Westlaw. For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Robert LOW, D.O. and Stephen Smith, M.D., Petitioners,
v.
Thomas J. HENRY and the Law Offices of Thomas J. Henry, Respondents.
No. 04-0452.

February 15, 2005

Appearances:
Carlos A. Villarreal, (argued), Hermansen, McKibben, Woolsey & Villarreal, Corpus Christi, TX, for petitioners.
Paul D. Andrews, (argued), The Law Offices of Thomas J. Henry, Corpus Christi, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

CONTENTS

ORAL ARGUMENT OF CARLOS A. VILLAREAL ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF PAUL D. ANDREWS ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF CARLOS A. VILLAREAL ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Thank you. Be seated please. The Court is ready to hear argument in 04-0452, Robert Low, D.O. and Steven Smith, M.D. v. Thomas J. Henry and the Law Offices of Thomas J. Henry.

SPEAKER: May it please the Court. Mr. Carlos A. Villarreal will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CARLOS A. VILLAREAL ON BEHALF OF THE PETITIONER

MR. VILLARREAL: May it please the Court. My name is Carlos Villarreal, I, along with Bob Seerden, represent Dr. Low and Dr. Smith, the petitioners in this case who were defendants in the case below, and we were moving on the motion for sanctions that is the subject to this appeal. The principal legal issue which this Court has asked to address in this case is whether Texas Rule of Civil Procedure 48, the alternative pleadings rule prompts or makes -- renders meaningless Chapter 10 of the Civil Practice and Remedies Code which is the penalty provision dealing with the respondents. Our contention, your Honors, is that the court of appeals erred in concluding that the trial judge, Judge Yeager, abused his discretion in entering the sanctions order against Mr. Henry and that the conclusion of the alternative pleading

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

for response Chapter 10 of the Civil Practice and Remedies Code is erroneous for various reasons.

First, we ask the Court to look at the legislative history regarding Chapter 10 and for that matter expressed that we're dealing with sanctioning of attorneys from previous lawsuits. Our brief takes the Court through the history, the development of this remedy case law. Going back to 1975 when the legislature first passed a statute of limitations provision pertaining to doctors and appointed the Keeton Commission -- created the Keeton Commission which then studied the issue of the medical malpractice insurance liability process and came back in 1977 and promulgated 4590i. Of relevant note is that the Keeton Commission did not recommend the creation of a sanction provision -- bad faith provision within 4590i. But in 1977, the legislature nevertheless promulgated Subchapter H to 4590i in which they would have allowed for cause of action where a bad faith filing had occurred. That provision never came into effect because the bar certified to the court, the court certified to the legislature. And in fact there were adequate remedies for dealing with frivolous filings specifically the Code of Professional Conduct Section 17.102 I think it worked. But the -- so that sort of strike one in 1977 legislature acts passes the statute and says you got to remedy with this bad faith filing but it never goes into effect. Doctors of course dealing with this issue having to pay ever more higher premiums find themselves suing attorneys and their former patient in malicious prosecution --

JUSTICE BRISTER: So what do you do? The patients come, the last day of the two-year period.

MR. VILLARREAL: Yes, your Honor.

JUSTICE BRISTER: And they say, will you file my case? You just tell him no. And they say if you don't then I'm not gonna get the case filed because of what you're refusing to do. The correct answer is that just people can't do that.

MR. VILLARREAL: I think that's actually correct, your Honor. That the line is shorter but, Judge Brister, that the first point that I should make in responding to that question is that's not a fact situation. The findings and the evidence support the notion that Mr. Henry had this case for four months before he ultimately filed the petition. And furthermore, the record shows that even though he had it for four months, when he ultimately filed the lawsuit on January 31, 2002 or January 30th, he filed a boilerplate petition that he had filed about eight months earlier in May of 2001 in the Brauer case, word for word identical except for substituting names of the parties and not putting in the facts that were pertinent to this case.

No mention of stroke which is what is uncontroversially what this man died of -- Mr. White died of and therefore limiting its allegations to the harm -- the alleged harm that Propulsid caused to the patient. And so that is the critical distinction here. I think an attorney is under an obligation under Chapter 10 to say to that client that comes in two days before limitations, you have two years and 75 day in 4590i and now it's Chapter 74 of the Civil Practice and Remedies Code to file your action. What do you do with coming to me two days before limitations were on? I can't represent you. You're not obligated indeed. It's in -- I won't get into the test that you've been talking about that you're not obligated to take every client that comes in. And it is indeed an improper purpose to file that action to avoid a malpractice cause of action which is under subparagraph 1 of 10.001, an alternative basis for sanctions, the filing of an improper -- the filing for an improper purpose as opposed to filing a factually

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

groundless case which is prohibited under subparagraph 3 of 10.001.

So then we go through the legislative history in 1987. We then have additional tort reform. We have Chapter 9 as promulgated and what happens there after the legislature passes Chapter 9 that says if you file a groundless pleading that's also in bad faith or for improper purpose, there's gonna be sanctions issued, that's the basis for sanctions. What is -- what does this Court use? The court promulgates the 1987 Rule 13 which basically has similar provisions. It's just they can be said to be a little bit broader because it applies to all pleadings not jus -- it should be applied to all motions and all documents in the case as opposed to merely pleadings which Chapter 9 applied to. If like Chapter 9 had a safe harbor provision that if you withdraw it and it had some others [inaudible]. The point is, when you promulgated 1987, you said at least in support has accomplished with this Chapter 9 as appealable.

Now in 1990, when you all amended it to take out the safe harbor provision, you don't put any language about appealing it. Fast forward to 1995, the legislature passed its Chapter 10. What's the legislature doing? A steady progression of more strange -- more strict standards that insist upon accountability in the following lawsuits. Chapter 10 requires an objective standard. No longer is bad faith going to be a sin. No longer are we gonna require under this objective intent of the attorney of a pleading that is merely groundless regardless of the motivation is sufficient to pose sanctions under Chapter 10 -- significant change there.

Chapter 10 also eliminates the good faith presumption. There is no presumption of good faith filing under Chapter 10 unlike Rule 13. There is no safe harbor provision in Chapter 10. So again, it's a more stringent standard and more strict standard that the legislature is passing. Not allowing the attorney to withdraw the offending motion or pleading. It requires that there be a factual basis of the attorney in signing his plea, certifies to the court that there will be a factual basis for his lawsuit and that there'll be a basis for each contention. There is a --

JUSTICE WAINWRIGHT: Were there any under Chapter 10, whether any specially identified allegation or actual contentions?

MR. VILLARREAL: Well, there is --

JUSTICE WAINWRIGHT: I mean --

MR. VILLARREAL: I'm sorry, could you ask the question again, your Honor?

JUSTICE WAINWRIGHT: Under Chapter 10.001, I think number 3, were there any specially identified allegations or factual contentions?

MR. VILLARREAL: Yes, your Honor. There were a number of specially identified factual contentions in this petition.

JUSTICE WAINWRIGHT: Well, in this provision, it distinguishes allegations and factual contentions from specially -- appears to distinguish them from specially identified allegations that may be likely to have evidentiary support after a reasonable opportunity for further investigation.

MR. VILLARREAL: Yes, your Honor.

JUSTICE WAINWRIGHT: Do you read that distinction in that provision?

MR. VILLARREAL: I think the more likely to have evidentiary support is that complies to both general and specific, your Honor. I don't read with the Court as reading it exactly but -- so I don't make that distinction. But I think regardless, we know that under Paragraph 5 of the petition which is the only paragraph that deals with the facts

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

in the case which the court of appeals chose to ignore for its own reasons. But under that second paragraph in the facts sections, which is dedicated to physicians, Mr. Henry specifically pleads that these doctors provided and prescribed Propulsid to Mr. White. Indeed, the entirety of that paragraph, and I'd be glad to read it to the Court. It's not that lengthy but it is a bit tedious to read, but the entirety of that paragraph talks about during the course of treatment with Propulsid. Everything about that 18-page petition dealt with Propulsid and the harm it could cause and the alleged complications, cardiac complications that Propulsid was supposedly causing. So the --

JUSTICE WAINWRIGHT: Let me ask you again about this language. So you believe that they're likely to have evidentiary support after a reasonable opportunity for further discovery applies to general allegations as well as specially identified allegations and contentions?

MR. VILLARREAL: That's the way I've read it, your Honor.

JUSTICE WAINWRIGHT: Does that mean you can file and research later?

MR. VILLARREAL: No, your Honor.

JUSTICE WAINWRIGHT: Or investigate later? What does that mean?

MR. VILLARREAL: I think you have to have a reasonable basis. According the language before that, if we go up to the language before that, you're really looking at Paragraph 3. If you look at the language before that, the statute talks in terms of to the signatory's best knowledge, information, and belief formed after reasonable inquiry. So the very beginning of the provision requires reasonable inquiry. If you don't have the reasonable inquiry, you don't have -- you can't rely on the fact that there may be further discovery that will indeed provide facts and support --

JUSTICE WAINWRIGHT: So --

MR. VILLARREAL: -- but indeed the problem with this, your Honor --

JUSTICE WAINWRIGHT: Let me make sure I understand it, your view of the law before you apply it to the facts. So the reasonable inquiry that the lawyer is required to undertake would lead to a determination that he or she is likely to have evidentiary support.

MR. VILLARREAL: That's correct.

JUSTICE WAINWRIGHT: That's the [inaudible] --

MR. VILLARREAL: Or the allegation --

JUSTICE WAINWRIGHT: -- that's the easier prong to satisfy.

MR. VILLARREAL: For the allegation made, yes, your Honor.

JUSTICE WAINWRIGHT: Okay.

MR. VILLARREAL: And the allegations made here don't relate at all to the treatment that was given by these physicians. It is absolutely uncontroversial. The only treatment given by these physicians came two weeks after Mr. White stopped using Propulsid. And so the only treatment that these physicians gave pertained to treatment for a stroke. Stroke which was nowhere mentioned in the petition. None of the allegations relate to treatment for stroke. And this is why Mr. Henry on a motion for new trial hearing admitted that 15 and four-fifths of his 16 allegations, 16 specific medical malpractice allegations did not pertain to these doctors. And the only thing that he would attribute to it is what he calls one-fifth of the final allegations, 16 allegations was general, well, they failed to monitor.

He also admitted that 16 allegations didn't pertain to three other doctors. So I think that even if we're looking at the specific criteria that the court is asking us to look at, Justice Wainwright, it doesn't get you to no sanctions in this case because the allegations that were

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

made did not pertain to the treatment that was given and he admitted that much. I did not say that in my brief into this Court but looking at in preparation of this argument, it was very interesting that he admitted that the contentions that he did have about negligence during the treatment for the stroke he didn't make. That's a very critical admission that he never make.

JUSTICE MEDINA: What should an attorney rely upon when he's filing? Here she is filing and pleading for her client other than the statements of your client so --

MR. VILLARREAL: While there's case law saying you can't just rely on the sake of your client. But I think these statements require support, your Honor. I think also in the medical record -- in medical malpractice case, there -- there are unique criteria with regard to expert testimony so you need to get expert testimony. You get expert consultation whether that be a nurse in your office or whether that be a doctor that actually released the medical records. There's also --

JUSTICE MEDINA: Thomas Henry didn't do any of this?

MR. VILLARREAL: Well, there's no evidence in the sanctions here that he did that. The motion for new trial evidence which was not admitted, he discussed some of these things that he did but the problem is, Judge, none of the evidence that he says he generated and supported the filing of the lawsuit was related to the contentions made in the petition. You have to remember that the petition asserts these doctors, who prescribed and provided Propulsid. These doctors failed to treat for cardiac complications caused by Propulsid but it's uncontroversial business. This guy -- Mr. White did not die because of cardiac complication caused by Propulsid. He died because of a stroke and there's nowhere in the allegations or in the facts or for that matter in reality that strokes are related to Propulsid.

So -- so the problem -- the bigger problem in this case is that the allegations that are made, there's no factual basis for them. And that the reason for that is because of mistake. There's a boilerplate petition that was taken from the Brauer case and we established that through the testimony of Dr. Mastin at the sanctions hearing. Dr. Mastin took the stand explaining that he had been sued in the circumstance for adding injury to the patients by Mr. Henry so that Dr. Canterbury also testified that he had been sued in the Brauer's case. Petition was factually identical except for the names of the parties as our circumstance and so he really recycled his boiler-point --

CHIEF JUSTICE JEFFERSON: For this would -- for the sanction to survive unless the pleading be absolutely and completely 100 percent wrong or if there are some pleadings that are -- you can link to, you know, an allegation after reasonable inquiry then would the sanction survive?

MR. VILLARREAL: May I finish -- may I answer the question.

CHIEF JUSTICE JEFFERSON: Yes, please.

MR. VILLARREAL: Your Honor, that I think goes to the heart of the court of appeals' conclusion with regard to alternative pleas. We cited to court Frantz case and the Basetech case, two federal cases that deal with this contention of alternative pleadings in the '80s. These pleadings over here have some factual basis so this is not a frivolous pleading. The Court's interpreting Federal Rule 11 which Rule -- which Chapter 10 was based on say no, that's not enough. You have to have a factual basis for each contention that is made.

Additionally, your Honor, the -- the -- one of the things that actually these cases rely upon and focus on is what is really the crutch of the petition. What is a fair reading of this petition in

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

terms of what is it about. The Court can look at these 18 pages, almost everything said in that petition deals with Propulsid and the damage it caused. It doesn't talk about strokes. And therefore I think it's fair for the Court to look at that and say, well, this is about Propulsid and he specifically plead that --

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. I think I've gone through it.

MR. VILLARREAL: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Paul Andrews will present argument for the respondent.

ORAL ARGUMENT OF PAUL D. ANDREWS ON BEHALF OF THE RESPONDENT

MR. ANDREWS: Good morning, your Honors. I've never done this before so I'm a little nervous but even though I'm here representing a rather well-known advertising claims attorney in a case where he got sanctioned at the request of some doctors, I didn't study Latin but I feel confident that the phrase that is grace facing me does not say abandon hope all ye who enter here.

Now, I'd like to try to answer a couple of the questions that I've just heard because I think as you might imagine my answer is a little bit different. First off, Justice Medina, what should an attorney rely upon? Obviously, just like a doctor who relies on a personal history from a patient and a patient who lies to a doctor can mislead cause of treatment to be different. Whenever an attorney first and foremost relies upon what his client tells him. Now, blindly not to the point of ignoring the law but clearly that's the primary source and particularly in a death case, your key witness is gone. Medical records are often very sketchy, they're hard to acquire. This was a case where they did not walk into the office the day of limitations but they had come in only a few months before. The record shows that the actual medical records where not obtained until mid-November. The statute of limitations even with the 4590i extension would have run, I believe, February 5th. So this lawsuit was filed January 31, 2002 at a point in time where it wouldn't have been realistic for these clients to find another attorney.

JUSTICE WAINWRIGHT: Is it -- do you agree with some of the briefing that the evidence in the record is undisputed that the doctors never prescribed or provided Propulsid, the drug?

MR. ANDREWS: Absolutely. Absolutely that's true and that's the motion. We didn't prescribe Propulsid. They came to the -- that's all they plead in the motion. And I think it's significant that motion does not say and he's done it before or this is a pattern. The motion is absolutely crystal clear. We did prescribe -- we did not describe Propulsid. You said you did. We want sanctions. And the --

JUSTICE WAINWRIGHT: The petitions -- sorry to interrupt you.

MR. ANDREWS: Yes, your Honor.

JUSTICE WAINWRIGHT: The petition does say in several places that the doctors did prescribe the drug, doesn't it?

MR. ANDREWS: It certainly suggests that. And again, I'm not gonna suggest here --

JUSTICE WAINWRIGHT: And they suggest that? Is that all it does?

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

MR. ANDREWS: No, your Honor. There's two key provisions here. The one that we discussed at hearing, the one that I believe the motion was based on, and the one that is specific as to these doctors, is paragraph -- let me just find it here exactly. It's paragraph number -- I'm getting through all the documents here. It was not number -- one is negligence of the defendant physicians in hospital. It's page 15 and 18 and it runs on through page 60. Now, what Mr. Villarreal has cited you to is Roman numeral V facts. Note that the doctors, the hospitals, the providers who are each individually named in the preceding section that identifies the party, and nowhere does it say and these group of parties or these groups are collectively called anything. But then what we have here is the rather inartful use of defendants. It says defendants and then defendant physicians, defendant hospital. It certainly could be read, I will acknowledge, Paragraph 5 is very inartfully drawn. It could be read to say, well, isn't that saying I'm prescribing Propulsid.

But the specific controls over the general and the specific here, negligence of the defendant physicians and hospital makes absolutely clear that these 16 categories A through P plead in the alternative or the allegation, the specific allegations against in this case, the two movements Drs. Low and Smith in one or more of the following particulars. At the hearing, Drs. Low and Smith both acknowledge that these pleadings included allegations that do not have anything to do with Propulsid. They admitted that. Mr. Henry made that clear out. I find that we're --

JUSTICE O'NEILL: But if you send a bunch of attorney's fees disproving things and the interpretation that are clearly not factually based, shouldn't you recover something for your time and effort?

MR. ANDREWS: You know what? If they had asked me the time and effort, that would have been a different issue. They did not ask for attorney's fees. They did not ask for costs. The entire sanction here is the penalty paid to the court.

JUSTICE WAINWRIGHT: What was to happen to that penalty? Well, the money is $50,000 paid to the registry of the court, any indication on the record?

MR. ANDREWS: I seem to have on the back of my mind the idea that they were gonna designate it to some charity. But clearly if these doctors were to come to court and put on evidence to say, I had to pay my attorney. I missed whatever. I had out-of-pocket expenses. But they both neither claimed any attorney's fees. They both acknowledged there were no out-of-pocket expenses and the court did not award that. The very first thing that was said by Mr. Villarreal when he got up here was he characterized the issue before this Court as does Rule 48 of the Texas Rules of Civil Procedure trump Chapter 10.

JUSTICE WAINWRIGHT: Let's come back to that. Let's look a little bit more at paragraph 12 that you're just referring to. It starts out defendant physicians and hospital violated immediate care to the plaintiff. Skip some language and come down to in one or more of the following particulars.

MR. ANDREWS: Yes, your Honor.

JUSTICE WAINWRIGHT: A. in prescribing the drug. B. in prescribing the drug --

MR. ANDREWS: I think it goes all the way to K.

MR. ANDREWS: Yes, oh, certainly. The majority of them, and remember that the majority of the physicians and hospitals --

JUSTICE WAINWRIGHT: Do you agree the drug is Propulsid?

MR. ANDREWS: Yes, certainly. Absolutely. The majority of these

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

allegations deal with Propulsid. There were eight doctors sued, six of those doctors are believed to have had something to do with Propulsid. So the majority of the allegations and the majority of the physicians sued as well as of course the manufacturers and the other sections had to with Propulsid. But let me just -- the reason I was bringing up Chapter 48 rise to that point that there was -- this Court can find that 48 does not trump ten and it still doesn't mean that in this case, this pleading with this motion and the specific evidence introduced at the July 30 hearing will support this specific order because this --

JUSTICE HECHT: But you think this was sanctioned? I just heard an answer to Justice O'Neill's question, do you think this is sanctioned?

MR. ANDREWS: I don't think that Mr. Dorsani should make room in his next Texas litigation guide for this form of petition. It is inartful. It is not very well written. Certainly with the subject --

JUSTICE HECHT: But specifically, you said it was sanctioned --

MR. ANDREWS: I said --

JUSTICE HECHT: -- that the doctors could get attorney's fees and any other offenses there were after.

MR. ANDREWS: Judge, I think that if they had asked for that and put on evidence of that, it might have been a different issue but that there was no evidence of that. There was no request for that and that's not what this order says. I'm not saying that these doctors under the different circumstances might have been entitled to recover out-of-pocket expenses.

JUSTICE BRISTER: When you say inartful --

MR. ANDREWS: Yes.

JUSTICE BRISTER: -- I mean the reason you say defendants without limiting is perfectly artful. You're doing it on purpose because you don't want to break it out. You want it to cover everybody and go as far as you want. This wasn't an accident and --

MR. ANDREWS: No --

JUSTICE BRISTER: -- inartful. This was on purpose.

MR. ANDREWS: No, it wasn't an accident and this isn't a case as all other case in these types of sanctions as the court had evidence in hearing where you say you've got the wrong doctor. These doctors did treat this person at the ER at the end of his life. And these specific allegations do apply by the doctors on admission. Some of these allegations arguably do apply to the treatment he received at the ER but after this long treatment --

JUSTICE BRISTER: Under that theory, we could sue you for Propulsid as long as we put something in there about also participating in the trial of the case or the appeal.

MR. ANDREWS: Doctor -- your Honor, this --

JUSTICE BRISTER: We clearly don't want to encourage that.

MR. ANDREWS: Of course not, of course not. And we -- I'm not saying --

JUSTICE BRISTER: So if we were doctors instead of lawyers, wouldn't this drive us crazy? That every time somebody dies in the hospital, everybody whose name is on the chart get sued and we have to pay for it. Not us personally. The insurance company pays for it and they raise our rates and we have to pay for it and shouldn't we be angry about that?

MR. ANDREWS: Judge -- your Honor, I understand that argument and I think there's a specific scheme that's been put into place for specifically those types of lawsuits which is under 4590i. And even it allows you if you will to sue first and research and investigate later, it gives you a 90-day window to file your expert report. It gives you a

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

180-day window to file that a cost bond, nonsuit your case, or then place sanctions. I think in that case, that scheme clearly shows that there is at least some leeway --

JUSTICE BRISTER: Yeah, but you still need an expert report to say whether or not Dr. X treated me.

MR. ANDREWS: Well, your Honor, there was no evidence at the hearing from any attorney. There was no evidence. There was reference to the record but there was not -- the actual medical records were not even put into evidence. The --

JUSTICE WAINWRIGHT: Counsel, I'm sorry, did you --

MR. ANDREWS: That [inaudible] the point --

JUSTICE WAINWRIGHT: Well, did you just say that you can file a medical malpractice action under 4590i without doing a reasonable inquiry?

MR. ANDREWS: No.

JUSTICE WAINWRIGHT: As a lawyer?

MR. ANDREWS: What I'm saying, your Honor, is --

JUSTICE WAINWRIGHT: And research this later?

MR. ANDREWS: There's a specific -- well, I believe to a certain extent you can because obviously to pursue a 4590i cause you don't merely need to research. You actually have to have a doctor expert in that same field --

JUSTICE WAINWRIGHT: I know the general requirements --

MR. ANDREWS: -- but you don't have to have it the day you filed --

JUSTICE WAINWRIGHT: -- I'm wondering if you believe that you can file a lawsuit without doing a reasonable inquiry first.

MR. ANDREWS: Well, let me -- may I speak to that?

JUSTICE WAINWRIGHT: Regardless of the type of lawsuit it is.

MR. ANDREWS: Yes, your Honor. And --

JUSTICE WAINWRIGHT: You think an attorney can in the state of Texas?

MR. ANDREWS: I don't think that that's -- that's certainly not a proper and prudent course. But in this case there was evidence at the motion for rehearing which the petitioners here successfully objected to that testimony but have now included it in their brief and even argued it today before you. Mr. Henry testified when he was on the stand that he had had a nurse and a physician look at these records. He also offered at that hearing the testimony of a board certified personal injury lawyer, who said based on his review, there were sufficient evidence in the record to at least assert a claim against Drs. Low and Smith. Now that was not before the court on July 30th. But the movements having the burden did not bring forward any evidence. No attorney, nothing to show what was Mr. Henry's intent, what was his client and his wife's intent on January 31, 2002 and that's the operative date.

JUSTICE O'NEILL: Well, the filing of boilerplate petition that doesn't relate to the underlying facts, isn't that some evidence of intent? But the allegations have been made that it was boilerplate petition based on the Brauer case, and that if that were the case and the allegations didn't relate to this particular case, isn't that some evidence of intent?

MR. ANDREWS: There's actually no evidence that this was a boilerplate petition based on the Brauer case. The only evidence is that there is an identical petition in the Brauer case with different names and different doctors. In other words, that the Propulsid allegations which are admittedly the majority of this pleading are exactly identical. The allegations in one other petition which Dr.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

Mastin and other party testified to are identical to this. So what you have at best are two identical petitions. Yes, these are boilerplate allegations but they're boilerplate allegations specific to a death or serious injury from the drug Propulsid. Not just a boilerplate medical malpractice or boilerplate, any drug-type case, and this was specific to Propulsid.

JUSTICE HECHT: But discerning his intent, follow up on that question, we know that he had no intent to do anything more. No further investigation because when he filed it, he withdrew.

MR. ANDREWS: Well --

JUSTICE HECHT: Isn't that some evidence of his intent not to do --

MR. ANDREWS: It's been argued that circumstantial evidence of Mr. Henry's intent not to prosecute the case, but that's not the issue. The issue is whether the plaintiff had grounds to go forward. The plaintiff and her lawyer, Mr. Henry, clearly drafted this petition and filed it. The plaintiff clearly showed her continued intent in the record on the May 6th withdrawal hearing when she said, "I still want to go forward. I want to find another lawyer."

JUSTICE BRISTER: So this was all plaintiff's idea, just to sue everybody and claim they all prescribed Propulsid, or you had nothing to do with it?

MR. ANDREWS: That's -- I'm not saying that at all, your Honor. I'm not at all suggesting that. I'm saying that the issue you can't show the lawyer has no intent to prosecute ergo it's a fruitless case if he moves to withdraw the date he files the petition. Under the facts of this case, you got a statute of limitation. He has had the case for a few months. It's not reasonable to think the lawyer, the clients are gonna find another lawyer. Now maybe a better practice would have been to prepare a pro se lawsuit but that will --

JUSTICE BRISTER: But once you unleashed the lawsuit, I mean that's been like a newspaper printing a scandalous article and then the next day saying we're withdrawing from that subject. I mean, the article's out now. The damage has been done. Everybody hires lawyers. Everybody -- lawyers do what they do. I mean that can't be an excuse in anyway that he withdrew the next day or the next month.

MR. ANDREWS: Your Honor, I'm sympathetic to the fact that the doctors are very upset with lawyers. The testimony of this case about harassment included things like I can't watch the Super Bowl without seeing an ad from this lawyer. But the fact is that does not rise to Chapter 10 sanctionable conduct. The petition is filed on January 31st --

JUSTICE BRISTER: My question was just his withdrawal. That doesn't make any difference. That doesn't make his conduct any better or worse.

MR. ANDREWS: It doesn't excuse sanctionable conduct because he was held to even after withdrawal, even after the nonsuit. Clearly the court had jurisdiction to go forward and sanctions. What I am saying is, it's not sanctionable conduct and the only evidence of his intent to pursue the case is what was alleged and then whether at the evidentiary hearing, whether all of those allegations were shown to be false or whether they were shown to be of certainly as a doctor who had absolutely nothing to do with the case which is then the situation in another sanctions case. That's not the situation here. We have at least some specific allegations that were not rebutted. We have the quote reading doctors -

JUSTICE WAINWRIGHT: But you did have some that were rebutted, right?

MR. ANDREWS: Certainly, certainly. And nobody in here said they

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

prescribed Propulsid.

JUSTICE WAINWRIGHT: And how do you reconcile -- and I understand that's your argument on alternative pleas.

MR. ANDREWS: Right.

JUSTICE WAINWRIGHT: How do you reconcile that argument with Chapter 10's language that each allegation of factual contention must have evidentiary support said some you'd have a better argument, right?

MR. ANDREWS: No, I think because each -- yes, but that's all right --

JUSTICE WAINWRIGHT: How do you explain -- how do you explain that?

MR. ANDREWS: Because alternative pleadings are allowed in the state in one or more of the following particulars, A through P with at the end of O or P. As long as any one of those allegations have factual support against anyone of these named physicians and hospital --

JUSTICE: So --

MR. ANDREWS: -- then you do not run a foul of Rule 10 and the order said every single allegation here is false and that is not supported by the evidence.

JUSTICE WAINWRIGHT: So, a lawyer could file a pleading with a 100 allegations, 99 without support, and as long as one has support you don't run a foul of Chapter 10, is that your argument?

MR. ANDREWS: No, it's not. And if I may explain the difference in your scenario judge is, every one of these allegations had support against at least one of these doctors. Remember, we've got six doctors who prescribed Propulsid. You all are focusing on the correct fact but the majority of these allegations assert Propulsid's involvement against the majority of these defendants which is absolutely correct. These two were the treating physicians of the year. They don't deny treating this man. They don't deny that the medical record show that he was a Propulsid victim if you will. Failing to properly diagnose, failing to properly read, failing to properly test, failing to properly react are all allegations that the record arguably supports that certainly Mr. Henry or Mr. Edwards show at the rehearing that there's evidence in the record to support those allegations against these specific points. So in your scenario, if I made 100 allegations against one doctor and 99 of them were false and one of them was true and he went after me on sanctions for the 99 false allegations, that would be a different scenario than to say look there are other people against whose these allegations --

JUSTICE WAINWRIGHT: Let's change to hypothetical.

MR. ANDREWS: Yes, your Honor.

JUSTICE WAINWRIGHT: There are 100 allegations and there are two doctors. Only 50 allegations apply to Doctor A and the last 50 apply to Doctor B, but your pleading says defendants committed all 100.

MR. ANDREWS: I think that you would have a much weaker sanctions case than that. I would say first off that still a stronger case than you have on these pleadings here. And secondly we do allow --

JUSTICE WAINWRIGHT: Because there's eight instead of two?

MR. ANDREWS: I think that --

JUSTICE WAINWRIGHT: Because it may be more difficult to match up the false allegations with the defendants who as to which they're false but there's still some allegations in here that are unsupported and you acknowledged that and I understand, you understand that probably your road to hoe is not the easiest one here.

MR. ANDREWS: I certainly do. And as Chief Justice Jefferson said for sanctions to survive must the pleading be 100 percent wrong and my answer to that would be yes. This order says they are 100 percent

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

wrong. Based on this evidence and this motion, I do not believe that these sanctions order can stand. And I think the court of appeals was absolutely correct in finding that t sanctions order does not cite specific conduct. It's just boilerplate if you will, reiterates the actual wording of Chapter 10. And it finds that every single allegation in this pleading against these doctors has no evidentiary support. And by the doctors' own admissions, there are non-Propulsid allegations that do not fall into that category. I see that my time is up. Thank you very much.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF CARLOS A. VILLAREAL ON BEHALF OF THE PETITIONER

MR. VILLARREAL: Justice Wainwright, you asked about where this money is going and I refer the court to Sterling v. Alexander. The court there talked about where penalties were issued under Chapter 10 that it is to go to the [inaudible] court for purposes of the county. And instead it takes us to another issue that I think it's really important for this Court to consider. And that is if you place an honest burden on the movement per se, you run the risk of nullifying the effect of any Chapter 10 or of any provision, Rule 13, any provision that requires an attorney to do his homework before he files the case.

JUSTICE O'NEILL: Let me ask you, is that a relative inquiry, what is reasonable inquiry vis-à-vis the time you've got? So that, for example, the client presents to your office the day before with only medical records and you don't know which doctors did what, can you craft a pleading this as that based upon the time we have. We don't know who did what but we're gonna, you know?

MR. VILLARREAL: I think it is a relative inquiry but -- and as Mr. Henry would have shown at the sanctions here which he didn't, which according to Sixth Schneider and some of the other cases, is evidence of -- is bad faith. But if he had shown up at the hearing and said, Judge, here are my circumstances. This is the information I have. This is what I did.

JUSTICE O'NEILL: No, I'm asking about the depth.

MR. VILLARREAL: Yes, your Honor.

JUSTICE O'NEILL: But you could have a situation where someone presented the day before limitations ran and you do think that pleadings could be crafted to show what the circumstances are?

MR. VILLARREAL: And I think the question of sanctions in that circumstance is what I think the court is asking me is in the sound discretion of the trial. And if the trial court faces the counsel and the counsel shows up and explains his actions and what he did then I don't think you got the situation.

But you didn't have that to happen in this case because counsel didn't show up and as I've said, the Sixth Schneider case at least talks about counsel is better to show up would be some indication of his improper motive that day. We need to go back and look at some of the procedure history that the court of appeals chose to ignore. Mr. Henry withdrew when he filed the petition. This Court recalls that eight years ago, I represented Judge Bennett and we were here talking about issues that the attorney fails to come forward and prosecute the case. He files the case without the intent to prosecute, that's

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

improper conduct. The [inaudible] case interpreting rule -- Federal Rule 11 says the same thing. You have to have a genuine intent or you're gonna have problems with sanctions. Also there was a non --

JUSTICE WAINWRIGHT: Mr. Villareal, you talked about this pleading being a boilerplate pleading?

MR. VILLARREAL: Yes. Mr. Henry admitted to that at the new trial hearing by the way. That's the exact words, boilerplate.

JUSTICE: Does that --

MR. VILLARREAL: Same as a form of his computer, you press the button.

JUSTICE BRISTER: Generally, and it's been my experience in toxic tort litigation, those pleadings are perhaps boilerplate litigations. That's a shotgun approach concerning the defendants may or may not have anything to do with the plaintiff. If this court would've find in your client's favor would that open a door, similar type of cases be filed against these plaintiffs firms and --

MR. VILLARREAL: I think counsel consider your toxic tort case with many plaintiffs in similar circumstances still needs to address each of those, unless it's a class action, needs to address each of those individual circumstances to see if for instance -- and you have this like for instance in asbestos cases and such. This manufacturer was in business from this state to this state. This person worked in that area after that day. Well, that guy shouldn't be sued in that case. I think that's what Chapter 10 requires, your Honor. I don't think you can live with shotgun pleas under Chapter 10.

I was surprised and really astounded to hear Counsel profess a 4590i was for the purpose of protecting plaintiff's attorneys and giving him more time to investigate their case. All we have to do is look at Section 1.02 of 4590i, sets out the purpose essentially the findings of the Keeton Commission to talk about the medical liability crisis and how health care was impacted by excessive fees for insurance coverage which was in turn caused by frivolous lawsuits. Those are in 1.02, the purpose of 4590i and Chapter 74 was the purpose of protecting the doctors, not the attorneys. I respectfully submit to withdraw the nonsuit conduct here, clearly warranted sanctions, there was no abuse of discretion. [inaudible] should improperly reverse. And this Court should affirm the proper decision and reverse the court of appeals.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take another brief recess.

SPEAKER: All rise.

2005 WL 6161834 (Tex.)

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE