

IN THE SUPREME COURT OF TEXAS

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No. 08-1066
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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
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Argued February 18, 2010

JUSTICE LEHRMANN, dissenting in part.

I fully join Chief Justice Jefferson's dissent. I write separately, however, to highlight the incongruity inherent in the Court's decision to remand the case for an award of attorney's fees and costs under former article 4590i § 13.01(e), given this case's circumstances. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(e) (repealed 2003)¹. The Court presumes that Dr. Michael Jelinek is entitled to attorney's fees because the expert report filed by Eloisa Casas's estate² was, on appeal,

¹ *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, *amending* the Medical Liability and Insurance Improvement Act of Texas, Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2041, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. For ease of reference, I will refer to the relevant provisions as they were identified in article 4590i.

² I refer to the estate, which was represented by Casas's husband and son, as "the Casases."

determined to be insufficient. But, after a pre-trial hearing was held on the defendant's motion to dismiss the lawsuit, the trial court rejected Dr. Jelinek's contention that the report was inadequate; consequently, the Casases had no opportunity to rectify any deficiencies as the statute and our precedent would have allowed.

Section 13.01(e) of article 4590i provided for an order awarding attorney's fees and costs if a health care claimant failed to supply an expert report within the time required under subsection (d)—180 days. But the statute provided several avenues for health care claimants to obtain an extension of the 180-day deadline, including section 13.01(g). That provision required the trial court to grant a thirty-day extension of the statutory deadline if a claimant's failure to provide an expert report was not intentional or the result of conscious indifference. And we have expressly held that "a party who files a timely but inadequate expert report may seek relief under the grace period provisions of section 13.01(g)." *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003). Thus, health care claimants could receive an opportunity to rectify deficiencies in a report if they could show that they did not intentionally, or with conscious indifference, submit an inadequate report.

Here, the Casases never had the chance to request an opportunity to cure any deficiencies in their report because the trial court determined that the report adequately complied with section 13.01(d). In *Gutierrez*, we were guided by our recognition that it would be "perverse" to allow a claimant who filed no report a second chance to comply with the statute's expert report requirement, while "punishing those who attempt to comply with the statute but fail." *Id.* In this case, perversely, the Casases may have been in a better position than they are now if the trial court had found that the report was inadequate; they might have had an opportunity to eliminate any deficiencies.

I agree fully with Chief Justice Jefferson that the report represents a good-faith effort to comply with section 13.01. Even if it did not, however, I would remand the case to allow the Casases an opportunity to show that their failure to present an adequate report was not intentional or the result of conscious indifference. See *City of DeSoto v. White*, 288 S.W.3d 389, 401 (Tex. 2009) (remanding in the interest of justice *sua sponte* to allow police officer “to make an appellate election with full knowledge of his appellate rights and with knowledge of” the guidance provided in Court’s opinion). In my view, the Casases should not be assessed attorney’s fees and costs if they can make the showing section 13.01(g) requires and then submit a report complying with the statute. For these reasons, as well as those expressed by Chief Justice Jefferson, I respectfully dissent in part.

Debra H. Lehrmann
Justice

OPINION DELIVERED: December 3, 2010