IN THE SUPREME COURT OF TEXAS

NO. 08-1066

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 PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 18, 2010

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN and JUSTICE LEHRMANN, dissenting in part.

We must decide whether an expert report gave a "fair summary" of the expert's opinions regarding standard of care, failure to meet the standard, and the link between that failure and the patient's damages. We must consider the expert's opinions "as of the date of the report." TEX. REV. CIV. STAT. art. 4590i § 13.01(r)(6) (repealed 2003). To do so, we must disregard today's holding that, at trial, there was no evidence linking the discontinuation of antibiotics to increased suffering by Casas. The expert report submitted in this case gave fair notice of a meritorious claim—that the doctor failed to ensure that his patient received antibiotics, thereby increasing her pain and suffering. I would affirm the court of appeals' judgment with respect to the doctor.

I. Background

Eloisa Casas, a patient recently diagnosed with colon cancer, was admitted to Rio Grande Hospital for abdominal pain. The cancer had perforated her colon, the contents of which leaked into her abdominal cavity, causing an abscess. After the doctor drained and surgically removed the abscess, he discovered that Casas had an E. coli infection, for which the doctor prescribed two antibiotics. Although those prescriptions were supposed to have been renewed five days later, they lapsed. Casas contends this mistake occurred because the doctor failed to ensure that hospital staff complied with his renewal order. During the four days after the prescriptions expired, Casas's surgical incision began to emit a putrid odor. She developed several infections in addition to E. coli, exacerbating her pain and extending her stay in the hospital. Casas died two months after she was discharged.

Casas's estate sued the Hospital and two of the treating doctors, Dr. Garcia-Cantu and Dr. Jelinek, for negligently causing Mrs. Casas "grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life which she would not have suffered to such degree if properly diagnosed, treated and cared for . . . ." The trial court denied Dr. Jelinek's motion to dismiss the case against him. Nevertheless, the estate nonsuited both doctors more than a year before Casas's claim against the Hospital was tried to a jury. At that trial, the jury found the hospital 90% negligent, and each doctor 5% negligent. The trial court rendered judgment against the hospital, and the court's order non-suiting Dr. Jelinek "with prejudice" merged into that final judgment.

Dr. Jelinek and the hospital appealed the trial court's judgment. The hospital complained that the evidence was legally insufficient to support the verdict. Dr. Jelinek complained that the trial

court improperly denied him attorney's fees, as the expert report was not a good faith effort to comply with statutory requirements. The court of appeals affirmed, 2008 Tex. App. LEXIS 5647, *28-*29, and the appellants below are now petitioners here. I fully join the Court's rendition of judgment for the hospital. I disagree with the Court's holding as to the doctor.

II. Good faith effort; fair summary

Former article 4590i provided that "[a] court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in [the statute]." TEX. REV. CIV. STAT. art. 4590i § 13.01(l). "That definition requires, as to each defendant, a fair summary of the expert's opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (citing TEX. REV. CIV. STAT. art. 4590i § 13.01(r)(6)). Because an expert report is filed long before discovery is complete, we cannot judge it according to what subsequent discovery reveals or how the evidence develops at trial. The question is whether the report fairly summarizes the malpractice elements before the case is tested in a full adversary process. For that reason, "to avoid dismissal, a plaintiff need not present evidence in the report as if it were actually litigating the merits. The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Id*. at 879.

The report must also give the defendant notice of the conduct the plaintiff challenges, and the trial court must have a basis to determine whether the claim has merit. *Id*. The dividing line

between a sufficient and an inadequate report is impossible to draw precisely. We have said, therefore, that the determination must be made in the first instance by the trial court, and review of that decision asks not how an appellate court would have resolved the issue, but instead whether the trial court abused its discretion. *See, e.g.*, *Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex. 2006); *Walker v. Gutierrez*, 111 S.W.3d 56, 63 (Tex. 2003).

III. Dr. Daller's report

Dr. Daller is a physician and an expert on intra-abdominal abscesses and infection. His report states that a doctor treating a patient like Casas must ensure that the antibiotics he prescribes are actually administered. Despite that standard, Dr. Daller states that antibiotics prescribed for Ms. Casas were not administered from July 17 through July 23, even though "[t]here [wa]s no order to discontinue the antibiotic therapy." He concluded that Dr. Jelinek breached the standard of care by his "failure to recognize that the antibiotics were not being administered as ordered." Dr. Daller concludes that "[t]his breach in the standard of care . . . , within reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering . . . ."

IV. Dr. Daller gave a "fair summary" of the required standard of care and how the allegedly inadequate care fell below that standard.

The Court concludes that Dr. Daller's report lacks the detail necessary to conclude that the estate's lawsuit has merit. But the cases it cites as support involve situations in which a hindsight view is entirely appropriate. *Earle v. Ratliff*, for example, is a summary judgment case; it presents the higher evidentiary standard that *Palacios* rejected for expert reports. *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999) ("Summary judgment can be granted on the affidavit of an interested expert

witness, . . . but the affidavit must not be conclusory. . . . [R]ather, the expert must explain the basis of his statements to link his conclusions to the facts."). Similarly, the standard employed in *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817-18 (Tex. 2009), also cited by the Court, is inapplicable here, since it examined an expert report under the "no evidence" standard of review. *See* ___S.W.3d at___.

In *Palacios* we held that an expert report that failed to articulate a standard of care or explain how the defendant hospital breached that standard was not a good faith effort to comply with the statutory requirements. *Palacios*, 46 S.W.3d at 880. The expert in that case blamed the hospital for taking no action to prevent a patient from falling out of his bed, even though the patient "had a habit of trying to undo his restraints." *Id*. at 879-880. The report, as such, was not a fair summary of the evidence because it neglected to articulate what actions the hospital *should* have taken that it did not. *Id*. at 880. Thus, the trial court did not abuse its discretion by dismissing the plaintiff's claim for lack of a good faith effort to summarize the expert's opinions.

Subsequently, in *Bowie Memorial Hospital v. Wright,* we held that the trial court did not abuse its discretion in concluding that an expert report failed to comply with the statute, as the report did not "establish how any act or omission of employees of Bowie Memorial Hospital caused or contributed to [the patient's] injuries." *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51-53 (Tex. 2002) (quoting the expert in that case as speculating, "I do believe that it is reasonable to believe that if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then [the plaintiff] would have had the possibility of a better outcome."). We observed that a report must satisfy *Palacios*'s two-part test. *Id*. at 52. Because the report "lack[ed]

information linking the expert's conclusion (that [the plaintiff] might have had a better outcome) to [the defendant's] alleged breach (that it did not correctly read and act upon the x-rays), the trial court could have reasonably determined that the report was conclusory." *Id*. at 53.

In each of those cases, the trial court could not have evaluated the claim's merit without speculating about actions the defendant could have taken to prevent injury. No such speculation is required here. Dr. Daller states that had the antibiotics been administered from July 17 through July 23, Eloisa Casas would have suffered less. Dr. Daller could have stated that conclusion in greater detail, of course, but "[a] report need not marshal all the plaintiff's proof." *Palacios,* 46 S.W.3d at 878. Daller's report includes his opinions on (1) the applicable standard of care (to maintain vigilance over a patient's treatment), (2) the manner in which the care failed to meet that standard (failing to ensure the treatment he ordered was actually administered), and (3) the causal connection between the failure and the claimed injury (without the antibiotics, the patient's pain and suffering increased and she required additional hospitalization).

A "good faith effort" does not require that the report "meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial"; therefore, an expert report does not fail the good faith effort test merely because it may not later prove legally sufficient to support a judgment. *Id*. at 879. So, here, whether the Casas estate ultimately amassed sufficient proof in an adversarial trial is beside the point; the claim itself was far from frivolous. *See id*. at 878 (noting that "one purpose of the expert-report requirement is to deter frivolous claims"). The law imposes a penalty for filing a frivolous suit. Only by today's decree does it also punish a claimant for failing to win an arguably meritorious case. *Cf. TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d

913, 918 (1991) (holding that "sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the . . . process justifies a presumption that its claims or defenses lack merit.").

I agree with the Court that the Estate failed to prove causation at trial; I disagree that, as to Dr. Jelinek, the expert report was not a good faith attempt to comply with the statute. I respectfully dissent in part from the Court's judgment.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: December 3, 2010