

CASE NO. 08-1066

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THE SUPREME COURT OF TEXAS

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MICHAEL T. JELINEK, M.D.,  
*Petitioner,*

v.

FRANCISCO CASAS AND JOHN MASTIN,  
*Respondents*

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ON APPEAL FROM THE COURT OF APPEALS  
THIRTEENTH DISTRICT OF TEXAS  
CORPUS CHRISTI- EDINBURG  
CASE NO. 13-06-00088-CV

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**PETITIONER'S REPLY TO RESPONSE TO PETITION FOR REVIEW**

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May 5, 2009

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## SUMMARY OF THE REPLY

Respondents' interpretation of Petitioner Michael T. Jelinek, M.D.'s Petition for Review is mistaken, as Respondents misleadingly refer this Court to the allegations asserted in Plaintiff's (sic) First Amended Original Petition, which was not the live petition on file at the time Respondents' 4590i Expert Report or at the time of Petitioner's motion for sanctions and dismissal. At the time the statutory expert report was served, and at the time Petitioner filed his motion to dismiss, Plaintiffs alleged a wrongful death cause of action against Petitioner.

However, Plaintiffs' expert report failed to address the frivolous wrongful death allegations. The expert report failed to relate the alleged negligence to the alleged death. Such failure required the trial court to apply former Article 4590i, Section 13.01(e), and dismiss Plaintiffs' cause of action against Petitioner, with prejudice, and awarding Petitioner his attorney's fees and costs. These sanctions were mandated by Article 4590i against the claimant or claimant's attorney.

## REPLY

### **A. Plaintiffs' Original Petition Alleged a Wrongful Death Cause of Action Against Defendant Michael T. Jelinek, M.D., Among Others.**

Respondents' response regarding the allegations asserted against Petitioner Jelinek is erroneous and misleading. There is no doubt that the underlying proceeding was a suit for wrongful death alleged against Petitioner, among others, which was filed on May 30, 2003. (App. 1). Within one hundred and eighty (180)

days of the filing of Plaintiffs' Original Petition, Defendant Jelinek received Plaintiff's expert report, purportedly sent pursuant to Section 13.01 of the Texas Medical Liability and Insurance Improvement Act. With such filing, Plaintiffs served what purports to be an expert report from John Daller, M.D. (App. 2).

Subsequently, on March 9, 2004, Defendant Jelinek filed his Motion for Sanctions and Dismissal Pursuant to Article 4590i, wherein he asserted that Plaintiffs failed to provide him with a proper expert report or reports, as required by the Texas Medical Liability and Insurance Improvement Act. (App. 3). Plaintiff's (sic) First Amended Original Petition was not filed until July 21, 2004, four months after the filing of Petitioner's Motion for Sanctions and Dismissal. (Respondents' Response Tab 1). Accordingly, the live petition relevant to the Defendant's motion for sanctions and dismissal was Plaintiffs' Original Petition, which undeniably asserted a wrongful death cause of action against Petitioner. (App. 1).

Respondents' argument that "Plaintiffs' pleadings made no claim that the negligence of any of the Defendants caused the 'death' of Eloisa Casas" is at best, disingenuous and at worst, intentionally misleading. Such argument completely ignores the allegations contained within Plaintiffs' Original Petition. As discussed in detail in Petitioner's Petition for Review, Respondents' expert report failed to address such allegations, even though Plaintiffs were required to do so by former Article 4590i. Without an adequate causation statement linking Petitioner's alleged breaches with Mrs. Casas' death, Respondents' expert report is inadequate and the

trial court should have dismissed Plaintiffs' claims against Petitioner with prejudice, and award Petitioner his attorney's fees and costs of court as mandated by former Article 4590i.

**B. Pursuant to the Plain Language of Former Article 4590i, Respondents' Counsel is Responsible for the Sanctions Sought by Petitioner.**

Respondents are completely ignoring the plain and unambiguous language of Article 4590i, Section 13.01, which was specifically recited within Petitioner's motion for sanctions and dismissal and Petitioner's Petition for Review. Former Article 4590i, Section 13.01(e) provides that the "court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant's attorney: (1) the reasonable attorney's fees and costs of court incurred by that defendant; . . ." TEX.REV.CIV.STAT.ANN. art. 4590i, §13.01(e)(repealed 2003).

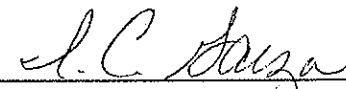
In his motion for sanctions and dismissal, filed on March 9, 2004, Petitioner sought sanctions pursuant to former Article 4590i. Such sanctions are clearly recoverable from the "claimant or the claimant's attorney." Accordingly, it is incredulous that Respondents now argue that Petitioner never sought sanctions against both Respondents. Also, any complaint concerning the award of sanctions against Respondent Mastin is premature, as no Court has yet awarded the attorneys' fees to which Petitioner is entitled. At that time, the Court can then decide who is responsible for such sanctions.

**PRAYER**

Petitioner Michael T. Jelinek, M.D. prays that this Court grant his Petition for Review, and after consideration, reverse the judgment of the Thirteenth Court of Appeals; and render an order that dismisses Respondents' claims against Petitioner with prejudice; awards Petitioner his attorney's fees and costs, against Respondents, and grant Petitioner such other and further relief, at law or in equity, to which he may be justly entitled to receive.

Respectfully submitted,

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By:   
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State Bar I.D. No. 24041627  
Ronald G. Hole  
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## PROOF OF SERVICE

I, Cecilia Garza, hereby certify that a true and correct copy of the above Petition for Review has, on this **5th of May 2009**, been sent, **by certified mail, return receipt requested** by depositing it enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the care of the custody of the United States Postal Service, to the following counsel of record:

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