SUPREME COURT OF TEXAS

Gilbert H. Olveda and Brendalee Olveda-North, Individually and as Representatives of the Estate of Frieda Hernandez, Deceased v. Rene A. Sepulveda, M.D.

Olveda · No. No. 04-0707 · Decided March 3, 2006

SUMMARY

Justice Harriet O’Neill dissented from the Texas Supreme Court’s denial of review in a medical-liability case involving claims arising from the death of Frieda Hernandez and her unborn child. The dissent concludes that the expert report was sufficient to support the survivorship claim under former Article 4590i, although it did not establish a causal connection between the alleged negligence and Hernandez’s death for the wrongful-death claim.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Justice Harriet O'Neill
JURISDICTION	Texas
DECIDED	March 3, 2006
DOCKET	No. 04-0707
DISPOSITION	cert_denied
PROCEDURAL POSTURE	The plaintiffs petitioned the Supreme Court of Texas for review after the trial court dismissed their survivorship and wrongful-death claims against Dr. Sepulveda and the court of appeals affirmed. The Supreme Court denied the petition for review; Justice O'Neill dissented from that denial.
STANDARD OF REVIEW	Whether the expert report satisfied the qualification and good-faith requirements of former Article 4590i was reviewed in the context of the statutory dismissal procedure; the dissent applied the statutory requirements to the report.
PRECEDENTIAL VALUE	Nonprecedential dissenting opinion; the Supreme Court denied the petition for review.
PARTIES	Gilbert H. Olveda, Brendalee Olveda-North, individually and as representatives of the Estate of Frieda Hernandez, Deceased v. Rene A.

Sepulveda, M.D.

TOPICS

medical malpractice | expert testimony | health law | writ of certiorari | appellate procedure

PRACTICE AREAS

health law | medical malpractice | torts | evidence | civil procedure | appellate procedure

QUESTIONS PRESENTED

1. Whether Dr. Suresh, an obstetric anesthesiologist, was qualified under former Article 4590i and Texas Rule of Evidence 702 to provide an expert opinion concerning the standard of care applicable to Dr. Sepulveda.
2. Whether Dr. Suresh's expert report constituted a good-faith effort under former Article 4590i by identifying the alleged breach and a causal relationship sufficient to support the survivorship claim.
3. Whether the expert report established a causal connection between Dr. Sepulveda's conduct and Hernandez's death for purposes of the wrongful-death claim.

HOLDINGS

1. The dissent concluded that Dr. Suresh was qualified because her report addressed general standards applicable to all physicians and surgeons performing a procedure on a patient in the third trimester, rather than standards particular to urology.
2. The dissent concluded that the report satisfied former Article 4590i as to the survivorship claim because it identified the failure to monitor uterine contractions and fetal heart rate and stated that the failure resulted in the baby's death.
3. The dissent agreed that the report failed to establish a causal connection between Dr. Sepulveda's conduct and Hernandez's death from preeclampsia and HELLP Syndrome.

KEY QUOTATIONS

> *"An expert report "need not marshal all the plaintiff's proof," but must represent "a good-faith effort to comply with the statutory definition of an expert report" in the MLIIA."*

> *"A good-faith effort must (1) inform the defendant of the specific conduct called into question, and (2) provide a basis for the trial court to conclude that the claims have merit."*

> *"She was therefore properly qualified as an expert in this case."*

FACTUAL BACKGROUND

Frieda Hernandez was seven-and-a-half months pregnant and presented to St. Luke's Hospital with severe abdominal pain. During hospitalization, Dr. Kuhl, assisted by Dr. Sepulveda and Dr. Ramirez, performed a cystoscopy without electronic fetal monitoring; Hernandez's baby died during the procedure. Hernandez later

suffered cardiac arrest and died three days later from multiple organ failure caused by preeclampsia and HELLP Syndrome.

PROCEDURAL HISTORY

The trial court dismissed the claims against Dr. Sepulveda under former Article 4590i after concluding that the plaintiffs' expert report was deficient and severed the claims. The court of appeals affirmed, holding that the anesthesiologist who prepared the report was not qualified to testify regarding the standard of care applicable to a urologist and that the report failed to establish causation. The plaintiffs sought review in the Supreme Court of Texas, which denied the petition; Justice O'Neill would have granted review and concluded that the report was sufficient to support the survivorship claim.

DISPOSITION

cert_denied

CASES CITED

- Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996)
- Hart v. Van Zandt, 399 S.W.2d 791, 797 (Tex. 1965)
- Roberts v. Williamson, 111 S.W.3d 113, 120-21 (Tex. 2003)
- Reed v. Granbury Hosp. Corp., 117 S.W.3d 404, 409 (Tex. App.—Fort Worth 2003, no pet.)
- Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972)
- Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002)
- Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001)

OPINION

PER CURIAM.

Footnotes in HTML versions of opinions are designated by boxes (click on the box to see the footnote text) and are not numbered. For an exact copy of the opinion, retrieve the Adobe PDF version. IN THE SUPREME COURT OF TEXAS ═══════════ No. 04-0707 ═══════════ Gilbert H. Olveda and Brendalee Olveda-North, Individually and as Representatives of the Estate of Frieda Hernandez, Deceased, Petitioners, v. Rene A. Sepulveda, M.D., Respondent ═══════════ On Petition for Review from the Court of Appeals for the Fourth District of Texas ═══════════

Justice O’Neill, dissenting.

The court of appeals held that the expert report filed in this case was insufficient to allow the plaintiffs’ survivorship and wrongful-death claims to proceed under former Article 4590i, the

Texas Medical Liability and Insurance Improvement Act ("MLIIA"). 141 S.W.3d 679.

Because I believe the report was sufficient to support the survivorship claim, I dissent from the Court's denial of the plaintiffs' petition for review. Frieda Hernandez was seven-and-a-half months pregnant and complaining of severe abdominal pain when she checked in to St. Luke's Hospital. Dr. Kuhl, an obstetrician, Dr. Sepulveda, a urologist, and Dr. Ramirez, an anesthesiologist, treated her during her hospitalization.

Kuhl, assisted by Sepulveda and Ramirez, performed a cystoscopy (placement of a ureteral stent to relieve kidney obstruction) without electronic fetal monitoring. Hernandez's baby died during the procedure and was later delivered by caesarian section. Shortly thereafter, Hernandez suffered a cardiac arrest, and died three days later from multiple organ failure caused by preeclampsia and HELLP Syndrome.

The Olvedas, Hernandez's children, sued the health-care providers for survivorship and wrongful-death damages, alleging that had the doctors complied with the standard of care, they would have diagnosed and treated Hernandez's condition in time to save her and her baby.

The Olvedas filed an expert report prepared by Dr. Suresh, an obstetric anesthesiologist, which addressed Sepulveda's alleged negligence. Sepulveda filed a motion to dismiss, arguing that Dr. Suresh was not a qualified expert under former Article 4590i.

The trial court dismissed the claims against Sepulveda and granted his motion to sever. A divided court of appeals affirmed, holding that Dr. Suresh, an anesthesiologist, was not qualified to testify about the standard of care applicable to urologists, and that in any event the expert report failed to establish a causal relation between the alleged breach of the standard of care and the injury.

141 S.W.3d at 683. The Olvedas petitioned this Court for review. Section 13.01 of former article 4590i requires plaintiffs in suits involving health-care-liability claims to submit an expert report. Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 13.01, 1995 Tex. Gen. Laws 985, 986 (former Tex. Rev. Civ. Stat. art. 4590i, § 13.01), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen.

Laws 847, 884. Rule 702 of the Texas Rules of Evidence requires that an expert be qualified "by knowledge, skill, experience, training, or education" regarding the issue. Tex. R. Evid. 702. The MLIIA requires an expert who: (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose; (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

Act of May 5, 1995, 77th Leg., R.S., ch. 140, § 14.01(a), 1995 Tex. Gen. Laws 985, 988 (repealed 2003). We held in Broders v. Heise, that "an expert of a different school [may] testify so long as the 'subject of inquiry is common to and equally recognized and developed' in both fields." 924 S.W.2d 148, 152 (Tex. 1996) (quoting Hart v. Van Zandt, 399 S.W.2d 791, 797 (Tex.

1965)); see also Roberts v. Williamson, 111 S.W.3d 113, 120-21 (Tex. 2003) (reiterating that an expert demonstrate "knowledge, skill, experience, training, or education" to testify regarding the specific issue before the court).

In the medical context, "[t]here are certain standards universally regarded as ordinary medical standards beneath which no common or community standards may fall." Reed v. Granbury Hosp. Corp., 117 S.W.3d 404, 409 (Tex. App.—Ft. Worth 2003, no pet.) (citing Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972)). These standards apply across multiple schools of practice and to any physician.

Id. Dr. Suresh is a board-certified anesthesiologist. She has been in practice for thirty-five years as an obstetric anesthesiologist, has won awards for her obstetrical research, and holds tenured professorships at Baylor and the University of Texas Medical Schools. Dr. Suresh's report states in part: On reviewing the records, there was no evidence of documentation of history and physical examination, assessment or plan of action by Dr. Sepulveda.

A reasonable expectation of any physician/surgeon who is planning a nonobstetric operative procedure on a parturient in the third trimester is to evaluate, assess and document a history, physical examination, and rationalize the plan of action. Further it is the responsibility of all physicians involved in the intraoperative care of the parturient to ensure both maternal and fetal well being during the entire intraoperative procedure.

Dr. Suresh did not address the standard of care particularly applicable to Dr. Sepulveda's specialty, urology; rather, she addressed the general standard of care applicable to all physicians and surgeons performing a procedure on a patient in the third trimester of pregnancy. She was therefore properly qualified as an expert in this case. Dr. Suresh's report also met the MLIIA's requirement that the report set forth "the manner in which the care... failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 13.01(r)(6), 1995 Tex. Gen.

Laws 985, 986 (repealed 2003). An expert report "need not marshal all the plaintiff's proof," but must represent "a good-faith effort to comply with the statutory definition of an expert report" in the MLIIA. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002) (citations omitted). A good-faith effort must (1) inform the defendant of the specific conduct called into question, and (2) provide a basis for the trial court to conclude that the claims have merit.

Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001). The expert report provided in part: In a parturient patient who is in the third trimester, having contractions q 3-5 minutes with fetal decelerations, the standard of care would have been to monitor uterine contractions and have continuous recording of [the fetal heart rate] by a qualified individual during the perianesthetic and perioperative period and to have arrangements for a stat ceserian section if the need arose.

[I]t is the responsibility of all physicians involved in the intraoperative care of the parturient to ensure both maternal and fetal well being during the entire intraoperative procedure. Further failure on the part of Dr. Kuhl, Dr. Ramirez, and Dr. Sepulveda to appropriately monitor the uterine contractions and the [fetal heart rate] resulted in adverse fetal outcome.

Although this report establishes no causal connection between Sepulveda's conduct and Hernandez's death from preeclampsia and HELLP Syndrome, it is not similarly deficient with respect to the survival action. The expert's report identifies how Sepulveda's conduct failed to meet the applicable standard of care and purports to connect that conduct to the baby's death, stating that Dr. Sepulveda's failure to monitor uterine contractions and the fetal heart rate resulted in the baby's death.

I would conclude that the report was sufficient under the MLIIA to support the survival action, and accordingly dissent from the Court's denial of the plaintiffs' petition. _____ Harriet O'Neill Justice OPINION DELIVERED: March 3, 2006