

No. 08-667

In the Supreme Court of Texas

EBERHARD SAMLOWSKI, M.D.,

Petitioner,

VS.

CAROL WOOTEN

Respondent .

**ON APPEAL FROM THE 413TH JUDICIAL DISTRICT COURT
OF JOHNSON COUNTY, TEXAS,
THE HONORABLE WILLIAM C. BOSWORTH, JR. , PRESIDING**

PETITIONER'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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PETITIONER'S REPLY BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COMES Eberhard Samlowski, M.D., Petitioner in the above-styled and numbered appeal, and Appellee and Defendant below, seeking reversal of the order of the Court of Appeals for the Tenth District of Texas at Waco, reversing the order of the trial court which dismissed the case for failure to provide an adequate expert report in support of the health care liability claims

alleged and remanding the case back to the trial court to grant one thirty day extension (30) to Carol Wooten, Plaintiff and Appellant below, to cure deficiencies in the expert report, and in Reply to Respondent's Brief on the Merits would respectfully show the Court the following:

STATEMENT OF JURISDICTION

Contrary to Respondent's assertion in her Brief on the Merit, the Supreme Court has jurisdiction over this appeal under Government Code §22.001(a)(1) because the justices of the court of appeals disagree on a question of law material to the decision. In addition, the Supreme Court has jurisdiction over this appeal under Government Code § 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. The establishment of a new standard of "good faith attempt" in contradiction with the clear language of "good faith effort" of Tex. Civ. Prac.& Rem. Code § 74.351 (c) is clearly just such an error as contemplated by Government Code § 22.001(a)(6)

ISSUE PRESENTED

Did the Trial Court abuse its discretion in denying Plaintiff's request for a thirty (30) day extension under the provisions of Section 74.351 (c) of the Texas Civil Practice & Remedies Code and dismissing this case because the expert report of Dr. R. Patman did not represent an objective "good faith" effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code ?

SUMMARY OF THE REPLY ARGUMENT

Contrary to the assertion of Respondent in her Brief on the Merits, the expert report of Dr. R. Patman does not represent a “good faith effort” as required by Tex. Civ. Prac. & Rem. Code §74.351. Indeed, the 10th Court of Appeals rightly found that the trial court did not abuse its discretion in finding that the expert report of Dr. Patman did not represent a “good faith effort” to summarize the causal relationship between Dr. Samlowski’s alleged negligence and Ms. Wooten’s injuries. The only issue before the Court is whether the Trial Court abused its discretion in denying a 30 day extension to plaintiff to remedy the expert report. Respondent’s assertion that the deficiencies in the report are mere technicalities is also incorrect. The lack of any basis for the conclusory language regarding proximate cause renders the report so deficient as to constitute no report. In addition, the facts of the underlying cause of action against Dr. Samlowski, as set forth in Dr. Patton’s report, confirm no causal connection between the alleged negligent acts of Dr. Samlowski and the injuries claimed by Ms. Wooten and , therefore, the report’s deficiencies cannot be remedied. Nowhere in Respondent’s Brief on the Merits does she provide any response to these issues.

ARGUMENT AND AUTHORITIES

Did the Trial Court abuse its discretion in denying Plaintiff’s request for a thirty (30) day extension under the provisions of Section 74.351 (c) of the Texas Civil Practice & Remedies Code and dismissing the case because the expert report of Dr. R. Patman did not represent an objective “good faith” effort to comply with the definition of an expert report pursuant to

Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code?

To the extent that Respondent argues, contrary to the holding of the Tenth Court of Appeals, that the expert report of Dr. Patman represented a good faith to comply with Tex. Civ. Prac. & Rem. Code §74.351 (r)(6), the term “expert report” means:

A written report by an expert that provides a fair summary of the expert’s opinions as of the date of the report regarding the applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards and **the causal relationship between that failure and the injury, harm, or damages claimed.** *Id.* at 74.351(r)(6). (Emphasis

added)

The Texas Supreme court has clearly established what is required of an expert report to constitute a good faith effort to provide a fair summary of an expert’s opinions under Tex. Civ. Prac. & Rem Code §13.01 (r)(6), now §74.351(r)(6). *American Transitional Care Ctrs., Inc. v. Palacios*, 40 S.W.3d 873,875 (Tex 2001); The Court has stated that the expert report must discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct that plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit. *Palacios* 46 S. W. 3d at 879. Further the court has stated that in order to constitute a good faith effort, the report must inform the defendant of not only the specific conduct which has been called into question and the proximate cause link, but also the basis for those opinions. *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48 (Tex. 2002). Most importantly, a report that merely states the expert’s conclusions about the standard of care, breach and causation does not constitute a good faith effort and a report that omits any of the statutory requirements likewise does not constitute a good faith effort. *Palacios* at 879. The only information relevant to

whether a report represents a good faith effort to comply with the statutory requirements is the report itself. *Palacios*, 46 S.W.3d at 878.

The 10th Court of Appeals agreed that the expert report of Dr. Patton was deficient on the issue of proximate cause. Therefore, the only issue before the court is whether the court abused its discretion in denying a 30 day extension to provide Respondent with the opportunity to cure the deficiency. Respondent cites no cases in her Brief on the Merits which holds that the trial court abused its discretion in failing to grant a 30 day extension to cure an expert report's deficiencies. In fact, all of the cases cited by Respondant in her Brief on the Merits stand for the proposition that if the appellate court found that the expert report (previously found sufficient by the trial court) was deficient, it would be appropriate to send the case back to the trial court to determine, **in its discretion**, whether a 30 day extension should be granted. In the present case, this determination has already occurred and the trial court found, exercising its discretion, that the 30 day extension should not be granted.

Respondent is of the erroneous opinion that the deficiencies of the report of Dr. Patman are a mere technicality. However, review of the report shows a complete lack of a causal connection between the alleged acts of negligence and the alleged injuries to Ms. Wooten. Respondent attempts to address specific references to proximate cause language in the report in her Brief on the Merits. First of all, Respondent points to Dr. Patman's list of potential complications of the surgery as language of proximate cause. However, examination of the report clearly reveals that the "alleged complications" of the surgery quoted by Respondent in her brief are simply post operative conditions of the patient which are not linked by proximate cause to the surgery itself (There are no allegations that Dr. Samlowski negligently performed the surgery in question) or any of the alleged "negligent

conduct” of Dr. Samlowski. The only other language referred to by Respondant is the vague and global language that the negligence of Dr. Samlowski was a proximate cause of Ms. Wooten’s developing multiple life-threatening complications that required resultant multiple but avoidable operations, multiple organ failure with permanent damage, and the multiple hospitalization admissions of prolonged duration. (Cr. 25)[Appendix C] without any basis for that proximate cause opinion.

All of the foregoing supports the argument that this report is not only deficient but is incapable of being “cured” for the reason that the subsequent surgery performed on Ms. Wooten showed complications in her pelvic area which was not even in the surgical field (upper outer right quadrant)of the initial surgery by Dr. Samlowski. the Respondent fails to address the fact that nowhere in Dr. Patman’s report does he connect the preoperative evaluation with the subsequent injuries to Plaintiff. Her reliance on *Austin Heart, P.A. v. Webb*, 228 S.W.3d 276 (Tex. App. - Austin 2007) is misplaced. In that case, the only deficiency of the report was the failure to include the name of the physician who was the only physician involved in the patient care. Certainly , simply placing the physician’s name in the report easily cured the defect. This is not comparable to the deficiencies of the present report

Respondent’s argument that denial of her request for a 30 day extension would result in the dismissal of a meritorious case is incorrect in that there is no factual basis for any causal connection between the alleged injuries to Ms. Wooten and the alleged negligent act of Dr. Samlowski. If the extension were to be granted, the result would be a revised report which would again fail to meet the statutory requirement of Tex. Civ. Prac. & Rem Code § 74.351 (r)(6)

Again, the sole responsibility of the Appellate Court is not to agree to with the trial court’s

opinion, but to determine if the trial court's decision has any rational basis. Respondant's Brief on the Merits as well as the opinion of the 10th Court of Appeals fail to establish the trial court's decision had no rational basis and constituted an abuse of discretion. In addition, allowing the 10th Court of Appeals to invade the discretion of the trial court by establishing a new standard of "good faith effort" with regard to expert reports is not supported by the clear language of the statute and would cause confusion and uncertainty in case precedent.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Eberhard Samlowski, M.D. . prays that the opinion of the Tenth Court of Appeals be reversed and that the dismissal with prejudice of the Trial Court be reinstated and that all costs of appeal be taxed against the Respondent.

Respectfully submitted,

By /s/ Kay Ellington

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record on this the 27 day of March, 2009.

/s/ Kay Ellington
KAY E. ELLINGTON