

NO. 08-1066

In the Supreme Court of Texas

**MICHAEL T. JELINEK, M.D. AND COLUMBIA RIO GRANDE HEALTHCARE,
L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL,**

Petitioners,

v.

**FRANCISCO CASAS AND ALFREDO DELEON, JR., AS PERSONAL
REPRESENTATIVES OF THE ESTATE OF ELOISA CASAS, DECEASED**

Respondents

*On Appeal from the Thirteenth Court of Appeals
At Corpus Christi-Edinburg
Court of Appeals No. 13-06-00088CV*

**REPLY TO THE PETITION FOR REVIEW OF
PETITIONER, MICHAEL T. JELINEK, M.D.**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This Court should not grant review of Petitioner Jelinek’s Petition for Review as its foundation is erroneous. Petitioner claims that the only cause that Plaintiffs below had against Petitioner was for the “wrongful death” of Eloisa Casas and therefore since Plaintiffs’ expert did not allude to the negligence causing the ‘death’ of Eloisa, it must

fail. In fact, the Plaintiffs' pleadings made **no claim that the negligence of any of the Defendants caused the 'death' of Eloisa Casas, rather it claimed that Petitioners' negligence was the cause of 'injuries'**. (Plaintiffs First Amended Petition, at 3, paragraph VI) (Appx 1) Further, the expert report of Dr. Daller was a good faith effort setting forth the standard of care, breach, and causation with sufficient clarity to both inform the Defendant of the conduct which Plaintiffs were calling into question; and, further provided a basis for the trial court to conclude that Plaintiffs' claims had merit. Finally, Petitioner has erroneously attempted to include Plaintiff's counsel in their request for sanctions, when neither its original motion, or order ever alludes to Plaintiffs' counsel.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Respondents accept as correct Petitioner's statement of the case, save and except that Plaintiffs' counsel, John Mastin was never included as a person responsible for the sanctions sought. Accordingly, the Petitioner's attempt to now include Plaintiffs' counsel is a bad faith attempt to seek sanctions when sanctions were never sought before, and Respondents respectfully request this Court to so find sanctions against Petitioner and his counsel, Ronald G. Hole, and I Cecilia Garza, Hole & Alvarez, L.L.P, and enter orders appropriate to this misconduct.

RESPONSE TO PETITIONER'S STATEMENT OF JURISDICTION

The Petitioner, in his Statement of the Case, is erroneous in his assertion that the Texas Supreme Court has Jurisdiction of this proceeding pursuant to Texas Government Code §22.001(a)(2), §22.001(a)(3) and §22.001(a)(6). The Texas Supreme Court does

not have jurisdiction of this proceeding pursuant to Texas Government Code §22.001(a)(2) because the Thirteenth Court of Appeals decision is in conformity with, not in contravention of, a well established criteria of expert reports pertaining to former Article 4590i, §13.01. Further, this Court does not have jurisdiction pursuant to Texas Government Code §22.001(a)(3) or §22.001(a)(6) in that this Petitioner seeks an opinion of a statute that was repealed nearly six years ago and therefore is of no legal significance in this state; nor, could the decision of the Thirteenth Court of Appeals evaluation of a statute now long buried, be of any legal import.

RESPONSE TO PETITIONER’S STATEMENT OF ISSUES PRESENTED

Reply To Petitioner’s Issue #1: Must a 4590i Expert Report Explain the Causal Connection Between the Alleged Deviations from the Standard of Care and the Damages Alleged in the Plaintiff’s Petition?

The Thirteenth Court of Appeals ruling which upheld the trial court’s denial of sanctions and dismissal as sought by Appellant Jelinek pursuant to former Article 4590i §13.01 was correct in that the Plaintiffs’ expert report was a good faith effort as it established the standard of care applicable in the case, as well as, the causative links to Eloisa’s pain and mental anguish.

STATEMENT OF FACTS

Respondent agrees that the Court of Appeals correctly stated the nature of the case, and hereby incorporates same by reference.

SUMMARY OF ARGUMENT

Petitioner's Issue 1: Must a 4590i Expert Report Explain the Causal Connection Between the Alleged Deviations from the Standard of Care and the Damages Alleged in the Plaintiff's Petition?

The foundation of Petitioner's Petition for Review is erroneous as it is based with the supposition that the only claim that Plaintiffs below had against Petitioner was for the "wrongful death" of Eloisa Casas. To the contrary, Plaintiffs' in their First Amended Petition made **no claim that the negligence of any of the Defendants caused the death of Eloisa Casas.** (Plaintiffs First Amended Petition, at 3, paragraph VI) (Appx 1) The expert report of Dr. Daller was a good faith effort setting forth the standard of care, breach, and causation with sufficient clarity to both inform the Defendant of the conduct which Plaintiffs were calling into question; and, further provided a basis for the Trial Court to conclude that Plaintiffs' claims had merit. Again, Respondents would point out to this court that Petitioner now seeks sanctions against counsel for Respondents, when his motion for sanctions did not contain such requests; nor, did the order of the court ever allude to such inclusion. Accordingly, such bad faith attempt of inclusion of a party for the first time should not only be stricken, but attorneys fees should be awarded to these Respondents and to their counsel. (see Prayer at 5; Defendant Michael T. Jelinek, M.D.'s Motion for Sanctions and Dismissal Pursuant to Former Article 4590i, Section 13.01(e) (Appx 2) and (Order Denying Defendant Michael T. Jelinek M.D.'s Motion for Sanctions

and Dismissal Pursuant to Former Article 4590i, Section 13.01(e), entered on November 19, 2004) (Appx 3)

ARGUMENT

Reply to Petitioner's Issue 1:

It is unquestioned that the expert report as required under former Article 4590i, was timely. Neither is it contended by Petitioner that Plaintiffs' expert, Dr. Daller did not have sufficient training or expertise to render an expert opinion pertaining to the malfeasance of Dr. Jelinek. Accordingly, Dr. Daller's statements as to the standard of care, and the failure to follow those standards, and the affect the failure have, are uncontroverted.

The complaint of Petitioner is simply that the expert report was insufficient to give notice to the Defendant of Plaintiffs' complaints as it pertained to Dr. Jelinek's care of Eloisa Casas. Apparently, the allegations and comments Dr. Daller made were not so ambiguous or unclear to Petitioner that it ever filed 'special exceptions' to the pleadings on file in order to clarify Plaintiffs' position as set out by their expert in his report.

An expert report must discuss the standard of care, breach, and causation so as to inform the Defendant of the conduct Plaintiff has called into question and to provide a basis for the trial court to conclude that Plaintiff's claims have merit. *American Transitional Care Centers of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) In section 13.01 of former Article 4590i, "Expert Report" is defined as "a written report by an expert that provides a fair summary of the expert's opinions...regarding applicable

standards of care, the manor in which the care rendered...failed to meet the standards, and the causal relationship between that failure and injury, harm or damages claimed.” *Former Article 4590i, §13.01(r)(6)* Clearly, the trial court’s determination concerning the adequacy of an expert report is reviewed under an abuse-of-discretion standard. *Palacios supra at 877* The *Palacios* court clearly indicates that the statute only requires one inquiry – whether the report evidences a good faith effort to provide a fair summary of the expert’s opinions. However, the court established that the report need not marshal all the Plaintiff’s proof...*Palacios supra at 878* It is clear that the expert report is not required to present evidence in a fashion as if the merits were actually being litigated; nor, does it require to meet the same requirements of evidence proffered in a Summary Judgment proceeding. *Palacios supra at 879*

Neither the trial court nor the appellate court abused their discretion as the expert report reviewed sufficiently set forth those requirements as established in *Palacios*. The trial court therefore was neither arbitrary nor acted in an unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 238, 241-242 (Tex. 1985) For appellate purposes, the trial court’s discretion should remain inviolate provided that their discretion has not been abused. *Flores v Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989) Further, the expert’s report need not use any particular ‘magical words’ such as ‘reasonable medical probability’. *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) Dr. Daller’s expert report with the attached Curriculum Vitae clearly established his credentials to proffer the applicable standard of care complained of and its breach and the causative effect of that

breach. In fact, Dr. Daller indicated at page two of his report as follows: “all opinions provided herein are based upon reasonable medical probability.” Dr. Daller sets forth his understanding of what “standard of care” and “negligence” means. That is, as he states at page three of his report, “standard of care” means, “...that duty of a medical doctor or nurse to have the knowledge and skill ordinarily possessed and to exercise the care and skill ordinarily used by trained and skilled members of the medical profession practicing their profession under the same or similar circumstances. “ He went further to state his belief that “negligence” means, “...the failure to use ordinary care or failing to do that which a physician or nurse of ordinary prudence would do under the same or similar circumstances or doing that which a physician of ordinary prudence would not do under the same or similar circumstances.”(Expert Report of John A. Daller, M.D., Ph.D) (Appx 4) Dr. Daller then explains what the applicable standard of care was both as to Dr. Garcia and Dr. Jelinek. That is, ‘to be vigilant concerning the treatments the patient is receiving *and* confirming that orders (physicians) are carried out.’ Dr. Daller states that Dr. Jelinek ‘failed to recognize that the ordered antibiotics were not being administered’ which is a breach in the standard of care. He then connects that breach as being negligent (failing to use ordinary care or failing to do that which a physician of ordinary prudence would not do under the same or similar circumstances). Dr. Daller then clearly links the resultant harm of this negligence by stating that ‘the breach of the standard of care resulted in a prolonged hospital course and increased pain and suffering being experienced by Ms. Casas. Dr. Daller indicates in the report that ‘receiving the ordered antibiotics was a necessary therapy for Eloisa.’ *Daller report at 4*

As the factual basis outlined in the Thirteenth Court of Appeals Opinion indicates, at all times, Dr. Jelinek intended that Eloisa have a regimen of antibiotics that he prescribed. These antibiotics were not given, even though ordered. The resultant pain and mental anguish is spoken of with sufficient clarity within the confines of Dr. Daller's report as to satisfy the good faith effort requirement as set forth in *Palacios*.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents request that the Texas Supreme Court deny the Petition for Review of Michael T. Jelinek, M.D., Petitioner herein. Respondents further respectfully request this Court to find sanctions as set out above against Petitioner and his counsel, Ronald G. Hole, and I. Cecilia Garza, Hole & Alvarez, L.L.P, and orders appropriate to their misconduct, and to award Respondents such other relief as may be proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to counsel listed below in accordance with the Texas Rules of Appellate Procedure on this the ____ day of April, 2009:

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