This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Juan Mario Villafani, M.D., Petitioner,
v.
Adela Trejo, Respondent.
No. 06-0501.

April 10, 2007

Appearances:
Cecilia Garza, McAllen, Texas, for petitioner.
Robert E. Brzezinski, San Antonio, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

CONTENTS
ORAL ARGUMENT OF CECILIA GARZA ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF ROBERT E. BRZEZINSKI ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF CECILIA GARZA ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated, please. Court is now ready to hear argument in 06-0501, Juan Mario Villafani M.D. versus Adela Trejo.
COURT MARSHALL: May it please the Court. Ms. Garza will present argument for the petitioner. Petitioner reserves ten minutes for rebuttal.

ORAL ARGUMENT OF CECILIA GARZA ON BEHALF OF THE PETITIONER

MS. GARZA: May it please the Court. Ida Cecilia Garza here on behalf of petitioner, Juan Mario Villafani. Good morning. The issue before the Court this morning, is whether an appellate court has jurisdiction to review a trial court's refusal to grant a defendant's motion for sanctions and dismissal filed pursuant to Article 4590i, after a plaintiff files a nonsuit of his claims. In other words, what is, what effect does a nonsuit have on an erroneous denial of a motion for sanctions and dismissal once the claim has been nonsuited. And ...
JUSTICE MEDINA: But what makes it erroneous as that? What makes the denial erroneous?
MS. GARZA: The denial is erroneous because the, as this Court is aware, Article 4590i establishes that a plaintiff must file an expert report which sets out the applicable standard to care for each the defendant, the alleged breached in that standard of care and how the alleged breach caused the plaintiff's injuries. In this particular case, the expert report filed by the plaintiffs did not meet those

requirements. Requirements were not met and it was an error for the trial court not to dismiss this case with prejudice. The legislator ma- - legislator mandated that if plaintiffs do not comply with this rigid expert report requirement, then the trial court has absolutely must grant a dismissal with prejudice and must enter an order that awards the defendant this ...

JUSTICE MEDINA: Wasn't there an extension of time here to find the requirements?

MS. GARZA: In this case, no, your Honor. And basically, under 4590i, there were two, two options for an, an extension of time, neither was requested in this case. Basically, the intent of the legislature ...

JUSTICE HECHT: If the nonsuit had occurred before the trial court ruled on the motion to dismiss, do you think you could appeal then?

MS. GARZA: If the nonsuit had occurred before a ruling had been made, then it would have no effect on the pending motion for sanctions. And yes, the, the Court would have the power to, to hear that, that motion. If the Court refused then yes, there, there would be.

JUSTICE HECHT: So whether the court had already ruled on the motion is irrelevant. You'll be-- you get to appeal it one way or the other.

MS. GARZA: In my view, yes, I believe so. And because of the fact that Article 4590i had specific legislative intent, the, you know, the problem that the legislature was trying to address was the repetitive filing of frivolous medical malpractice lawsuits. And in order to, to curtail the frivolous filing, they've set out this requirements. And they had mandatory sanctions. They had a dismissal with prejudice. They had an award of attorneys' fees. And a plaintiff cannot circumvent that statutory scheme by filing a frivolous lawsuit, getting pass the trial court and then all of the sudden as in this case within three weeks of the denial of the motion for sanction dismissal, plaintiffs file the motions of nonsuit. Which I believe supports the argument that this was a frivolous case. And because it was a frivolous case, defendant Villafani was entitled to a dismissal with prejudice and he was entitled to an award of attorney's fees.

JUSTICE O'NEILL: Now, what happens if you are able to appeal and the Court of Appeals upheld the affidavit? What happens then? You're left with a nonsuited case, the case is just, what happens, I'm not sure I wouldn't [inaudible] if you lost your appeal.

MS. GARZA: Okay, well, if, in other words that the trial court denies our motion finds, in other words holds it as an adequate report.

JUSTICE O'NEILL: Right.

MS. GARZA: We go up to the Court of Appeals and the Court of Appeals affirms it. Saying it's an adequate report.

JUSTICE O'NEILL: Right.

MS. GARZA: We always have you to come to and you can decide whether if it's an adequate report, then obviously the defendant was, was incorrect and, and this Court has felt that it has merit to continue. That was the whole point ...

JUSTICE O'NEILL: And then and so the nonsuit without prejudice is still good, so there's no case but the plaintiff is free to refile.

MS. GARZA: Exactly. And to that's the point here is ...

JUSTICE WAINWRIGHT: Defendant does not recover attorneys' fees and cost.

MS. GARZA: Right. If it is determined ultimately by all the appellate courts that it is an adequate expert report which we don't feel is the case here ...

JUSTICE WAINWRIGHT: Or by the panel appellate court.

MS. GARZA: By ...

JUSTICE WAINWRIGHT: Not by all the appellate courts.

MS. GARZA: Exactly. I'm sorry, I, I misspoke. Basically, what this Court did in 2001 in Palacios was said that, "The purpose of this expert report was to determine whether the plaintiff's medical negligence cause of action had merit to continue." This is the e-- purpose of expert report was to determine merit. This motion for sanctions and dismissal is a motion based on the merits of the case. So a nonsuit cannot ...

CHIEF JUSTICE JEFFERSON: If this had, if this had been a different case. What if, if this had been a motion for sanctions for discovery abuse that you had file, not based on expert report, but based on some other matter. And the trial court and then after you file your motion for sanction, the plaintiff nonsuits. Isn't there a case law that says that the trial court still can consider that motion for sanctions and that there can have, there can be an appeal from the trial court's ruling?

MS. GARZA: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: And what's different about this case than that?

MS. GARZA: The difference and I'm not sure I understand your question but the difference in this case ...

CHIEF JUSTICE JEFFERSON: In other words, this is a case where there you filed a motion for sanctions, trial court later, the, the plaintiff later files a nonsuit and the trial court nonsuits. Why wouldn't you have an appeal? Just as you would if sanctions were pending when –

MS: GARZA: I believe you would have an -

CHIEF JUSTICE JEFFERSON: - done with the nonsuits filed.

MS. GARZA: I believe you would have an appeal. I believe, I believe that a motion for dismissal as a motion or Rule 13 motion for sanctions, its, it's a claim, it's a claim for relief, it's a claim for relief for a dismissal with prejudice. It's a claim for attorney's fees and even more importantly is its statutorily mandated. The whole purpose of Article 4590i was to deter frivolous lawsuits. Now if a plaintiff can file a report, any report and the trial court deems it's adequate even though it's not and then realizes, "All right, I'm, I'm not going to go forward. I'm going to go ahead and nonsuit my claims," with the ability to re-file later. It's, it's, it's basically trying to circumvent with those-- there's no deterrence is what I was trying to say. There's no deterrence effect. If the trail court, if the appellate court is allowing plaintiffs to go ahead, file this report, its not adequate, the trial court lets it go, because let's face it, this is a Rio Grande Valley and it is rare, if not, it's a rare occurrence that an expert report is deemed to be inadequate and, and a case is dismissed. And that rarely happens down there. So plaintiffs know this that's why they filed their cases down there.

JUSTICE BRISTER: Why is that? I've, I've noticed that, too.

MS. GARZA: It's ...

JUSTICE BRISTER: Make sure these people can read, what's, what's, why is it that in one part of the state the, there's a different standard applied to expert report?

MS. GARZA: I wish I knew the answers to that. I mean, I think is this they basically really want to afford every opportunity they can to a plaintiff. And in fact, we have judges in Hidalgo County who during a hearing on a motion for sanction dismissal say, "They disagree with the

legislature, they're making it hard and I'm not going to agree with this. I don't like this expert report requirement." So this is what we're dealing with.

JUSTICE HECHT: That what happen here?

MS. GARZA: Excuse me?

JUSTICE HECHT: Is that what happen here?

MS. GARZA: That did not happen in this case. No. That did not happen in this Court.

JUSTICE HECHT: Let me ask you, if there were a motion for summary judgment by the defendant, on the ground that there was no competent expert testimony that have been adduced so far and therefore the plaintiff is not going to be able to get to the jury. And that motion were denied and then there was a nonsuit. Would the defendant be allowed to appeal the denial of the summary judgment motion?

MS. GARZA: I, I feel that the defendant should be allowed to appeal that. I don't ...

JUSTICE HECHT: We, we have a pretty strong rule that you can't appeal and do not ...

MS. GARZA: Right. Right. Exactly.

JUSTICE HECHT: So what's the difference? It seems like at least the summary judgment motion was on the merits whereas the motion to dismiss for one of the expert report is largely procedural or and certainly preliminary for that thing.

MS. GARZA: Well, I think you're right. And I think the fact is, it is a preliminary procedural thing that this, that Article 4590i says, "you have to do." They put these hoops up there for the plaintiffs to, to grow through and they need to do it. And the fact they don't do it and they're not able to do it shows the frivolous nature of the lawsuit. I think that's what the difference is. Is this is a statutorily mandated dismissal with prejudice.

CHIEF JUSTICE JEFFERSON: But also rule on the merits in, in the summary judgment context doesn't involve, generally doesn't, denial would involve assessment of attorneys' fees. Right?

MS. GARZA: Generally, no. It would not.

CHIEF JUSTICE JEFFERSON: [inaudible] so I mean, that's what, that's what I'm trying to key in on here, there's statutorily or entitled to your fees and you'd move for sanction and stop the fees so it seems to me that's a pending claim for relief.

MS. GARZA: It is. It is a pending claim for relief and it is a claim, it's an affirmative claim for relief. It is, it is completely dependent on, if-- I'm sorry it's completely independent from plaintiff's cause of action. This is a cause of-- I guess you could say a type of cause of action that is given to a defendant in a medical negligence case where the defendant can tell the, can ask the trial court, "Give me my attorney's fees, give me a dismissal with prejudice," because that's what the statute has mandated to in a case where the expert report is inadequate. Now, the, another effect of a nonsuit is to place the plaintiff and the defendant in the same posture they were prior to the filling of, of a lawsuit. In this case, in a medical negligence case that does not happen. Basically, the defendant, defendant Villafani has incurred attorneys' fees, he has wasted several months, I believe it was nearly 10 months before this hearing and before plaintiff's nonsuit. So because of the fact that the statute requires as a deterrence, plaintiffs need to give the defendant his attorneys' fees. He's not in the same posture that he was before the lawsuit was filed. Another problem with the Thirteenth Court of Appeals' opinion is it's flawed in several aspects. The Thirteenth

Court of Appeals' opinion conflicts with it's own prior precedent. There was a case, Del Villar versus Garcia which we appealed a dis-- denial of a dismissal after a nonsuit and we were told by Thirteenth Court of Appeals, "No, there are still pending motions, we have no jurisdiction." The only pending motions, where other motions for sanctions and dismissal which had been nonsuited. No jurisdiction. Fine. The Court of Appeals also says that writ of mandamus is not available becau-- under 4590i to determine the adequacy of an expert report because inadequate appeal by remedy exist based to that back in March of 2004 in In re Maldonado they did, just did that recently last month in In re Clinica Sta. Maria. And then when, when we get a nonsuit because they're telling us we have an adequate remedy by appeal, we take that final appealable order and we take it up to Thirteenth Court of Appeals and they tells us, "No, you don't have jurisdictions." So there could, there a-- it's conflicting. The opinions that are issued out of that court are conflicting and we're left absolutely no remedy. Additionally, it doesn't distinguished another major flaw in the Thirteenth Court of Appeals because it doesn't distinguished between claimants. It is the blanket, we have no jurisdiction, nonsuit vitiates all prior interlocutory orders, that's it. In this particular case, plaintiffs did have right to file, to re-file within a statute of limitations period. They didn't and that's not a problem. However, there are cases and another one who just currently pending before this Court in Barrera versus Rico, where the alleged negligence occurred at birth. So you have 20 years where a plaintiff can file, give us an inadequate expert report, the trial court's going to say it's adequate, nonsuit, refile. It's a cycle that'll never end in a case like that. That's not the case currently before this Court, however, a blanket rule that we had no jurisdiction it affects a case like that. Basically, what the Thirteenth Court of Appeals is doing is they're encouraging the plaintiff's attorneys to find ways to skirt the legislative mandates. They're telling him, "We, you know, we agree with you. That's fine. Go ahead and do whatever you have to do, nonsuit whenever you have to." And that's alright because we're going to say that there's no jurisdiction and defendants will have absolutely no, no adequate, adequate remedy. They'll have no way to appeal and they'll no, they'll won't be able to get their statutorily mandated award. That, that was contemplated by the legislature.

CHIEF JUSTICE JEFFERSON: Are there any questions? Thank you, Counsel.

MS. GARZA: Thank you.

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

COURT MARSHALL: May it please the Court. Mr. Brzezinski will present argument for the respondent.

JUSTICE MEDINA: How does a, how does appellate court have a jurisdiction on a nonsuit?

ORAL ARGUMENT OF ROBERT E. BRZEZINSKI ON BEHALF OF THE RESPONDENT

MR. BRZEZINSKI: The appellate court have jurisdiction on a nonsuit. Well, first of all under the, the current law is a moot issue because if, if a motion to dismiss for inadequate report is denied currently it goes up on appeal interlocutory. So it's, I would submit

that this issue is a non-issue because this scenario doesn't exist anymore. I would also point out initially that as far as this particular suit goes, the statute limitations ran on June 14th of 2004. The statute had actually run before the order of nonsuit was entered. So a plaintiff, in spite of the nonsuit being characterized as one without prejudice to re-filing the statute limitations had actually already gone by boards.

JUSTICE BRISTER: But it might make a difference to the defendant whether the case was dismissed because it was frivolous, or not, or dismissed just because the plaintiffs not decided not to go forward. It might make a difference to how I felt about my record, if I was the doctor. Right?

MR. BRZEZINSKI: Absolutely. Absolutely. I, I, I've got three points that I'd like to make this morning. The first one is that the petitioner has admitted that there was no pending claim at the time of his nonsuit. Petitioner concedes on page 1 of his reply brief which was filed on January 10th of this year that quote, There is absolutely no doubt that petitioner's motion for sanctions and dismissal was no longer pending at the time of the nonsuit. Rule 162 expressly states that a dismissal under this rule shall have no effect on any motion for sanction, attorneys' fees or other cause pending at the time of dismissal.

JUSTICE O'NEILL: Well, but I mean pending meaning it had already been ruled on.

MR. BRZEZINSKI: Yes, ma'am.

JUSTICE O'NEILL: So that doesn't really answer the question. I mean, my understanding is the fact that it's been ruled on it's still, it's still alive in the case. It's just, that, that in sort of an arbitrary line to say, "If it's not been ruled on, then you can appeal it. But if it has been, you can't."

MR. BRZEZINSKI: Well, and I think there are other reasons to, to show that, that this is not, this does not fit in to the category of claims that survive a nonsuit and I'll, and I'll get to that in just one moment but I, I do think it is important in B.H.P. versus Mullard which is a 1990 Supreme Court case. This Court confirmed that the right to nonsuit is absolute unless there is a pending claim. The, the Bennett case ...

JUSTICE BRISTER: But, but the legislature changed that?

MR. BRZEZINSKI: Yes.

JUSTICE BRISTER: And they did in 1301(p). Right?

MR. BRZEZINSKI: They did that in chapter 74, yes.

JUSTICE BRISTER: Well, before that 4590i, wasn't there same provision of entry conflict.

MR. BRZEZINSKI: I'm sorry, with regard to the right to ...

JUSTICE BRISTER: And conflict in this section and another law including a rule of procedure this section controls to the extent of context?

MR. BRZEZINSKI: Yes.

JUSTICE BRISTER: So I mean, it doesn't really matter what we've set when you can nonsuit if they say otherwise, does it?

MR. BRZEZINSKI: That's, that's true, sir. And the-- I think the important thing about the, the Bennett case which was alluded to earlier by one of the other justices is that in the Bennett case, the court refuse to sign an order of nonsuit because there were sanctions pending. So that's different from this case and that there, there were, there, there was a pending motion. In this case, the court has already ruled on the motion to dismiss. And ...

JUSTICE BRISTER: And the ninth sanctions which if that's the reason to ninth sanctions could stop the affidavit was fine. But if that was wrong, then the motion has to be reconsidered by the trial court, doesn't it?

MR. BRZEZINSKI: Well, I would ...

JUSTICE BRISTER: Sanction is mandatory.

MR. BRZEZINSKI: Your Honor, I -

JUSTICE BRISTER: Always, at least.

MR. BRZEZINSKI: - I, I would submit that the way the law existed under 4590i, petitioner had, had no further right. I, I would quote, In re Schneider 134 S.W. 2d at 869, "The legislature expressly chose to apply the amendment prospectively," giving the right to interlocutory appeal, "... had the legislature intended to provide interlocutory review of the denial of motion's to dismiss under the former article, it could have done so." It did not. I would also point out that petitioner's motion to dismiss was not a judgment on the merits.

CHIEF JUSTICE JEFFERSON: Would you answer my question that oppose to, you know, counsel earlier if there's a motion for sanctions for discovery abuse. Let's say, it's in that context. And after that motion for sanction is filed, the plaintiff nonsuits the case. Does that motion for sanction survive or not?

MR. BRZEZINSKI: I think, under the Bennett case and particularly if the trial court refuses to sign the order of nonsuit, then yes, it does survive. You know, Bennett is analogous because it was sanctions directed to the attorney for the attorneys' conduct and I think in, in your example, Mr. Chief Justice, yes, it, it would probably survive.

CHIEF JUSTICE JEFFERSON: But why is this different, it's a motion for sanctions that has, has granted the statute that says, "we get attorneys' fees for this inadequate report."

MR. BRZEZINSKI: It's a motion for sanctions related to, directly tied to the underlying claim. And the-- again in the Mullard case, the Court says, "That a claim for affirmative relief," in other words a claim that survives a nonsuit "... must allege a cause of action independent at the plaintiff's claim on which the claimant could recover compensation or relief even if the plaintiff abandons or is unable to establish his cause of action."

CHIEF JUSTICE JEFFERSON: But would that fit on a discovery abused type sanctions is not an independent cause of action, its just complaining about the, your opponents conduct.

MR. BRZEZINSKI: Well, I think the, the Bennett case gives the court to right, the right under those circumstances where it's attorney conduct to refuse to sign a nonsuit. This is not attorney conduct, this is a consideration of a preliminary matter, I think as Justice Hecht indicated a procedural matter not an evidentiary one.

JUSTICE GREEN: On, on signing the nonsuit order have any effect, I thought plaintiffs had an absolute right to just notice of the nonsuit. There's no order involved. When does that matter?

MR. BRZEZINSKI: They do, Justice Green. the nonsuit is effective upon the notice, the appellate guidelines, the appellate deadlines-- excuse me, began to run when the order was sign.

JUSTICE GREEN: Or the notice is filed.

MR. BRZEZINSKI: That's, that could be true. At my recollection, the case is kind of distinguished the two, I know there some, there some probably some confusion there.

JUSTICE WAINWRIGHT: Sometimes trial court's never sign orders of nonsuit because they know it's effective, that nonsuit's effective on file.

MR. BRZEZINSKI: That, that is true. It is obviously it was a practice of our office at the, at the time of this case at least to simply file a notice of nonsuit.

JUSTICE WAINWRIGHT: It's ...

MR. BRZEZINSKI: In, in the order of nonsuit actually tendered to the court by petitioner.

JUSTICE WAINWRIGHT: So you're, sounds like to over generalize your position its, you know defendants won. We nonsuited, he went away, sounds like you're acknowledging that statute of limitation has run and case could not be brought again legitimately. So the case should be over, its done, why do we have to keep fighting over this, there's no longer any jurisdiction or reason to appeal it. Defendants are saying that the legislature said cases against doctors and health care providers in which there is no adequate expert report to base the case on entitles the other side, the health care provider or doctor to get their attorneys' fees and cost. And they're saying that, that survives even a nonsuit and that they have an appellate, a right to go to appeal of this Courts to get a determination that the case, at cases expert report entitles them to those fees in cause. Don't we have to look at the legislative intent and particularly the wording of the statute to see if they intended that to survive 162, we can't just conclude that rule 162 automatically ends the, the issue. We better look at what the legislature intended, don't we?

MR. BRZEZINSKI: I, I think so Justice Wainwright and I think you need to look at the, the law interpreting the cases. And, and first of all, I'm not aware of any case in this state that gives, that gave defendants under 4590i the right to appeal the denial of a, a motion for to dismiss.

JUSTICE WAINWRIGHT: So you're saying this is a case of first impression.

MR. BRZEZINSKI: I, I would believe so yes.

JUSTICE WAINWRIGHT: Which means we again look at the words the legislature use and their intent and forgot what, what they meant?

MR. BRZEZINSKI: That's correct, your Honor, and I think you need to look at, at the case law, as well, petitioner would have you hold that the report requirement under the old Article 4590i was a judgment on the merits. That a ruling on the motion to dismiss would acquit to a judgment on the merits. And obviously, to do so avoids the extinguishment of a suit. At trial court s-- ...

JUSTICE O'NEILL: That access a judgment on the merits in many ways, I mean it, it's a dismissal with prejudice and it's based on the failure to meet elements of proof subsonically.

MR. BRZEZINSKI: Well, I would argue that, that if granted a motion to dismiss really terminates the case on a procedural ground.

JUSTICE O'NEILL: Well, but -

MR. BRZEZINSKI: Not, not an evidentiary ...

JUSTICE O'NEILL: - it's sort of a hard but that wouldn't, it is not like you're dismissing it because he didn't pay your filing fee or, or some reason like that, it's because the legislature said you have to make some prima facie shewing of your case. And if you fail to do that, then it is a bit of merits termination, didn't it?

MR. BRZEZINSKI: I, I can see you, Justice O'Niell, what you're saying that it's, it's somewhere in between a full blown evidentiary determination on the merits and ...

JUSTICE O'NEILL: It's certainly merits related.

MR. BRZEZINSKI: Well, and I think, we need to look at the, the Palacios holding is instructive. Petitioner would interpret Palacios to

say that, there's a quote from Palacios in petitioner's brief that says that, "The purpose of the report requirement under Article 4590i is to provide a basis for the trial court to conclude the claims have merit." And I think, petitioner would have you isolate that word, "merit" to say, "Okay, this is a determination on the merits of the case." If you read further in Palacios at page 879, the Court states, "to avoid dismissal, a plaintiff need not present evidence in the report as if it were actually litigating the merits." And that opinion goes on to say the report can be informal and that the information in the report does not have to meet the same requirements as evidence offered in a summary judgment hearing.

JUSTICE O'NEILL: But, but it is clearly by the rule itself, I mean, it's merits based. You, you'd have to admit it's not purely procedural.

MR. BRZEZINSKI: But petitioner wants you to bootstrap it essentially into a summary judgment ruling.

JUSTICE MEDINA: I mean, a lot of reasons to dismiss at lawsuit, didn't have to be, because you didn't find an expert for other reasons, you can think of a laundry list of them, counsel wouldn't ready, plaintiff said not to pursue her cause of action, what have you, I mean, that it's so I don't understand your argument.

MR. BRZEZINSKI: Well, in, your Honor, it's not unusual in a medical malpractice context to have the case reviewed, have an expert tell you, the case does merits against defendants X,Y and Z. You get into the case and actually start developing the evidence conducting discovery and you realize, you know what, defendant acts shouldn't be in this suit. And you make the determination to nonsuit them. I think the effect of what petitioner's arguing would actually discourage plaintiffs or at least under 4590i, would have discouraged plaintiffs from willingly nonsuiting defendants and that, to me doesn't make any sense. But, but you are correct. There, there are many different reasons why you would, you may end up having the nonsuited defendant. And again although there are some element of, of a merit based decision, this is not an affidavit. There is no evidence actually submitted at the hearing on the report. There are no records attach to the report, the report is by an individual who has no factual connection to the underlying case. It can have hearsay in it, it really is very, very distinct from summary judgment evidence which obviously is a, a ruling in the merits that survives a nonsuit. But it's very distinct from that, it's very distinct from trial evidence and so I think it's, it's erroneous to equate it to a, a decision on the merits that ought to survive the nonsuit. And the-- again, I think that distinguished from Bennett, some of other cases there, there was nothing pending at the time this nonsuit was, the order was entered. The motion had been heard, it had been denied, petitioner had the opportunity to request rehearing to file a motion for summary judgment, to a file for writ of mandamus, there many actions that could have taken which clearly would have survive the nonsuit. None of those occur. Three months went by and then petitioner submitted the order of nonsuit and when it was sign then the appeal was filed. So I think that, that this is clearly an instance where the nonsuit under the Blackmon case and, and some of the other cases. The nonsuit terminated petitioner's right to complain about this.

JUSTICE WAINWRIGHT: So do you think this case in which there was an expert report filed is distinguishable from this situation where a lawsuit is filed against the healthcare provider, no expert report has ever cert. Then there's a motion to dismiss after a hundred and twenty

days and the, the, before that is well, that, that judge then denies that however-- and then there's a nonsuit. You think there should be jurisdiction to review that on appeal?

MR. BRZEZINSKI: I think under the way the law existed in 2004, no.

JUSTICE WAINWRIGHT: Clearly no merit because no expert report was filed. You think still the nonsuit ends the discussion entirely?

MR. BRZEZINSKI: It does, your Honor, and if the plaintiff's statute has not run and the plaintiff allege to refile then obviously the defendant will refile the motion to dismiss and either the plaintiff has obtained an inexpert report in the matter, it can be heard and you go down the same trail, but I, I think under the way the law and, and again as the, as the, as the In re Schneider case said that's the way the law was at that time.

JUSTICE WAINWRIGHT: Does that have the effect of in the serial filing case that were talking about just accumulating the fees and expenses that the legislature said, healthcare provider should not have to pay for inadequate or failure to file expert reports?

MR. BRZEZINSKI: It, it would and I think the remedy ...

JUSTICE WAINWRIGHT: It could happen that way under the scenario we're talking about we're talking about. Right?

MR. BRZEZINSKI: It, it they would, your Honor. And I think the remedy that would survive nonsuit in that case very likely would be a motion for sanctions directly against the lawyer. A not sanctions related to the, the report but sanctions for, for in excusable conduct just like in the Bennett case where the plaintiffs file a number of lawsuits at the same time and then try to consolidate them all into the court that, that they felt was most helpful to them. Those sanctions were directly against the attorney and in that case Judge Bennett refuse to sign the order of nonsuit. And under those circumstances the Court said that that survived the filing of the notice of nonsuit by the plaintiffs. I, I think appealing a matter that has been nonsuited has the same effect on the part of the defendants, on the part of petitioner. We've worked on this appeal for three years and there had been a cause certainly racked up on a case that the Thirteenth Court of Appeals said they had no jurisdiction to consider.

JUSTICE BRISTER: Will you, could had dismiss with prejudice.

MR. BRZEZINSKI: I could have, your Honor. The effect was actually the same in this case because the statute ...

JUSTICE BRISTER: But it was, was, eventually, it was at that time?

MR. BRZEZINSKI: That the statute had actually run at the time the nonsuit the order was signed. We have no ability to refile the case.

JUSTICE BRISTER: So why didn't you do it with prejudice in the board three years of appeal?

MR. BRZEZINSKI: I think, your Honor, I think that the appeal probably would have gone forward regardless. Only petitioner can answer that but, but I think the appeal would have gone forward regardless. The statute had run, why we didn't do it that way, I guess, it's because I'd instruct my legal assistance to always file a nonsuit without prejudice. Simply matter that. I have nothing further.

CHIEF JUSTICE JOHNSON: Any further question? Thank you, counsel.

MR. BRZEZINSKI: Thank you.

REBUTTAL ARGUMENT OF CECILIA GARZA ON BEHALF OF THE PETITIONER

MS. GARZA: I have some few points to reply. I want to make it perfectly clear because I, I feel respondents still doesn't quite understand our argument, we're not saying that plaintiff had no right to nonsuit. We're not saying that the trial court erred in granting the nonsuit. What we're saying is the effect of that nonsuit made a prior order for denying our sanctions, our motion for sanctions and dismissal which was interlocutory order, made that order final and appealable. According to res--

JUSTICE GREEN: Is that, is that happened when the order is signed or when the nonsuit is taken?

MS. GARZA: Yes, no, it's a, the nonsuit takes effect at, when the plaintiff files his notice of nonsuit. However, the appellate deadlines and time tables begin to run when the order granting the nonsuit as signed.

JUSTICE WAINWRIGHT: And if an order is never signed by trial judge granting the nonsuit?

MS. GARZA: Deadlines don't start.

JUSTICE WAINWRIGHT: That's your case.

MS. GARZA: That's why we submit an order.

JUSTICE WAINWRIGHT: Deadlines never start, did you say?

MS. GARZA: Well, if-- no, I mispoke, I apologize. If a trial court refuses to enter an order, I, I would assume that there's several ways that you can get there are mandamus, trying to get the court to enter an order, to, to, If finally get that orders signed, so that the appellate deadlines can start to run. So basically, it, it is not. We're not saying that they shouldn't have filed their notice their, their nonsuit. We're not saying they can't. We're just saying that the effect of that notice basically just made out interlocutory order which under Article 4590i was not appealable, it made it a final appealable order. And yes, there was some questions about whether, Justice O'Neil, brought up whether this is a substantive requirement or procedural requirement. The expert report requirement is a procedural requirement with substantive issues. Palacios says, "It's a determination to see whether the case has merit to continue, to go forward." It has to, it has to be, the report has to be written by a qualified expert. It has to have opinions based for the standard of care, the breach and the causation require in all medical negligence cases. It is ba-- it is a report on the merit to the case, does this case have the merit to go forward. It is not simply a procedural motion, it is not simply a procedural issue, it's based on the substance of the report. Respondent mentioned that current state of, of law says that, "A nonsuit vitiates it's over jurisdiction is done." The Hyundai versus Alvarado case says that, "A nonsuit may have the effect of vitiating." It does not say, "shall," it does not say it always does, it says it may. And specifically excepts where it was based on merits. It's, it's all position that yes, although this is a procedural requirement, it's a procedural requirement that includes substantive issues. It is, it includes the merits.

JUSTICE WAINWRIGHT: Let's say, hypothetically there's motion to dismiss, trial court denies it, case goes all the way to trial, defendants lose a trial. As a found judgment, you appeal it. Can you appeal that the denial of the motion to dismiss and if you win that can you go back and get attorneys' fees in cause?

MS. GARZA: I would say that you can.

JUSTICE WAINWRIGHT: Even though you lost at trial.

MS. GARZA: I would say that you can because the basis of the 100 and now 120-day requirement back in 180-day requirement was that you

have to show, you have to meet these elements. And if that expert report was inadequate, the trial court let it go forward, it eventually went to trial and in the unfortunate case that plaintiff would prevail in that case but the in, the report was obviously inadequate then that was a procedural issue and a substantive issue that should have been dealt within the beginning and I believe that a defendant has a right to appeal that issue even after a judgment against him. Finally, I believe that Justice O'Neil also brought up an issue in point about why it's an arbitrary rule. Why it, it can go forward as to why, why whether it's pending, whether it has been ruled on, or it has not been ruled on. That's the problem that, that deci-- that the decision and the court had stated a law as Thirteenth Court of Appeals, I believe the Fourth Court of Appeals is doing the same thing. Is it's creating an arbitrary rule as to what you can and can't appeal. And I just strongly argue to this Court that the legislature mandated this. This is a dismissal with prejudice, is an award of attorneys' fees, we're trying to stop frivolous lawsuit. We're trying to deter plaintiff's attorneys from continually filing this frivolous lawsuits and if we're not enforcing, the trial court is not enforcing what's mandated which has the word "shall" in it, it's not having that effect. Also, respondent brought up the fact that this would discourage, being able to appeal would discourage a, a plaintiff from willingly nonsuit any cause of action with regardless of the reason. I don't think so because if it was a claim that had merit and it was not a frivolous lawsuit and they had their expert report that satisfied all the elements, I don't think there'd be an issue to appeal. So it's not discouraging, if this is the case with merit, if it's not a frivolous case, it shouldn't discourage anybody from filing a nonsuit. The problem is in the case like this were it was, it's frivolous as to this defendant, the requirements were not met. This case should have not come forward and it should have been dismiss with prejudice. So no, I don't think that allowing an appeal from an order of nonsuit would in any way discourage a plaintiff from, form making his trial strategy decisions and, and deciding who to nonsuited and not. Basically, I just would conclude with asking this Court to correct the flawed interpretation of the Thirteenth Court of Appeals and, and hold that a tr-- an appellate court does have jurisdiction over an erroneous denial, a failure of a trial court to grant a motion to dismiss that would show obviously should be granted just because the plaintiff nonsuits their claim does not rob an appellate court to of jurisdiction. Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Ms. Garza. The cause is submitted and the Court would take another brief recess.

MS. GARZA: Thank you.

COURT MARSHALL: All rise.

2007 WL 5231243 (Tex.)