

CASE NO. 08-1066

THE SUPREME COURT OF TEXAS

MICHAEL T. JELINEK, M.D.,
Petitioner

v.

FRANCISCO CASAS AND JOHN MASTIN,
Respondents

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

**PETITIONER MICHAEL T. JELINEK, M.D.'S
BRIEF ON THE MERITS**

I. Cecilia Garza
State Bar No. 24041627
Ronald G. Hole
State Bar No. 09834200

HOLE & ALVAREZ, L.L.P.
612 W. Nolana, Suite 370
P.O. Box 720547
McAllen, Texas 78504
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

July 3, 2009

CASE NO. 08-1066

THE SUPREME COURT OF TEXAS

MICHAEL T. JELINEK, M.D.,
Petitioner

v.

FRANCISCO CASAS AND JOHN MASTIN,
Respondents

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

**PETITIONER MICHAEL T. JELINEK, M.D.'S
BRIEF ON THE MERITS**

I. Cecilia Garza
State Bar No. 24041627

Ronald G. Hole
State Bar No. 09834200

HOLE & ALVAREZ, L.L.P.
612 W. Nolana, Suite 370
P.O. Box 720547
McAllen, Texas 78504
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

IDENTITY OF PARTIES AND COUNSEL

Plaintiffs/Respondents and Counsel

Francisco Casas, Individually and as Personal Representative of the Estate of Eloisa Casas, c/o John N. Mastin, Law Office of John N. Mastin, 630 Broadway, San Antonio, Texas 78215;

Alfredo De Leon, Jr., c/o John N. Mastin, Law Office of John N. Mastin, 630 Broadway, San Antonio, Texas 78215;

Concepcion Pacheco, Individually and for All of Those Entitled to Recover for the Wrongful Death of Eloisa Casas under the Texas Wrongful Death Act c/o John N. Mastin, Law Office of John N. Mastin, 630 Broadway, San Antonio, Texas 78215; and

John N. Mastin, Law Office of John N. Mastin, 630 Broadway, San Antonio, Texas 78215.

Defendant/Petitioner Michael T. Jelinek, M.D. and Counsel

Michael T. Jelinek, M.D., c/o Hole & Alvarez, L.L.P., P.O. Box 72054, McAllen, Texas 78504; and

I. Cecilia Garza and Ronald G. Hole, Hole & Alvarez, L.L.P., Water Tower Centre, 612 W. Nolana, Suite 370, McAllen, Texas 78504.

Defendant/Appellant Columbia Rio Grande Regional Healthcare, L.P. and Counsel

Columbia Rio Grande Regional Healthcare, L.P. d/b/a Rio Grande Regional Hospital c/o Mike A. Hatchell, Sarah B. Duncan, Elissa G. Underwood, Locke Liddell & Sapp PLLC, 100 Congress Avenue, Suite 300, Austin, Texas 78701.

TABLE OF CONTENTS

Identity of Parties and Counsel	ii
Table of Contents	iii
Index of Authorities	v
Statement of the Case	vii
Statement of the Jurisdiction	viii
Issue Presented	viii
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?	viii
2. Is a Plaintiff’s Counsel Responsible for the Sanctions Awarded to a Health Care Liability Defendant Pursuant to Former Article 4590i?	viii
Statement of Facts	1
Summary of the Argument	1
Argument	3
A. The Thirteenth Court of Appeals Has Misinterpreted the Statutory Mandates of Former Article 4590i, Necessitating this Court’s Review and Correction.	3
B. Respondents’ Expert Report Fails to Comply with the Article 4590i Expert Report Requirements as It Fails to Contain Two of the Required Elements.	4
1. Respondents’ Expert Report is Completely Silent as to the Standard of Care Applicable to Petitioner	6
2. No Causal Link Was Established by Respondents’ Expert Report	10

a.	Causation Must Relate to the Claims Asserted in Plaintiffs' Petition	10
b.	In Addition to Failing to Address Plaintiffs' Complained-of Injury, Dr. Daller's Statements Regarding Causation are Conclusory.	16
C.	Pursuant to the Plain Language of Former Article 4590i, Respondents' Counsel is Responsible for the Sanctions Sought by Petitioner.	22
D.	Conclusions	22
Prayer	23
Proof of Service	25

INDEX OF AUTHORITIES

Cases

<i>American Transitional Care Centers of Texas, Inc. v. Palacios</i> , 46 S.W.3d 873 (Tex. 2001)	<i>passim</i>
<i>Alfonso v. Bracamontes</i> , 2005 WL 1693677 (Tex.App.–Corpus Christi-Edinburg, July 21, 2005, no pet.)	5
<i>Austin Heart v. Webb</i> , 228 S.W.3d 276, (Tex.App.–Austin 2007, no pet. hist.)	5
<i>Bowie Memorial Hospital v. Wright</i> , 79 S.W.3d 48 (Tex. 2002)	<i>passim</i>
<i>Craig v. Dearbonne</i> , 259 S.W.3d 308 (Tex.App.–Beaumont 2008, no pet. hist.)	<i>passim</i>
<i>Dews v. Palo Pinto Nursing Center</i> , 2009 WL 1636019 (Tex.App.–Eastland June 11, 2009, no pet. hist.)	19,21
<i>Earle v. Ratliffe</i> , 998 S.W.2d 882 (Tex. 1999)	10
<i>Hopkins County Hosp. Dist. v. Ray</i> , 2009 WL 434063 (Tex.App.-Texarkana February 24, 2009, no pet.)	4
<i>In re Collom & Carney</i> , 62 S.W.3d 924 (Tex. App.–Texarkana 2001, orig. proceeding)	11,16
<i>In re McAllen Medical Center</i> , 275 S.W.3d 458 (Tex. 2008)	4
<i>In re Tenet Hospitals Limited</i> , 116 S.W.3d 821 (Tex.App.–El Paso 2003, orig. proceeding)	16
<i>Jelinek v. Casas</i> , 2008 WL 2894889 (Tex.App-Corpus Christi - Edinburg July 29, 2008, pet. filed)	1,7
<i>Jones v. King</i> , 255 S.W.3d 156 (Tex.App.–San Antonio 2008, pet. denied)	17,19,21

<i>Nelson v. Ryburn</i> , 223 S.W.3d 453 (Tex.App.–Amarillo 2006, no pet.)	13,15
<i>Raines v. Stephens</i> , 2005 WL 428478 (Tex.App.–Waco February 23, 2005, no pet.)	11,15
<i>Regent Health Care Ctr. of El Paso v. Wallace</i> , 271 S.W.3d 434 (Tex.App.–El Paso 2008, no pet. hist.)	16,17
<i>Strom v. Memorial Hermann Hosp. Sys.</i> , 110 S.W.3d 216 (Tex.App.–Houston [1 st Dist.] 2003, pet. denied)	6,7
<i>Sutton v. Collums</i> , 2003 WL 22533688 (Tex.App.–Amarillo, November 7, 2003, no pet. hist.)	7,9
<i>Thomas v. Vaz</i> , 2004 WL 1576738 (Tex.App.–Corpus Christi-Edinburg July 15, 2004, pet. denied)	6,7,8
<i>Villa v. Hargrove</i> , 110 S.W.3d 74 (Tex.App.–San Antonio 2003, pet. denied)	5
<i>Wells v. Ashmore</i> , 202 S.W.3d 465 (Tex.App.–Amarillo 2006, no pet.)	13,14,15
<i>Windsor v. Maxwell</i> , 121 S.W.3d 42 (Tex.App.–Fort Worth 2003, pet. denied)	10,15

Statutes

TEX.REV.CIV.STAT.ANN. art. 4590i §13.01 (repealed 2003)	5,22
--	------

STATEMENT OF THE CASE

The underlying lawsuit was a medical negligence claim filed by the Respondents against Petitioner Michael T. Jelinek, M.D., among others. Petitioner filed a motion for sanctions and dismissal pursuant to former Article 4590i, Section 13.01, which was denied by the trial court. The Order Denying Defendant Michael T. Jelinek, M.D.'s Motion for Sanctions and Dismissal was signed by Judge Juan Partida, Judge of the 275th Judicial District Court, Hidalgo County, Texas. Judge Partida subsequently entered an Order on Plaintiffs' Motion for Non-Suit with Prejudice. No order of severance was entered and the lawsuit proceeded to trial against Defendant Columbia Rio Grande Regional Healthcare, L.P. d/b/a Rio Grande Regional Hospital, only.

After the Final Judgment, Dr. Jelinek appealed the trial court's denial of his motion for sanctions and dismissal to the Thirteenth Court of Appeals – Corpus Christi-Edinburg. The parties were Michael T. Jelinek, M.D., a Defendant in the case below; Columbia Rio Grande Regional Healthcare, L.P. d/b/a Rio Grande Regional Hospital, a Defendant in the case below; Francisco Casas, the Plaintiff in the case below; and John Mastin, the Plaintiffs' attorney in the case below.

In a Memorandum Opinion authored by Justice Garza, with Chief Justice Valdez and Justice Benavides participating, the Thirteenth Court of Appeals affirmed the trial court's order denying Petitioner's motion for sanctions and dismissal. The opinion can be found at 2008 WL 2894889 (Tex.App.–Corpus Christi–Edinburg July 29, 2008).

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this proceeding pursuant to Texas Government Code §22.001(a)(2) because, in its decision, the Thirteenth Court of Appeals holds differently from a prior decision of several other courts of appeals on a question of law material to a decision of the case. This Court also has jurisdiction pursuant to Texas Government Code §22.001(a)(3) because this case involves the construction of a statute necessary to the determination of this case, former Article 4590i. Finally, this Court has jurisdiction over this appeal pursuant to Texas Government Code §22.001(a)(6) because the Thirteenth Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it requires immediate correction.

ISSUES PRESENTED

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?
2. Is a Plaintiff's Counsel Responsible for the Sanctions Awarded to a Health Care Liability Defendant Pursuant to Former Article 4590i?

STATEMENT OF FACTS

Petitioner affirms that the Thirteenth Court of Appeals correctly stated the nature of the case, with the exception of one pertinent fact having been misstated. Accordingly, in addition to the background noted in the Memorandum Opinion, the following facts are also believed to be pertinent to a determination of Petitioner's Petition for Review:

Although Dr. Jelinek initially prescribed Maxipeme and Flagyl to treat Ms. Casas' infectious disease, Dr. Jelinek was not involved in the treatment of Ms. Casas during the time period in which she was not receiving the prescribed antibiotics. (R.R. Vol. 12, p. 19).

Procedurally, after Plaintiffs filed their Motion for Non-Suit With Prejudice as to Dr. Jelinek and Dr. Garcia-Cantu, the trial court entered an Order on Plaintiffs' Motion for Non-Suit with Prejudice on June 28, 2005. (C.R. Vol. 1 of 1, p. 58-59).¹ The trial of the underlying case began on August 8, 2006, against the only remaining Defendant, Columbia Rio Grande Healthcare, L.P., and a Final Judgment was entered on February 1, 2006. (C.R. Vol. 1 of 1, p. 62-64).

SUMMARY OF THE ARGUMENT

Respondents' "expert" report fails to articulate a clear standard of care for Petitioner and completely fails to explain a causal relationship between the alleged

¹In the Memorandum Opinion, the Thirteenth Court of Appeals refers to such order as "an order dismissing the case against Dr. Jelinek and Dr. Garcia-Cantu with prejudice." *Jelinek v. Casas*, 2008 WL 2894889 at p. 2 (Tex.App.—Corpus Christi - Edinburg July 29, 2008; Case No. 13-06-00088-CV).

deviation from the standard of care and the damages alleged in Plaintiffs' Original Petition. Based upon the clear and unambiguous statutory language, as well as the guidance provided by sister courts of appeals, the lack of an adequate statement as to what Petitioner should have done differently and the lack of a statement of causation tying the death of Eloisa Casas to the alleged negligent conduct renders Respondents' 4590i report inadequate.

An expert must do more than provide general, conclusive statements regarding causation. The expert report must link his/her conclusions to the facts alleged and provide a basis for the defendant to understand the claims brought against him. This was a wrongful death case. However, Respondents' 4590i report wholly failed to explain how the alleged deviation from the standard of care, failure to recognize that antibiotics were not being administered, caused Ms. Casas' death. Accordingly, Petitioner requests this Court grant his petition for review; reverse the trial court's denial of his motion for sanctions and dismissal; render an order that dismisses Respondents' claims against him; and render an order that Petitioner recover his attorney's fees and costs from the Plaintiffs and their attorney, as mandated by statute.

ARGUMENT

A. The Thirteenth Court of Appeals Has Misinterpreted the Statutory Mandates of Former Article 4590i, Necessitating this Court's Review and Correction.

This Court should exercise its discretion to hear this petition for review as the issue of what constitutes a good faith expert report has been widely interpreted by the state's courts of appeals thus necessitating this Court's attention. Rule 56.1(a) of the Texas Rules of Appellate Procedure lists at least three factors which are applicable to this case.

First and foremost, the Thirteenth Court of Appeals has incorrectly interpreted the clear and concise language of Article 4590i, Section 13.01(r)(6) and case law, and has strayed from the unambiguous legislative intent of the Texas Medical Liability and Insurance Improvement Act. In affirming the trial court's denial of Petitioner's motion for sanctions and dismissal, the Thirteenth Court of Appeals has committed an error of law in a case that is of importance to this state's jurisprudence. The legislative intent of former Article 4590i was to curtail the filing of frivolous lawsuits by imposing a mandatory expert report requirement within one hundred eighty days of the filing of a medical negligence cause of action.

This intent did not vanish with the repealing of former Article 4590i. Rather, it was intensified in the enacting of Chapter 74 of the Texas Civil Practice and Remedies Code. The fact that former Article 4590i no longer applies does not diminish the value of the decision of the Thirteenth Court of Appeals in the instant

case. The expert report requirement still exists and any opinion determining the adequacy of any element of the expert report requirements still carries precedential value. In fact, at least one plaintiff has already cited to this report as an example of a report containing an adequate statement of the standard of care. See *Hopkins County Hosp. Dist. v. Ray*, 2009 WL 434063 (Tex.App.-Texarkana February 24, 2009, no pet.)(Appellee's Brief).

This Court recently alluded to the fact that some courts are opposed to or confused by the strict statutory mandates. See *In re McAllen Medical Center*, 275 S.W.3d 458, 461 (Tex. 2008). The Memorandum Opinion in the instant case illustrates such confusion. Accordingly, this erroneous opinion must be corrected to ensure that the legislative intent is carried out.

Finally, various courts of appeals have recently come to a different conclusion than the Thirteenth Court of Appeals as to what constitutes an adequate statement of causation. In such cases, reports strikingly similar to the report in the instant case have been held to be inadequate by several appellate courts, requiring reversal. In an effort to maintain consistency among the appellate courts and carry out the intent of the Legislature, Petitioner seeks review by this Honorable Court.

B. Respondents' Expert Report Fails to Comply with the Article 4590i Expert Report Requirements as It Fails to Contain Two of the Required Elements.

The Thirteenth Court of Appeals boldly states that the report provided by Dr. Daller included the "the three elements required by the MLIIA: standard of care,

breach, and causation.” *Jelinek*, 2008 WL 2894889. Petitioner respectfully disagrees.

In order to comply with Article 4590i, Section 13.01, **an expert report must set out the standard of care for each defendant, describe how each defendant breached that standard, and explain how said breach caused Plaintiff’s injury.**

TEX.REV.CIV.STAT.ANN. art. 4590i, §13.01)(repealed 2003); *American Transitional Care Ctrs. of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). Additionally, an expert report must “represent a good faith effort to comply with the statutory definition.” *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *Palacios*, 46 S.W.3d at 878; *Alfonso v. Bracamontes*, 2005 WL 1693677 (Tex.App.–Corpus Christi-Edinburg, July 21, 2005, no pet.); *Villa v. Hargrove*, 110 S.W.3d 74, 78 (Tex.App.–San Antonio 2003, pet. denied). “Although the report need not marshal all the plaintiff’s proof, it *must* include the expert’s opinions on the three statutory elements—standard of care, breach, and causation.” *Palacios*, 46 S.W.3d at 878-79. (emphasis added).

This Court has held that, when determining the adequacy of an expert report, the only relevant information is contained within the four corners of the report itself. *Palacios*, 46 S.W.3d at 878. “This requirement precludes a court from filling in gaps in a report by drawing inferences or guessing as to what the expert likely meant or intended.” *Austin Heart v. Webb*, 228 S.W.3d 276, 279 (Tex.App.–Austin 2007, no pet. hist.)(quoting *Bowie*, 79 S.W.3d at 53).

In the instant case, Respondents' report does not represent a "good faith" effort to comply with the statute. As explained in more detail below, Dr. Daller's report does not establish the applicable standard of care, nor does it set forth the causal relationship between Petitioner's alleged breaches of the unidentified standards of care and Mrs. Casas' complained-of injury – death.

1. Respondents' Expert Report is Completely Silent as to the Standard of Care Applicable to Petitioner.

Respondents' expert report, authored by Dr. John Daller, completely fails to satisfy the elements of former Article 4590i because, for one reason, it fails to identify the standard of care applicable to Petitioner. The Thirteenth Court of Appeals has specifically held that "appellants cannot overcome their burden of laying out the standard of care by merely providing a chronology of events and listing the ways in which they believe appellee departed from an *unspecified* standard." *Thomas v. Vaz*, 2004 WL 1576738 (Tex.App–Corpus Christi-Edinburg July 15, 2004, pet. denied)(emphasis added). Instead, "an expert report needs to set forth the standard of care in sufficient detail so as to provide the defendant with specific information about what should have been done differently." *Id.*; *Strom v. Memorial Hermann Hosp. Sys.*, 110 S.W.3d 216, 221 (Tex.App.–Houston [1st Dist.] 2003, pet. denied). Unfortunately for Respondents, it is impossible to determine from Dr. Daller's report what Petitioner should have done differently. Rather, Dr. Daller's report merely states that "[t]he standard of care when managing a patient requires vigilance toward the treatments the patient is receiving and confirming that orders

specified in the physician order sheets are carried out.” *Jelinek*, 2008 WL 2894889 at p. 9; (R.R. Vol. 2, Exhibit 1). However, this broad and general statement fails to articulate exactly what exactly Petitioner **should have done** to “recognize” that antibiotics were not being given as ordered.

For example, does the standard of care require a physician to check with each nurse, on every shift, to ensure the antibiotics ordered are given? Is it acceptable to just check with the nurses or must a physician actually personally observe each administration of the antibiotic? Should a physician actually verify the antibiotics administration by checking with the pharmacy? Also, since Dr. Jelinek was never even at the hospital during the entire time of this failure of administration (R.R. Vol. 12, p. 19)², does the standard of care require him to personally come into the hospital, even when he has another physician providing coverage? If on vacation, or away at a continuing medical education course, must a physician nonetheless call in daily to check on the medication orders?

It is well-settled case law that, without such information, a report cannot be considered a good faith effort to comply with the statute. See *Palacios*, 46 S.W.3d at 879; *Thomas*, 2004 WL 1576738 at p. 2; *Sutton v. Collums*, 2003 WL 22533688 (Tex.App.–Amarillo, November 7, 2003, no pet. hist.); *Strom*, 110 S.W.3d at 223. The First Court of Appeals has found a similar report deficient for a failure to address the standard of care. *Strom*, 110 S.W.3d 216. In *Strom*, two separate reports were

² In fact, it was upon Dr. Jelinek’s return that he immediately noticed that Ms. Casas was not being given the antibiotics ordered.

considered by the trial and appellate courts as to the defendant physician's standard of care. *Id.* at 222. One report contained the plaintiff's medical history followed by a statement that "[b]ased upon the records, it is my expert opinion that the total knee and carpal tunnel release were not medically indicated." *Id.*

The second report contained the following information regarding the standard of care:

Based upon the medical records, the surgery of 8/1/97 [total knee and carpal tunnel syndrome surgeries] was not indicated medically. This apparently was unnecessary surgery. The medical records do not contain adequate indications for the surgery performed on 8/1/97. A markedly obese 52-year-old lady with a short right leg is not a candidate one would expect to have a good result from a total knee replacement. The diagnosis of carpal tunnel syndrom seems to be in adequate grounds to justify the surgery of 8/1/97.

Id. at 223. The First Court of Appeals held that "to the extent that the reports state what an ordinarily prudent physician would not have done, i.e., what Dr. Blum did, the reports are addressing a breach of care rather than the applicable standard of care. *Id.* Accordingly, the court held that the report was deficient since one required element was missing. *Id.*

In *Thomas v. Vaz*, the Thirteenth Court of Appeals considered a report which stated that the expert was familiar with the standard of care and qualified to render expert opinions, and found the report to be deficient. *Thomas*, 2004 WL 1576738 at p. 2. The report outlined the plaintiff's medical history, the procedures used during the C-section, then listed three specific "departures from the standard of care". *Id.* The appellant in *Thomas* argued that the statement that there was a "sharp

dissection of the bladder” set forth the standard of care. *Id.* The Court of Appeals disagreed holding that such a statement did not provide specific information about the applicable standard of care. *Id.*³

The Amarillo Court of Appeals has reached the same conclusion addressing the standard of care element. *Sutton*, 2003 WL 22533688 at p. 2. In *Sutton*, the relevant portions of the expert report were as follows:

It was a serious error and negligent to fail to ask the question ‘why did not the treatment restore his hearing and balance?’, then analyze the answer and act thereon. Had that been done, the appropriate diagnosis of ‘brain attack’ or ‘stroke’ would have been made, and appropriate treatment, i.e. administration of a blood thinner would have been initiated, limiting the effect of the stroke. . . . Mr. Sutton’s decline and death was a result of that failure to diagnose and treat.

The standard of care breached is: That which an ordinarily prudent health care provider (in this case a general practitioner) would do under the same or similar circumstances. Such a physician would, under the circumstances, have made a proper diagnosis after further examination following the failure of the initial treatment (ear cleaning). *Id.*

The Amarillo court held that such statements did not discuss any tests or procedures that should have been performed by the physician to make the proper diagnosis. *Id.* Accordingly, the report lacked the required standard of care discussion, and therefore could not be considered to be an adequate expert report. *Id.*

Dr. Daller’s report is completely silent as to what specific conduct the standard of care required of Petitioner. Simply stating that Dr. Jelinek’s “failure to recognize that antibiotics were not being administered as ordered” does not set forth the

³ In considering the instant report as adequate, the Thirteenth Court of Appeals has even departed from its own precedent.

standard of care, but rather addresses an alleged breach. (R.R. Vol. 2, Exhibit 11). Suffice it to say that a clear statement as to what the standard of care is in this circumstance - when antibiotics that are ordered are not given in the physician's absence - is lacking from Dr. Daller's report. This failure, alone, renders Dr. Daller's report inadequate, mandating reversal.

2. No Causal Link Was Established by Respondents' Expert Report.

The Thirteenth Court of Appeals has incorrectly applied the statutory language as well as the applicable case law regarding what is required to establish causation in its Memorandum Opinion affirming the trial court's denial of Petitioner's Motion for Sanctions and Dismissal Pursuant to former Article 4590i, Section 13.01. "A report cannot merely state the expert's conclusions about these elements." *Bowie*, 79 S.W.2d at 52. "Rather, the expert must explain the basis of his statements to link his conclusions to the facts." *Id.* (quoting *Earle v. Ratliffe*, 998 S.W.2d 882, 890 (Tex. 1999)). Respondents' expert report wholly fails to establish the required causal link between Dr. Jelinek's alleged breaches of the standard of care and Ms. Casas' death.

a. Causation Must Relate to the Claims Asserted in Plaintiffs' Petition.

A causal connection must be established between the alleged breach in the standard of care and Plaintiff's pleaded cause of action. See *Windsor v. Maxwell*, 121 S.W.3d 42, 48 (Tex.App.–Fort Worth, 2003, pet denied). To evaluate whether the causal connection between the alleged breach and the claimed damages is

established, it is necessary to consider the pleadings to determine the claimed injuries and damages. *Raines v. Stephens*, 2005 WL 428478 (Tex.App.–Waco February 23, 2005, no pet.)(emphasis added). Petitioner urges this Court to examine the fact that Dr. Daller’s report is completely silent as to the injury, harm or damages claimed by the Plaintiffs – Ms. Casas’ death. (C.R. Vol. 1 of 1, p. 22). This omission, alone, requires reversal of the trial court’s denial of Petitioner’s motion for sanctions and dismissal. See *Palacios*, 46 S.W.3d at 879 (Tex.. 2001); *In re Collom & Carney*, 62 S.W.3d at 924, 928 (Tex. App.–Texarkana 2001, orig. proceeding).

In Plaintiffs’ Original Petition, Respondents alleged that they were “bringing this suit in their own behalf, and on behalf of all of those entitled to Recover for the Wrongful Death of ELOISA CASAS under the Texas Wrongful Death Act”. (C.R. Vol. 1 of 1, p. 19). Respondents also alleged that “the Plaintiffs herein are the sole heirs and beneficiaries under the Wrongful Death Statutes of the State of Texas.” (*Id.*). Regardless of Respondents’ argument on appeal, Respondents were, at all times relevant to Petitioner’s motion for sanctions and dismissal, alleging in their live pleading that “it is the negligence of these Defendants in failing to properly administer to the care and well-being of the Deceased, ELOISA CASAS, **that led to her excruciatingly painful death** on November 12, 2001.” (C.R. Vol. 1 of 1, p. 22)(emphasis added).⁴ In fact, Respondents further alleged that “[a]s a result of the

⁴ 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. (C.R. Vol. 1 of 1, p. 18-28). On March 9, 2004, Defendant Jelinek filed his Motion for Sanctions and Dismissal Pursuant to Article 4590i. (C.R. Vol. 1 of 1, p. 32-37). Plaintiff’s (sic) First Amended Original Petition was not filed until July 21, 2004, four

negligence of the Defendant HOSPITAL, its employees, servants or representatives, as well as the negligence of the Defendant GARCIA and Defendant JELINEK, ELOISA CASAS was caused to suffer grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life which she would not have suffered to such degree or extent of properly diagnosed, treated and cared for at the hands of these Defendants. . . .” (*Id.*). However, the expert report fails to adequately state how Petitioner’s alleged breach of the applicable standard of care proximately caused Ms. Casas’ **death**. (R.R. Vol. 2, Exhibit 11). Dr. Daller’s report makes only a conclusory stab at articulating causation and does not even mention the complained of injury – death. (*Id.*)

This Court has held that an expert report does not represent a good faith effort to comply with Section 13.01 of the Texas Medical Liability and Insurance Improvement Act when it simply opines that plaintiff “might have had the possibility of a better outcome”, without explaining the causal connection between defendant’s breach and plaintiff’s injury – her death. *Bowie*, 79 S.W.3d at 53. In *Bowie*, plaintiff sustained injuries in a car accident and was taken to Bowie Memorial Hospital for x-rays where a physician’s assistant allegedly misplaced or misread the x-ray and failed to discover a fracture on plaintiff’s foot. *Id.* Plaintiff was referred to an orthopedic surgeon who treated her knee but failed to discover similar injuries to her

months after the filing of Petitioner’s Motion for Sanctions and Dismissal. (C.R. Vol. 1 of 1, p. 38-47). Accordingly, the live petition relevant to the Defendant’s motion for sanctions and dismissal was Plaintiffs’ Original Petition, not Plaintiffs’ First Amended Original Petition.

foot until one month later. *Id.* Plaintiff's expert report stated "if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then Wright would have had the possibility of a better outcome." *Id.* This Court held that "[w]e cannot infer from this statement that [defendant's] alleged breach precluded [plaintiff] from obtaining a quicker diagnosis and treatment." *Id.*

The Amarillo Court of Appeals has similarly held that, to comply with former Article 4590i, Section 13.01, "the expert must do more than merely voice his opinions in the report; instead, he is obligated to inform the defendant of the specific conduct called into question and provide a basis for the trial court to conclude that the claims have merit." *Nelson v. Ryburn*, 223 S.W.3d 453, 455 (Tex.App.–Amarillo 2006, no pet.); *Wells v. Ashmore*, 202 S.W.3d 465 (Tex.App.–Amarillo 2006, no pet.).

In *Nelson*, the Amarillo Court of Appeals also held that expert reports must contain some explanation accompanying the expert's utterances. *Nelson*, 223 S.W.3d at 455. In *Nelson*, the expert report accused the defendant of failing to perform an adequate pre-operative evaluation and further opined that "[a]s a direct result of performing this elective surgical procedure on Mr. Nelson's right eye under general anesthesia, in the absence of a proper pre-operative medical evaluation, Mr. Nelson lost his life." *Id.* at 456. The court held that such a statement was insufficient to explain how the absence of a proper pre-operative medical evaluation caused plaintiff's death, other than because the expert said so. *Id.* The court continued by

noting that the experts should have discussed what the pre-operative evaluation would have uncovered and whether surgery should have been performed. *Id.*

In *Wells*, the plaintiff's expert offered the following statement of causation:

Mr. Ashmore would within a reasonable degree of medical certainty [have] survived had the above mentioned measures been performed upon arrival. However, it is still possible he would have survived had Dr. Wells responded and taken appropriate measures when first paged by nursing staff.

Wells, 202 S.W.3d at 467-68. The Amarillo Court of Appeals found the foregoing statement lacking in information explaining the link between the alleged breaches committed by Dr. Wells and Mr. Ashmore's death. *Id.* at 468.

In the instant case, Respondents' expert report offers no explanation as to how Dr. Jelinek's alleged failure to recognize that the ordered antibiotics were not administered between July 17, 2001 and July 23, 2001⁵ was the proximate cause of Eloisa Casas' "excruciatingly painful death," especially considering the fact that, at all relevant times, Ms. Casas suffered from, and was being treated for, metastatic colon cancer. (C.R. Vol. 1 of 1, p. 22; R.R. Vol. 2, Exhibit 11). Respondents expert report offers no opinions that explain how, based upon reasonable medical probability, had Dr. Jelinek recognized that the antibiotics he ordered were not being administered for seven days, Ms. Casas' hospitalization would have been any different, that she would not be in the same pain, or that she would have ultimately survived.

⁵Dates when he was not even providing coverage at this hospital.

Instead, Dr. Daller's report merely provides a conclusory statement that Drs. Jelinek's and Garcia's breaches of the standard of care represent negligence and, within reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering. (R.R. Vol. 2, Exhibit 11). Dr. Daller's report does not even address the complained of injury – Ms. Casas' death. (*Id.*) Rather, Dr. Daller conjures up a new injury – prolonged hospital course and *increased* pain and *suffering* – still without providing any link whatsoever even to such new injury. (*Id.*) Case law is quite clear that the causal connection must be established between the alleged breach in the standard of care and *Plaintiff's pleaded cause of action* not the expert's claimed injuries. See *Windsor*, 121 S.W.3d at 48 (emphasis added).

In *Raines*, the Waco Court of Appeals specifically reviewed the four corners of the plaintiffs' pleadings to determine whether the four corners of the expert's report addressed a causal relationship between the alleged deviations from the standard of care and Plaintiff's complained-of injuries. *Raines v. Stephens*, 2005 WL 428478 (Tex.App.–Waco February 23, 2005, no pet. hist.). In doing so, the Waco Court of Appeals held that the expert's causation conclusions did not provide any information linking the defendant's alleged breach to the plaintiff's injuries. *Id.* Thus, the report could not be considered a good faith effort to meet the expert report requirements. *Id.*

Like the plaintiffs' reports provided in *Bowie*, *Wells*, *Ryburn*, and *Raines*, Respondents failed to timely produce an expert report which in good faith sets forth

opinions explaining the causal connection between Dr Jelinek's alleged breach and Ms. Casas' death. "There cannot be an analytical gap between the breach of care and the ultimate harm." *Regent Health Care Ctr. of El Paso v. Wallace*, 271 S.W.3d 434, 441 (Tex.App.–El Paso 2008, no pet. hist.). Furthermore, as noted by several courts of appeal, "[w]here a report totally omits one of the three required elements, **the trial court has ministerial duty to dismiss the lawsuit with prejudice and has no discretion to do otherwise.** *In re Collom & Carney*, 62 S.W.3d 924, 928 (Tex. App.–Texarkana 2001, orig. proceeding); *In re Tenet Hosp. Ltd.*, 116 S.W.3d 821, 827 (Tex.App.–El Paso 2003, orig. proceeding). Consequently, Petitioner was entitled to dismissal of Plaintiff's claims pursuant to Section 13.01 of the Texas Medical Liability and Insurance Improvement Act.

b. In Addition to Failing to Address Plaintiffs' Complained-of Injury, Dr. Daller's Statements Regarding Causation are Conclusory.

Even if this Court focuses on the injury articulated in Dr. Daller's report, "prolonged hospital course and increased pain," instead of Plaintiffs' pled injury, as required by the statute, Dr. Daller still provides absolutely no causal link between Dr. Jelinek's alleged failure to recognize that antibiotics were not being administered and the "prolonged hospital course and increased pain and suffering" noted in Dr. Daller's report. (R.R. Vol. 2, Exhibit 11). There is no question that an expert report need not marshal all the plaintiff's proof as if litigating the case on the merits. See *Palacios*, 46 S.W.3d at 878. However, "[m]ere reference to general concepts

regarding assessment, monitoring, and interventions are insufficient as a matter of law.” *Wallace*, 271 S.W.3d at 441.

The San Antonio Court of Appeals recently reviewed a report strikingly similar to Dr. Daller’s report (but actually more detailed) and held that such conclusory language is insufficient to meet the strict statutory requirements. *Jones v. King*, 255 S.W.3d 156 (Tex.App.–San Antonio 2008, pet. denied). In *Jones*, the plaintiff’s expert report stated that:

(1) the morphine pump should never have been placed and its placement proximately caused all of the injuries and damages alleged by King, (2) the failure to timely detect the meningitis and treat it for more than forty-eight hours caused it to become worse and resulted in numerous additional complications and injuries including decreased vision, diabetes insipidus, and pain, and (3) the failure to turn off the morphine pump when the catheter was removed caused diabetes insipidus.

Id. at 157. The court characterized such statements as being “little more than a series of repetitious conclusory statements.” *Id.* The court also noted that “a close reading of the relevant portions of the report confirms Powell’s failure to link any delay in diagnosis to any additional pain and suffering or exacerbation of the meningitis that [sic] what would have occurred in the face of an earlier diagnosis.” *Id.* at 158.

In its determination, the San Antonio Court of Appeals opined that the expert report “failed to provide any baseline from which the trial court could conclude the delay **caused** the results.” *Id.* The court noted that the report failed to contain an explanation of what facts led to such a conclusion and was silent as to the normal

or expected course of meningitis; whether the disease becomes more difficult to treat if there is a delay; and whether the disease becomes more virulent without treatment. *Id.* Relying on *Bowie*, the San Antonio Court of Appeals ultimately held that the plaintiffs' report did not even attempt to explain how prolonged hospitalization would not have occurred if the diagnosis had occurred earlier. *Id.* Thus, reversal was required. *Id.*

The Beaumont Court of Appeals recently issued a similar opinion. See *Craig v. Dearbonne*, 259 S.W.3d 308 (Tex.App.–Beaumont 2008, no pet. hist.). In *Dearbonne*, the plaintiffs' "petition alleged that the appellants' negligence was a proximate cause of the injuries and damages suffered by Betty Dearbonne and her resulting death." *Id.* at 310. The plaintiffs' expert report stated, in pertinent part:

Dr. Craig's failure to see her on 01/26 to examine her and document the examination is below the standard of care. The harm/injury that resulted from the failure to examine her daily is that it resulted in the failure to diagnose/recognize the worsening of Mrs. Dearbonne's pneumonia/congestive heart failure. If Mrs. Dearbonne had been properly examined and assessed on 01/26/05, 01/27/05, and on 01/28/05 by Dr. Craig, her worsening congestive heart failure/pneumonia would have been recognized. Had this been done, Mrs. Dearbonne could have been effectively treated on 01/26/05, 01/27/05, and 01/28/05. Cardiac and pulmonary consultation should have been obtained to evaluate Mrs. Dearbonne, [but] this was not done. Mrs. Dearbonne obviously developed congestive heart failure between 01/25/05 and 01/28/05.

If proper assessment and treatment had been performed by Dr. Craig on 01/26, 01/27, or 01/28 then more likely than not, Mrs. Dearbonne could have been successfully treated and would not have died when she did.

It is my opinion that Dr. Susan Craig's failures as outlined here proximately cause[d] Mrs. Dearbonne's death. Had it not been for these failures, Mrs. Dearbonne would not have died when she did.

It is my opinion that the most likely sequence of events in this case based on reasonable medical probability is that Mrs. Dearbonne actually died from pneumonia, congestive heart failure, sepsis and adult respiratory distress syndrome.

Id. at 312. Even the Beaumont Court of Appeals (not exactly known for its conservative opinions) found such statement to be conclusory, as the quoted statements were not linked to the facts and failed to explain "precisely how Craig's alleged negligence caused Betty's death." *Id.* at 313. Undoubtedly, the report in *Dearbonne* is **substantially** more detailed than the report at issue in the instant case. However, in construing the statutory requirements, the Beaumont Court of Appeals could reach only one conclusion – that such report, was not a good faith report.⁶

The Eastland Court of Appeals recently considered a report, with significantly more detail than the Casas' expert's report, to be conclusory as to causation. *Dews v. Palo Pinto Nursing Center*, 2009 WL 1636019 (Tex.App.–Eastland June 11, 2009, no pet. hist.). In *Dews*, the expert opined that:

If the above standards of care had been met by Dr. David Ramsey, Dr. Alice Ramsey and Dr. Hisel, the severity of Ms. Dews' bleeding ulcer, as well as the cause and specific source of the bleed, would, in reasonable medical probability, have been diagnosed. If the severity of the bleeding ulcer and cause and specific source of the bleed had

⁶ It should be noted that neither the *Dearbonne* court nor the *Jones* court affirmed trial court dismissals, but instead both appellate courts found that the trial courts abused their discretion in not dismissing the cases; and the opinions reversed the trial courts' denials.

been determined, the bleed, in reasonable medical probability, would have been slowed or stopped by surgery or medication. Death can, and often does, occur quickly after the onset of a bleeding ulcer due to excessive blood loss and related complications. If the bleed had been slowed or stopped before Ms. Dews' discharge from Palo Pinto General Hospital on June 24, 2004, Ms. Dews' death, in reasonable medical probability, would have been prevented. Additionally, bleeding ulcers are painful. If the bleed had been slowed or stopped before Ms. Dews' discharge from Palo Pinto General Hospital on June 24, 2004, in reasonable medical probability, Ms. Dews would not have suffered severe pain due to the bleed.

It is my opinion that the above described failure of David B. Ramsey, M.D.; Alice L. Ramsey, M.D. and Patrick W. Hisel, M.D. to meet the reasonable, prudent and accepted standards of medical care for a family practice physician in the diagnosis, care and treatment of Ms. Dews was a probable cause of Ms. Dews' injuries, harm and death for the reasons described above.

Id. The Eastland Court of Appeals held that the report did not "describe how [the expert] reached his conclusion that the bleeding was severe or how the severity of the bleeding caused [the patient's] death." *Id.*

Contrast such report with the report in the instant case, in which Dr. Daller opines that:

The standard of care when managing a patient requires vigilance towards the treatments the patient is receiving and confirming that orders specified in the physician order sheets are carried out. Both Dr. Carlos Garcia and Dr. Michael Jelinek by their failure to recognize that the antibiotics were not being administered as ordered committed a breach in the standard of care. This breach in the standard of care represents negligence and, within reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering being experienced by Ms. Casas.

(R.R. Vol. 2, Exhibit 11). Somehow, the Thirteenth Court of Appeals considered these statements as sufficient. However, these statements are the very epitome of

conclusory, as Dr. Daller fails to link his conclusion to any facts and, most importantly, to the injury or damages of which the Plaintiffs complain – the wrongful death of Ms. Casas.

As was the case in *Jones*, nowhere in Dr. Daller's report does he note the expected course of Mrs. Casas' cancer and/or infection, with or without the antibiotic treatment. (R.R. Vol. 2, Exhibit 11). Also lacking from Dr. Daller's report is an explanation as to what facts led to his conclusion that Mrs. Casas suffered a prolonged hospitalization and increased pain and suffering. Dr. Daller does not even attempt to explain how Petitioner's alleged failure to recognize that antibiotics were not being administered affected Mrs. Casas' treatment or condition, nor does Dr. Daller's report explain what effect, if any, the antibiotics even had on Ms. Casas. Without any of this information, Dr. Daller is stating nothing more than conclusions, without *any* factual basis or analysis.

The conclusory reports described in *Dews*, *Dearbonne* and *Jones* have language and circumstances very similar to the report presently before this Court, with the important exception that the reports found to be conclusory in those cases actually contained much more detailed information than Dr. Daller's report. However, the Thirteenth Court of Appeals, in its Memorandum Opinion, strayed from the decisions of its sister courts of appeals resulting in confusion as to what constitutes a good faith report as to causation. "An expert report must show causation beyond mere conjecture." *Dews*, 2009 WL 1636019. Additionally, where

a report omits one of the required statutory elements, it cannot be considered a good faith effort. *Dearbonne*, 259 S.W.3d at 311 (*quoting Palacios*, 46 S.W.3d at 878-79).

Plain and simple, the Thirteenth Court of Appeals erred in its Memorandum Opinion. Such error which is of utmost importance to the state's medical negligence jurisprudence and must be reviewed and corrected by this Court.

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

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. (C.R. Vol. 1 of 1, p. 32-37). Such sanctions are clearly recoverable from the "claimant or the claimant's attorney." TEX.REV.CIV.STAT.ANN. Art. 4590i §13.01(e)(replead 2003). Accordingly, should this Court grant Petitioner's Petition for Review and remand this matter for a dismissal with prejudice and a determination of attorney's fees, such remand should include Respondents and their counsel as parties from whom sanctions can be recovered.

D. Conclusions

The language contained within former Article 4590i and the applicable case law are quite clear that conclusory statements are not enough to cross the long-

standing preliminary threshold created by the Legislature to curtail the filing of frivolous lawsuits. However, the Thirteenth Court of Appeals has once again ignored the strict statutory hurdle and this erroneous opinion needs to be corrected, especially in light of the disparity between at least six courts of appeals regarding the former Article 4590i and Section 74.351 expert report requirements.

A trial court must not look beyond the four corners of the report and is not permitted to make inferences in reviewing the report's adequacy. *Palacios*, 46 S.W.3d at 878. Dr. Daller's report requires several inferential leaps to enable a court to conclude that Petitioner's "breach in the standard of care represents negligence and, within reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering being experienced by Ms. Casas." (R.R. Vol. 2, Exhibit 11). It is well-settled that reports which require inferences outside of the four corners of the report are inadequate.

Accordingly, this Court should grant Petitioner's Petition for Review of the Thirteenth Court of Appeals' Memorandum Opinion issued on July 29, 2008; reverse the trial court's denial of Petitioner's motion for sanctions and dismissal; and remand this case for a dismissal with prejudice and a determination of attorney's fees as sanctions against Respondents and their attorney.

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 remand this case with instructions that Respondents' claims against Petitioner be dismissed and that Petitioner recover his attorney's fees and costs from Respondents and their attorney, as mandated by statute; and be granted such other and further relief, at law or in equity, to which he may be justly entitled to receive.

Respectfully submitted,

HOLE & ALVAREZ, L.L.P.
P. O. Box 720547
McAllen, Texas 78504-0547
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

By: _____

I. Cecilia Garza
State Bar I.D. No. 24041627
Ronald G. Hole
State Bar I.D. No. 19834200

PROOF OF SERVICE

I, Cecilia Garza, hereby certify that a true and correct copy of the above Petition for Review has, on this 3rd day of **July 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:

Attorneys for Respondents

Mr. John Mastin
Law Offices of John Mastin
630 Broadway
San Antonio, Texas 78215
CMRRR #7008 0150 0002 7711 8335

Attorneys for Columbia Rio Grande
Regional Healthcare, L.P. d/b/a Rio
Grande Regional Hospital

Mr. Mike A. Hatchell
Ms. Sarah B. Duncan
Ms. Elissa G. Underwood
Locke Liddell & Sapp PLLC
100 Congress Avenue, Suite 300
Austin, Texas 78701
U.S. MAIL-FIRST CLASS

I. Cecilia Garza