IN THE SUPREME COURT OF TEXAS

NO. 04-0575

COLUMBIA MEDICAL CENTER OF LAS COLINAS, INC. D/B/A LAS COLINAS MEDICAL CENTER, PETITIONER,

v.

ATHENA HOGUE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT HOGUE, JR., DECEASED, CHRISTOPHER HOGUE, AND ROBERT HOGUE, III, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued April 12, 2005

JUSTICE GREEN, joined by JUSTICE HECHT, concurring in part and dissenting in part.

I respectfully dissent to the part of the Court's judgment sustaining the gross negligence damages. I join in the remainder of the judgment.

The standard for establishing gross negligence sets a very high bar for claimants to overcome. And it should. Gross negligence equates to outrageous conduct for which severe punishment is justified. And because it is punitive in nature, the evidence of gross negligence must be clear and convincing before punitive damages are recoverable. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a)(3); *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004). This elevated clear

and convincing standard, to have any meaning, must necessarily affect legal sufficiency review. It is not enough to simply conclude, as the Court does, that there is some evidence to support the jury's gross negligence finding without determining whether that evidence is clear and convincing. We have explained this legal sufficiency review at length, recognizing that "a finding that must meet an elevated standard of proof must also meet an elevated standard of review." *Sw. Bell Tel. Co.*, 164 S.W.3d at 622. Even if an appellate court determines that the supporting evidence amounts to more than a scintilla, "the finding is invalid unless the evidence is also clear and convincing." *Id.* at 621.

Although the Court recites the correct standard for gross negligence, ___ S.W.3d at ___, it does not apply that standard but instead uses some lesser standard when evaluating the evidence. *See id.* at ___ (stating that there is "sufficient evidence to support the jury's conclusion"). *But see Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23, 26 (Tex. 1994) (explaining the objective and subjective components of the test for gross negligence and holding that the evidence did not support such a finding); *see Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 171–72 (Tex. 2005) (holding that clear and convincing evidence of gross negligence did not exist); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231, 234 (Tex. 2004) (holding that evidence did not support gross negligence). Gross negligence includes both objective and subjective elements. *Moriel*, 879 S.W.2d at 23. Objectively, when viewed from the actor's perspective, "the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *Id.* The risk or peril analysis "requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Id.* A remote possibility of serious injury or a high probability of minor

injury is not enough. *Qwest Int'l Communs. v. AT&T Corp.*, 167 S.W.3d 324, 327 (Tex. 2005). Subjectively, the actor must have had actual "awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Id.* In this legal sufficiency review, we must consider whether, viewing the evidence in the light most favorable to the verdict, there was clear and convincing evidence that could have led a reasonable juror to form a firm belief or conviction that Columbia Medical was grossly negligent. *See Diamond Shamrock Ref. Co.*, 168 S.W.3d at 170.

With regard to the objective prong of the gross negligence analysis, the record fails to show by clear and convincing evidence that Columbia Medical's failure to contract for "stat" echocardiogram services, or its failure to advise the treating physicians of this limitation, posed an extreme risk of harm to its patients.[1] There is no evidence that, at the time when Columbia Medical was evaluating its need for medical diagnostic services, the hospital recognized that the lack of stat echo services would pose an extreme risk of harm to its patients. *See Moriel*, 879 S.W.2d at 23 ("If somebody has suffered grave injury, it may nevertheless be the case that the behavior which caused it, viewed prospectively and without the benefit of hindsight, created no great danger."). To the contrary, as noted in more detail below, the record shows that although Columbia Medical believed echo services to be important to its mission, it saw the need for echo services as being rare enough so as to make in-house services unnecessary. Instead, the hospital chose to contract for echo services on an as-needed basis. The Hogues do not complain about the hospital's decision to outsource echo

[1] I also believe the record fails to show by clear and convincing evidence that Columbia Medical was grossly negligent for the other grounds claimed by the Hogues, but not addressed by the Court.

services; they asserts only that the hospital's failure to contract for immediate response times for echo services was gross negligence. But, in fact, the echo response time provided by the contractor satisfied the physicians who were responsible for ordering it.

Dr. Schroeder, who was the director of Columbia Medical's intensive care unit (ICU) as well as Hogue's treating ICU pulmonologist, ordered the echo after consulting with Dr. Lawson, a cardiologist. Dr. Schroeder testified that he ordered an echo "now" so that Dr. Lawson could review the results when he arrived at the hospital. Dr. Lawson, who believed "stat" meant "within an hour or two," suggested they "obtain an echo today, this evening, you know, so that we could assess his cardiac status," and that he and Dr. Schroeder "knew it would probably take several hours to get the echo completed." Despite the echo technician having told Hogue's nurse that it would probably take up to two hours for him to get to the hospital, Dr. Schroeder's echo order remained in place, and Hogue's treating physicians chose to wait rather than immediately transfer Hogue to another hospital, which could have been done under the hospital's policies. The echo technician arrived at the hospital about two hours after being paged and completed the study within about twenty minutes. None of Hogue's doctors complained about the delay in obtaining the echo. In fact, Dr. Schroeder testified that Columbia Medical provided the assistance and support he needed to care for Hogue.

Not only were Hogue's doctors satisfied with the availability of the echo services, but nothing in the record indicates that the results would have been available sooner had Columbia Medical pre-arranged for a guaranteed stat echo response time. The record shows that Hogue's echo was performed within the maximum response time available from Cardiovascular On-Call Specialists, Inc., the contractor that provided technicians to Columbia Medical for echo services. Morton

Graham, the president of Cardiovascular On-Call Specialists, testified that they did not offer on-call services, to guarantee a fast response, during the hours in which Hogue's echo was ordered. Although the Court implies that Columbia Medical could have guaranteed stat echo response time during business hours by paying the on-call fee, ___ S.W.3d at ___, the record states otherwise. Graham testified that Cardiovascular On-Call Specialists "did not offer on-call services at that time between the hours of 8:00 in the morning and 5:00 in the afternoon," Monday through Friday. Graham explained that he could not guarantee staffing availability during that time because he could not afford the overhead required to employ someone who was "sitting around waiting in the hope of being called." Because he received the call for Hogue's echo during regular business hours, the on-call fee would not have been applicable. And even if the company had offered on-call services at that time and Columbia Medical had contracted for that guaranteed response time, it is undisputed that the response time for Hogue's study would not have been different because Graham responded within the company's two-hour guarantee window.[2] When asked if, under the terms of the contract with Columbia Medical, he could have done any better than a two-hour guaranteed response time, Graham responded, "No." Graham testified that, from time to time prior to the day of Hogue's echo, he had received requests to perform stat echos, and, as with Hogue's study, he was able to accomplish his goal of responding within two hours. The record contains no evidence of what response times might have been available from other companies offering echo services—except that Cardiovascular On-Call Specialists' two-hour response time was comparable to that of its

[2] The record indicates that Cardiovascular On-Call Specialists, Inc. did charge Columbia Medical an $85 stat fee for Hogue's echo, however.

competitors—and no evidence that Columbia Medical could have contracted for a faster or guaranteed response time.[3] Neither Hogue's doctors nor the hospital staff acted, at the time the events occurred, in any way suggesting that the echo response time created an extreme risk of harm to Hogue.[4] We cannot now, with the benefit of hindsight, draw that conclusion. Because there is no evidence that the response time would have been different had Columbia Medical paid for on-call services or arranged for a guaranteed response time, Columbia Medical's failure to ensure faster stat echo response time does not support a finding of gross negligence.

Even if Columbia Medical's failure to ensure a guaranteed stat echo response time created an extreme risk to Hogue, the record lacks clear and convincing evidence of the subjective prong of the gross negligence analysis: that Columbia Medical was actually aware of the extreme risk and consciously disregarded it. "What separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the

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[3] The Court states that Morton Graham would have been willing to negotiate appropriate terms if Columbia had wanted to guarantee stat echo capabilities, but that Columbia Medical was not interested in doing so. ___ S.W.3d at ___. The record, however, does not reflect this. Graham testified that he would have been interested in talking with the hospital about possibilities to get stat echos in 30 to 45 minutes, and he testified that he would have done everything he could to negotiate "something that made . . . business sense," or he claimed he would have told the hospital if he couldn't accommodate it. But the trial court sustained an objection to a question asking whether it would have been feasible for Cardiovascular On-Call Specialists to provide a quicker guaranteed response time, if there had been discussions with the hospital about doing so. In fact, the trial court refused to allow "a hypothetical about could they have negotiated a different contract with a reduced response time . . . opening up all terms, including, I mean, if you pay somebody a million dollars a year can you get them to do this . . . ."

[4] In fact, Dr. Schroeder testified that, despite Columbia Medical having to call in an outside technician, the risk of transferring Hogue outweighed the potential of getting faster echo results from another hospital. Dr. Schroeder believed that Hogue was not stable to transfer at that point and testified that it was more likely than not that, whether the echo was conducted then or soon after, Hogue would have died anyway. The majority cites Dr. Levitsky's testimony of a ninety percent survival chance if Hogue had been diagnosed and transferred earlier, ___ S.W.3d at ___, but Dr. Levitsky also testified that, even considering the response time, Hogue would likely have survived if he had been transferred within an hour after completion of the echo. It can hardly be said that the response time created an extreme risk of serious injury or death when even the Hogues' expert believed that, immediately following the echo, Hogue's survival chances were quite good.

peril, but his acts or omissions demonstrate he did not care." *Diamond Shamrock Ref. Co.*, 168 S.W.3d at 173 (quoting *Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246–47 (Tex. 1999)). When the hospital was being established, the administration considered whether echo services should be available, and it was agreed that they should. But a market analysis projecting very low need for echocardiograms in the relatively young community the hospital would serve, and the availability of experienced, competent technicians, led Columbia Medical, with the advice of Dr. Overbeck, Chief of Medicine and a representative of the hospital's main cardiology group, to decide to outsource the service. The plaintiffs do not claim that outsourcing the echo procedure was in any way improper.[5] The sole complaint is that the hospital should have assured a stat response time when it was needed. The evidence is inconclusive about what a stat response time is—somewhere between thirty minutes and two hours—and whether Cardiovascular On-Call Specialists or any other echocardiogram contractor could have provided a guaranteed shorter response time if requested. The evidence shows that, until March 9, 1998, Columbia Medical believed its echo contractor, who responded to stat echo orders within two hours, was doing a "great job" and "providing a level of service that was consistent with the needs and expectations of the medical staff," and the physicians were very happy with the service provided. Even assuming that stat echo results should have been available in a much shorter time, the evidence does not establish that Columbia Medical was actually, subjectively aware that its failure to provide such a response time created a likelihood of

[5] Likewise, the Court says that its holding does not require all hospitals to provide all services. ___ S.W.3d at ___. But if it takes fifteen to twenty minutes to conduct an echo, as the record in this case indicates, and if, as the Court suggests, stat echo results should be available within thirty minutes or so, it is hard to imagine how it can be reasonable any longer for a hospital to outsource its echo services.

serious injury to patients but then acted with conscious indifference toward that risk. At most, the evidence shows that Columbia Medical was negligent in not considering the risk or appreciating the danger of failing to arrange for immediate echo services, but the evidence does not establish gross negligence. Scott Montgomery, Columbia Medical's Director of Clinical Outpatient Services who negotiated the contract with Cardiovascular On-Call Specialists, testified that he was concerned about the timeliness with which echocardiograms were going to be done and was focused on making sure the contracted services would meet the needs and expectations of the hospital's physicians. That is a far cry from showing that the hospital knew, but did not care, that by not having immediate echo services, some patients would die.

Because no clear standard exists for a stat echo response time, the next point of contention is that the hospital administrators failed to make it clear to treating physicians that stat echo might not be available at the hospital, and that a patient needing it might have to be transferred to another facility. The Court focuses on expert testimony that hospitals should have guidelines for provision of contracted services, and that hospitals should communicate the limitations on services to its staff. ___ S.W.3d at ___. Although Columbia Medical's hospital administrators admitted they made no effort to inform the medical staff of the echo capabilities and potential response times, the ICU nurse manager at the time Hogue was treated at Columbia Medical testified that she was aware the hospital outsourced its echo services, that she passed that information on to all of the nurses she hired, and that the previously hired nurses "already knew." With no evidence that anything more was done to inform physicians and the medical staff about the hospital's echo capabilities, a reasonable juror could have concluded that Columbia Medical was negligent. But the evidence falls far short of

showing the "black heart" required of the actor to qualify for a gross negligence finding. The hospital administrators responsible for echo services knew the medical staff had been satisfied with the existing arrangement for echo services, and Hogue's treating physicians testified that the hospital provided the services necessary to care for Hogue. As noted, before Hogue's echo was performed, Dr. Schroeder knew that a technician would have to be brought in from off-site and assumed it would take several hours for the echo to be completed. Moreover, the nursing staff knew that a technician likely would not arrive to begin the echo for at least an hour and a half. Under these circumstances, it is not reasonable to conclude that Columbia Medical's failure to communicate to its staff that echo services were outsourced, or that stat echos were not available, exhibited conscious indifference to an extreme risk.

The Court focuses on evidence regarding appropriate stat echo response time, concluding that Columbia Medical breached the standard of care by not ensuring a shorter response time. ___ S.W.3d at ___. But the evidence is uncontroverted that no federal or state law or rule governs stat echo response times; that no published medical guidelines apply to stat echo response times; that Cardiovascular On-Call Specialists did not offer a guaranteed response time when Hogue's study was ordered; that even if Cardiovascular On-Call Specialists had offered a guaranteed response time and Columbia Medical had paid for that service, the response time for Hogue's study would not have been different; and that the medical staff at Columbia Medical had been satisfied with the echo services provided under the contract with Cardiovascular On-Call Specialists. In addition, there is no evidence that Columbia Medical could have obtained a contract from another company that would ensure a faster response time; in fact, the evidence shows that Cardiovascular On-Call Specialists'

two-hour stat echo response time was consistent with what competitors provided. On appellate review, we do not disregard undisputed evidence that does not support the jury's finding because doing so could skew the analysis of whether there is clear and convincing evidence. *Diamond Shamrock Ref. Co.*, 168 S.W.3d at 170 (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). In this case, the record fails to show the required clear and convincing evidence of a state of mind so indifferent to peril as to elevate the hospital's conduct from negligence to gross negligence.

Viewing the record in the light most favorable to the Hogues, reasonable jurors could have concluded that Columbia Medical acted with negligence, but not gross negligence. Without clear and convincing evidence to support the necessary gross negligence elements, the jury's finding must be set aside. *See Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641–42 (Tex. 1995). Because the Court fails to do so, I dissent.

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PAUL W. GREEN
JUSTICE

OPINION DELIVERED: August 29, 2008