Id.*). Under Texas law, the person who signs a pleading may be sanctioned. *E.g. Bloodworth v. Aden*, No. 01-05-00796-CV, 2007 WL 1845111 at *4 (Tex. App.—Houston [1st Dist.] June 28, 2007, pet. denied). Similarly, a law firm may be subject to liability for a sanction based on an attorney’s conduct. *Finlay v. Olive*, 77 S.W.3d 520, 527 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (upholding sanction against attorney and his law firm).

Here, Pierson Behr was at all times an attorney of record in the trial court. (CR 6, 8, 16, 84, 86, 96, 113, 119, 139, 172, 218, 221, 224, 248, 267, 278-279, 282, 294). As such, the conduct of its attorneys, including Mr. Poster, Mr. Pierson, and Mr. McHam⁴, can be attributed to the firm and renders the firm subject to sanctions. Mr. Poster and Mr. Pierson both signed pleadings on behalf of Mrs. Jersak. Those pleadings, including the responses in opposition to the Motion to Dismiss, the Motion for Reconsideration of the order granting the Motion to Dismiss, George Jersak’s Original Answer, and George Jersak’s tardy motion for extension of time to file an expert report, were part and parcel to the violation of the Act. As such, Mr. Poster, Mr. Pierson, and Pierson Behr are all

⁴ 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. Moreover, at the time the lawsuit was filed, Mr. McHam was not even licensed to practice law in the State of Texas and he had been licensed for less than six months at the time he first appeared in the case. As such, it is unlikely that he was calling the shots and making strategic decisions in this case.

subject to sanctions. Dr. Gurkoff would request that his fees be awarded jointly and severally against Mr. Poster, Mr. Pierson, and Pierson Behr because of their culpability in this case. Pierson Behr has been consistently involved in this case from the beginning and is, thus, the common denominator. Mr. Poster presumably made the initial decision not to file an expert report, and Mr. Pierson, by signing the engagement contract on behalf of the Firm, should be held liable for that decision as well. Moreover, Mr. Pierson himself took affirmative action in the trial court both before and after Mrs. Jersak's death to avoid dismissal, avoid sanctions, and delay the resolution of the case. (See pages 2-4 *supra*). Any assertion that he lacks culpability is meritless. In the end, the trial court was required to award fees against someone. Dr. Gurkoff maintains that the attorneys are the only appropriate persons against whom sanctions may be awarded given the factors present here. (Brief on the Merits at 28-31). However, the trial court's decision to deny fees altogether was an abuse of discretion and must be reversed.

IV. The trial court had jurisdiction over the parties and was required to award attorneys' fees to Dr. Gurkoff.

In his Brief on the Merits, Dr. Gurkoff discussed at length why the trial court had jurisdiction over the parties, how he complied with the requirements of Rule 151, and why the status of Mrs. Jersak's Estate was irrelevant but was, nonetheless, established as a matter of law. (Brief on the Merits at 20-27). Tellingly, Mr. Pierson does not address the arguments and authorities presented by Dr. Gurkoff on this issue. Rather, Mr. Pierson continues to rely on his unsupported assertions that Dr. Gurkoff failed to comply with Rule 151, that such alleged lack of compliance deprived the trial court of jurisdiction, and

that Dr. Gurkoff's allegedly faulty attempts to comply with Rule 151 was the cause of delay in resolution of this case. Each of these assertions is meritless.

First and foremost, the trial court exercised jurisdiction over the parties by granting Dr. Gurkoff's motion to dismiss and dismissing the plaintiff's claims based on the failure to provide an expert report as required by the Act. (CR 297). 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 and, by doing so, was required to also award Dr. Gurkoff his attorneys' fees. (*See also* discussion at pages 20-21 of Brief on the Merits).

Second, Dr. Gurkoff complied with the requirements of Rule 151. As discussed at length in the Brief on the Merits, Rule 151 does not require Defendant to plead and prove anything regarding the status of a deceased plaintiff's estate. (Brief on the Merits at 21-22). Rather, Rule 151 permits a defendant to seek issuance of a *scire facias* requiring a representative to appear on the decedent's behalf so that the defendant and the court may determine whether those heirs want to pursue the decedent's claims. TEX. R. CIV. P. 151; see *Estate of C.W. Pewthers v. Holland Page Indus., Inc.*, 443 S.W.2d 392, 395 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.). Dr. Gurkoff took all necessary steps under Rule 151 by obtaining, serving, and filing a *scire facias* on George Jersak, Mrs. Jersak's husband. George Jersak is the executor and sole beneficiary under Mrs. Jersak's will. (CR 270-271). The rule required nothing else from Dr. Gurkoff. (Brief on the Merits at 21-22). The cases relied on by Mr. Pierson do not support his contention that Dr. Gurkoff failed to comply with Rule 151. In fact, Dr. Gurkoff did more than what was required of him under Rule 151 by also obtaining, serving, and filing *scire facias* on Mrs.

Jersak's only children, Brenda Cook and Brian D. Jersak. (CR 255-265). Therefore, all potential heirs were ultimately served with *scire facias*.

Similarly, none of the cases relied on by Mr. Pierson support his argument that Dr. Gurkoff had the burden to plead and prove that no administration was necessary. On the contrary, Texas law is clear that a deceased plaintiff's heir must plead and prove that no administration is pending or necessary if that heir wants to pursue the deceased plaintiff's claims and seek affirmative relief on behalf of the deceased plaintiff. *Bluitt v. Pearson*, 7 S.W.2d 524, 525 (Tex. 1928) (citing general rule that the heir must plead that no administration is pending or necessary in order to seek affirmative relief); *Casillas v. Cano*, 79 S.W.3d 587, 590 (Tex. App.—Corpus Christi 2002, no pet.) (“It is a settled law of this state that before heirs, as such, can maintain a suit to recover a chose in action or other property which have descended to them, . . . they must plead and prove facts entitling them to prosecute the action. . . .”) (internal citations omitted); *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 433 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (describing the issue as one of standing and stating that the “[h]eirs must allege that an administration is neither open nor necessary” in order to bring an action on behalf of the decedent); *Kenseth v. Dallas County*, 126 S.W.3d 584, 596 (Tex. App.—Dallas 2004, pet. denied) (plaintiff's mother was properly substituted for her deceased son and permitted to seek affirmative relief on his behalf where she filed an affidavit establishing that she was the sole heir and that no administration was pending or necessary).

Here, 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. (Brief on the

Meirts at 22-25); *Fox v. Hinderliter*, 222 S.W.3d 154, 157 (Tex. App.—San Antonio 2006, no pet.) (holding that a motion to dismiss and request for fees filed under section 74.351 of Texas Civil Practice and Remedies Code does not allege an independent cause of action or otherwise constitute a claim for affirmative relief). Dr. Gurkoff was not required to plead and prove anything regarding the status or necessity of an estate administration.

Moreover, no Texas court has held that a trial court is deprived of jurisdiction to take action on remaining issues that are not claims for affirmative relief brought by the decedent's heir. Dr. Gurkoff complied with the requirements of Rule 151 and was, thus, entitled to have his motion heard and acted upon. George Jersak's failure to plead the status and necessity of an estate administration had no impact on the trial court's ability to rule on Dr. Gurkoff's motion to dismiss and request for fees. At most, that failure would have prevented George Jersak from obtaining affirmative relief from the court. *Bluitt*, 7 S.W.2d at 525; *Casillas*, 79 S.W.3d at 590. (Brief on the Merits at 22-25). However, the status of Mrs. Jersak's estate is another equitable reason for the court to award the required sanctions against the attorneys.

Finally, the question of whether an administration is necessary should have been determined as a matter of law by the trial court because Mrs. Jersak died testate, Mrs. Jersak's Will provided for an independent executorship, and it is undisputed that the Will appoints George Jersak as executor of her Estate. (CR 270-271); *See* discussion at pages 26-27 of Brief on the Merits; *see also Ashbrook v. Hammer*, 106 S.W.2d 776, 779 (Tex. Civ. App.—Amarillo 1937, no writ) ("There being a will, there was no necessity for an

administration. 13 Tex. Jur. 592.”); *see also* TEX. TITLE EXAMINATION STANDARDS § 11.50 (1999) (permitting an heir of an estate to convey property without probating the will of the decedent); *see also* TEX. PROB. CODE § 145(b) (Vernon 2003) (providing that a will may provide for independent administration by stating that “no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate.”); *Brown v. Canal Bank & Trust Co.*, 141 F.2d 832, 835 (5th Cir. 1944) (Under Texas law, independent executors act directly under powers granted in will without interference from probate court); *see also Frame v. Whitaker*, 7 S.W.2d 140, 142 (Tex. Civ. App.—San Antonio, 1928), *rev’d on other grounds* 36 S.W.2d 149 (Tex. 1931).

The trial court was required under section 13.01(e) to award fees and costs against someone. In this instance, the award should be against the attorneys because they chose not to file an expert report and then chose to delay dismissal and sanctions both before and after Mrs. Jersak’s death. The court abused its discretion by refusing to do so. The trial court’s judgment should, thus, be reversed and judgment rendered in Dr. Gurkoff’s favor. *See World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 684 (Tex. App.—Fort Worth 1998, pet. denied).

PRAYER

Petitioner Jerry Gurkoff, D.O. respectfully prays that the Court grant his Petition for Review, reverse the appellate court’s judgment, and remand to the trial court for entry of an order of reasonable attorneys’ fees incurred from the date the lawsuit was filed

through the entry of judgment on remand jointly and severally against the Pierson Behr law firm, Grey Pierson, and Jeffrey Poster. Alternatively, Petitioner prays that the Court grant his Petition for Review, reverse the appellate court's judgment, and render judgment in Petitioner's favor in the amount of \$22,280.90, which was the uncontested amount of fees proven by counsel in the trial court, plus post-judgment interest. Petitioner prays for such other and further relief to which he may be entitled.

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 Petitioner's Brief on the Merits was sent to the following counsel of record and parties as follows on January 5, 2009:

VIA FEDERAL EXPRESS

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

825137
0563/00001