Affirmed and Opinion filed December 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00494-CV

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ALTON SIMMONS, Appellant

V.

DREW WILLIAMS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 96I0977

O P I N I O N

Alton Simmons appeals, *pro se*, the dismissal of his medical malpractice action for failure to file an expert report on the grounds that the dismissal: (1) violated his constitutional rights of access to the courts, due process of law, and equal protection; (2) was erroneous because the expert report requirement did not apply; and (3) was granted without ruling on Simmons's pending discovery motions. We affirm.

Background

Rumaldo Mesa, a prison inmate, filed a medical malpractice claim, *pro se* and *in forma pauperis*, against Dr. Drew Williams, a physician at Mesa's correctional facility. Mesa thereafter executed an assignment of all his rights in the lawsuit against Williams to Alton Simmons, a fellow inmate. Simmons was thereafter substituted as the plaintiff in the action. Williams filed, and the trial court granted, a motion to dismiss the lawsuit on the ground that an expert report had not been filed within 180 days of filing suit. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon Supp. 2000) ("section 13.01").

Constitutional Challenges

The first three of Simmons's five points of error contend that section 13.01 violates his constitutional rights to equal protection, open courts, and due course/process of law because it mandates dismissal of a medical malpractice action for no reason other than the plaintiff's indigency and thereby allows health care providers to commit negligence against indigent patients with impunity. Simmons further argues that the requirement of an expert report is unreasonable, and thus unconstitutional, where, as here, a plaintiff is not required to provide independent expert testimony at trial because: (1) he may satisfy the requirement for expert testimony with the defendant's own testimony; and (2) he has asserted a claim for res ipsa loquitur which requires no expert testimony.[1] Simmons also asserts that section 13.01 is unreasonable because, rather than accomplishing its stated purpose of reducing the costs of health care and litigation, it increases those costs to plaintiffs; and because it applies to cases like this which have no effect on the insurance industry because the defendant is not covered by medical liability coverage.

This court has previously overruled a due process challenge to section 13.01. *See Andress v. MacGregor Med. Ass'n , P.A.*, 5 S.W.3d 855, 859-60 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.). Similarly, section 13.01 has withstood equal protection and open courts challenges to the extent that the prosecution of a medical malpractice case, even by an indigent plaintiff, requires presentation of expert testimony. *See, e.g., Knie v. Piskun*, 23 S.W.3d 455, 467 (Tex. App.—Amarillo 2000, pet. denied). The constitutionality of section 13.01 has also been upheld despite recognition that it can present

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[1] Although article 4590i recognizes the doctrine of res ipsa loquitur, it makes no exception to the expert report requirement for cases in which that doctrine applies. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 7.01, 13.01 (Vernon Supp. 2000).

a barrier for even meritorious claims that do not comply with it. *See Schorp v. Baptist Mem. Health Sys.*, 5 S.W.3d 727, 737 (Tex. App.—San Antonio 1999, no pet.).

Expert testimony is required to meet a plaintiff's burden to prove medical malpractice unless the mode or form of treatment is a matter of common knowledge or is within the experience of laymen. *See Hood v. Phillips*, 554 S.W.2d 160, 165-66 (Tex. 1977). The circumstances in which an alleged malpractice is within the common knowledge of laymen, and the doctrine of *res ipsa loquitur* thereby applies, are very limited. *See Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990). Examples include negligence in the use of mechanical instruments, operating on the wrong part of the body, and leaving surgical instruments or sponges within a body. *See id.*

In this case, Williams was alleged to be negligent in cancelling Mesa's prescription for a walking cane. However, the nature of Mesa's medical condition and the extent to which it should or should not have been treated with a walking cane are not matters within the common knowledge of laymen. Because Simmons's claim was therefore one for which expert testimony would have been required, the application of section 13.01 to it is not unconstitutional. *See Knie*, 23 S.W.3d at 467.

Similarly, with regard to Simmons's assertion that he may satisfy the requirement for expert testimony with Williams's own testimony, we note that the expert report required by section 13.01 (like the expert evidence needed at trial) must include opinions regarding, among other things, the manner in which the health care rendered failed to meet the applicable standard of care and the causal relationship between that failure and the injury, harm, or damages alleged. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(r)(6). To assume that Williams (or any medical malpractice defendant) holds or would admit to any such opinions is, at best, highly speculative and provides no basis to conclude that the expert report requirement of section 13.01 is unconstitutional. Because Simmons's first three points of error fail to demonstrate that section 13.01 is unconstitutional, they are overruled.

Article 4590i Inapplicable

Simmons's fourth point of error challenges the dismissal of the case because article 4590i does not apply where, as here, a defendant is not covered by medical liability insurance. In support of this contention, Simmons cites *Melendez v. Beal*, 683 S.W.2d 869, 873 (Tex. App.—Houston [1st Dist.]

1984, no writ). However, *Melendez* was addressing the two-year medical malpractice limitations provision, which had been enacted expressly for the purpose of establishing standards for setting insurance rates for health care providers and had formerly been limited in its application to health care providers covered by professional liability insurance. *See id.*; *Littlefield v. Hays*, 609 S.W.2d 627, 629-30 (Tex. Civ. App.—Amarillo 1980, no writ). Because Simmons fourth point of error fails to show that any such considerations apply to the expert report provision, it affords no basis for relief and is overruled.

Denial of Discovery

Simmons's fifth point of error complains that the trial court's dismissal of the case without ruling on his pending discovery motions deprived him of the opportunity to seek summary judgment which he claims is not precluded by article 4590i. However, because the failure to comply with section 13.01 is grounds for dismissal of a case, independent of the merits of the case,[2] Simmons's inability to obtain discovery information to support his claims

[2] *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e)(3).

is of no consequence to the dismissal. Accordingly, Simmons's fifth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 21, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

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