



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
Eberhard Samlowski, M.D., Petitioner,
v.
Carol Wooten, Respondent.
No. 08-0667
November 18, 2009

Oral Argument

Appearances: Kay E. Ellington, Law Offices of Kay Ellington, PC, Dallas, TX, for petitioner.

Barney L. McCoy, Law Offices of Barney L. McCoy, Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

CONTENTS

ORAL ARGUMENT OF KAY E. ELLINGTON ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF BARNEY L. MCCOY ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF KAY E. ELLINGTON ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0667, Eberhard Samlowski, M.D. vs. Carol Wooten.

MARSHALL: May it please the Court, Ms. Ellington will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KAY E. ELLINGTON ON BEHALF OF THE PETITIONER

ATTORNEY KAY E. ELLINGTON: Chief Justice, may it please the Court. The only issue presented here today is whether or not it was a clear abuse of discretion for the trial court to deny an extension, a 30-day extension, for the plaintiff to cure a deficient report. Now, there's no question that the trial court and the Tenth Court of Appeals in its entirety agreed that this report was not a good faith effort. Based on the statutory language of 74.351, it was then appropriate and within the Court's discretion and indeed mandatory that the case be dismissed.

JUSTICE DAVID M. MEDINA: Was there any explanation as to why it should be dismissed?

ATTORNEY KAY E. ELLINGTON: Why what?

JUSTICE DAVID M. MEDINA: Why the case should be dismissed?

ATTORNEY KAY E. ELLINGTON: Why it should be dismissed? I'm sorry.

JUSTICE DAVID M. MEDINA: Was there any explanation in the order by the trial court why the case should be dismissed?

ATTORNEY KAY E. ELLINGTON: Yes. The order specifically states that the report did not comply with the statutory requirements of 74.351, was not a good faith effort, that is specifically in the order, and that the case would be dismissed.

JUSTICE DAVID M. MEDINA: Is that enough?

ATTORNEY KAY E. ELLINGTON: Yes.

JUSTICE EVA GUZMAN: Counsel, if the report is not a good faith effort, then what is the basis then for moving forward to consider the deficiency and whether a 30-day extension is appropriate?

ATTORNEY KAY E. ELLINGTON: Well, the statute allows that. The statute specifically says that the Court may grant a 30-day extension if the report is found to be deficient.

JUSTICE EVA GUZMAN: Is this report so deficient that it does not constitute a report at all?

ATTORNEY KAY E. ELLINGTON: Well, I know that that is an issue before this Court on numerous occasions, and I have to say in all honesty that the reports that have been considered by the Court to be no report were much less than this one.

JUSTICE EVA GUZMAN: Well, I don't think you can argue that this report is adequate as to the standard of care, but we're talking about causation.

ATTORNEY KAY E. ELLINGTON: Right.

JUSTICE EVA GUZMAN: The conclusory allegations in the report, do they amount to no report as to that element or are they simply deficient?

ATTORNEY KAY E. ELLINGTON: It is my opinion that the causation language in this report is so weak and in no way connected to any of the nine pages of negligent acts that are listed in the report that it does constitute no report. I mean that's one way -- I look at this two ways. One way is that the causation issue is so lacking in this report that it constitutes no report and therefore the Court basically does not have even the discretion to give a 30-day extension. On the other hand if the Court finds that it is sufficient enough to constitute some report, but it is deficient, then the burden is not on the defendant to establish that there should not be an extension given, as the Waco

Court of Appeals has said, but that it is the burden on the defendant to establish that there is -- I mean on the plaintiff to establish that there is some reason that an extension should be given. And I think that's the way the court of appeals cases that I've cited and the Waco court cited have decided this case, and that is, is there some evidence in the record that an extension should be given.

JUSTICE HARRIET O'NEILL: Well, here's where I get confused.

ATTORNEY KAY E. ELLINGTON: Okay.

JUSTICE HARRIET O'NEILL: Because it seems to me that the definition of an objective good faith effort equals a good report. In other words, the good faith effort requires that you address standard of care, breach and causation, that you do it with sufficient specificity to inform the defendant of the conduct that's called into question and to allow the trial court to conclude the claims have merit. Well, if it meets all those things, it's never going to be deficient. So why would you ever need to cure?

ATTORNEY KAY E. ELLINGTON: Why would you ever what?

JUSTICE HARRIET O'NEILL: Why do we need the cure provision? If to be a good faith effort, it's got to be a hundred percent and meet the requirements of being a good report, then it strikes me the ability to amend is just surplusage.

ATTORNEY KAY E. ELLINGTON: Well, yes, I guess you would have to ask the legislature why they put that provision in there.

CHIEF JUSTICE WALLACE B. JEFFERSON: But that's your argument, right? That that 30-day cure provision is surplusage. Because --

ATTORNEY KAY E. ELLINGTON: I'm sorry, is?

CHIEF JUSTICE WALLACE B. JEFFERSON: Is that it is not consistent with the definition of a good faith report. So that if there is anything missing in a report that makes it less than a completely adequate report, then the trial court would have no discretion to grant a 30-day period for the claimant to cure that deficiency?

ATTORNEY KAY E. ELLINGTON: Yes, that is my position.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the statute says the trial court has a 30-day cure. You understand what the problem is?

ATTORNEY KAY E. ELLINGTON: Yes, and in an attempt to try and reconcile this and try to give the Court some way in which to apply this statute until and unless it is changed, it is my position that in the event that there is a deficient report and it is not a good faith effort, but there is some extraneous outside issues that may be in the record such as --

JUSTICE HARRIET O'NEILL: That's not --

ATTORNEY KAY E. ELLINGTON: Well, I guess I what I'm saying --

JUSTICE HARRIET O'NEILL: -- [Inaudible] of the cure statute.

ATTORNEY KAY E. ELLINGTON: Right.

JUSTICE HARRIET O'NEILL: That's your standard, but the legislature did create a cure. But if you read the Good Faith Effort Requirement literally the way you're proposing, there could never be a cure. And so how do we reconcile those two? Shouldn't we just look at whether the trial court can determine that the claims have merit?

ATTORNEY KAY E. ELLINGTON: I'm sorry, that the trial court what?

JUSTICE HARRIET O'NEILL: The trial court needs enough to determine that the claims have merit. And we can tell here from the depth of this report enough to know that there's some basis. It's not a frivolous claim. The purpose is to weed out frivolous claims.

ATTORNEY KAY E. ELLINGTON: I think that the -- you know, if we look, I think if we look at the history of this extension provision, if you look at the previous statute, 4590(i) was you know a much easier way to get an extension. In fact, 4590(i) provided that you could get an extension even if you hadn't even filed a report. You know, if there were outside circumstances that were available to be reviewed by the Court, then the plaintiff could even get an extension even if they hadn't filed an expert report. Clearly that's been eliminated, and I think that the language in the statute was placed there to give some out, some authority to the trial court if there were extenuating circumstances of some sort that would allow them to let the plaintiff amend or fix the report in some way.

JUSTICE HARRIET O'NEILL: But if these don't satisfy extenuating circumstances, what would?

ATTORNEY KAY E. ELLINGTON: There is no, there was no record of the hearing, there is no record of the hearing or anything like that that the Court could rule upon, so you know it's my position that there is no evidence before the Court that would allow the Court to determine that there were some other circumstances. And the reason that I bring that up is if you look at the cases that -- let me get to that -- the cases that are cited by the Waco Court of Appeals as well as the cases that I've cited in my brief, they all come to the conclusion, none of them come to conclusion that it was an abuse of discretion not to grant the 30-day extension. They all have the language in them that says, "There is no evidence in the record that it was an abuse of discretion not to grant the 30-day extension."

JUSTICE DAVID M. MEDINA: Okay. You said there must be some extenuating circumstance for the 30-day extension to apply. What --

ATTORNEY KAY E. ELLINGTON: Well, what they talk about --

JUSTICE DAVID M. MEDINA: Hold on.

ATTORNEY KAY E. ELLINGTON: I'm sorry.

JUSTICE DAVID M. MEDINA: Thank you. What's an extraordinary circumstance? I mean that doesn't appear to be the intent of the

statute. It appears, as Justice O'Neill said, to make sure that there are no frivolous litigations filed, and if you comply 99 percent with the first part and you screw up on the 1 percent, we're gonna give you, the trial judge is going to going to give you an opportunity to cure that. What is so wrong with that?

ATTORNEY KAY E. ELLINGTON: Well, it is my position that once you've crossed that threshold of not being a good faith effort, then you can't cure it. Now I have to reconcile --

CHIEF JUSTICE WALLACE B. JEFFERSON: So it would be an abuse of discretion for the trial court to grant a 30-day extension [inaudible].

ATTORNEY KAY E. ELLINGTON: To grant a 30-day extension, that's my position and that's what I feel, but I am trying in an attempt to in some way --

CHIEF JUSTICE WALLACE B. JEFFERSON: And when the expert report is deficient in some respect, the trial court has no discretion but to dismiss?

ATTORNEY KAY E. ELLINGTON: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Despite the 30-day cure language?

ATTORNEY KAY E. ELLINGTON: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: So what does it mean, what does the legislature mean, getting back to where we started earlier on, that the trial court has discretion to give a one-time 30-day extension to correct deficiencies in the report? What does that mean then?

ATTORNEY KAY E. ELLINGTON: Well, the legislature did not give us any help in that regard. As I said in the previous statute, it had some guidelines, you know, showing good cause, not accident or mistake. That has all been taken away and it's just simply "may grant a 30-day extension," and I think that that's put in there just because the legislature was attempting to -- although it's a pretty straightforward bar with regard to the definition of "good faith effort."

CHIEF JUSTICE WALLACE B. JEFFERSON: What if it had all the elements, the standard of care and causation and injury, et cetera, but there was a misnomer in the report itself --

ATTORNEY KAY E. ELLINGTON: Right, right.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- that makes it technically a problem. Would there be discretion then to give a 30-day extension? Is that the only way?

ATTORNEY KAY E. ELLINGTON: Well, again, we have no cases on this, and this is what has -- I'm sure that's why we're here. But I think that if it was such a minor thing as a misnomer, that you know that would be allowed to be changed, that that would be allowed to be changed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay. So if there is some discretion, then the question now is whether it is reviewable. Can we

look at what the trial court did and determine whether there was an abuse of discretion in denying a ground? And here there's a broad statement, I found it wasn't a good faith effort because it was not an adequate report, I mean generally speaking. But could the trial court deny a motion to cure based on other irrelevant factors? Doesn't like the claimant, doesn't like the claimant's lawyer? I mean factors that have nothing to do with the merits or the statute. How would that be reviewable?

ATTORNEY KAY E. ELLINGTON: Well, I think that it has to be, you have to be able to appeal the failure to grant the 30-day extension, it's a final judgment. And I think that, and just as these cases that I referred to in my brief as well as the Waco Court of Appeals referred to, again none of those cases find that it's an abuse of discretion, but they do state and imply in their dicta that there might be some evidence of abuse of discretion by the trial court that could be presented to the Court of Appeal in order for them to evaluate whether or not it was an abuse of discretion. You do not have anything in that issue here. I mean you don't have any record of any extenuating circumstances or -- the reason I say that is in the, let's say for instance in the Hardy vs. Marsh case, which is a Texarkana case I cite. In that case, they specifically state that the plaintiff had plenty of time to get an expert. In another case, Bosch vs. Wilbarger, which is out of the Amarillo court, they waited too long to file their objection -- or there I mean request for extension. I think that the Courts were looking for some way that they could say that there, you know, either is or is not some reason to grant an extension. And I think that the Waco Court --

JUSTICE EVA GUZMAN: Well, what about --

ATTORNEY KAY E. ELLINGTON: I'm sorry.

JUSTICE EVA GUZMAN: Excuse me, Counsel. What about in this case though, you have a report that's pretty thorough, you have nine breaches, and then you have three aspects that go to causation. Why isn't that a fair summary? Why couldn't the trial court look at this and determine that these claims have merit, and it's basically somewhat deficient because it needs a little bit more elaboration on the causation element? I think that when you look at it, the report talks about developing life-threatening complications as a result of the breaches above. Are you saying that he had, that the doctor had to tie in each breach to each specific injury?

ATTORNEY KAY E. ELLINGTON: That's what is so frustrating. Again, I --

JUSTICE EVA GUZMAN: And if so, why isn't the failure to do so simply a deficiency?

ATTORNEY KAY E. ELLINGTON: That's what so frustrating about this report. It's nine pages long, and you plow through all of this language, but when you really get down to what is causation language, it specifically states that, you know, all of this is the negligence on the part of Dr. Samlowski, and that such negligence, proximate cause of Ms. Wooten's developing multiple life-threatening complications that resulted in multiple but avoidable operations, multi organ failure with

permanent damage, no where in this report does it specifically connect any of the actions of Dr. Samlowski to --

JUSTICE EVA GUZMAN: Well, wait. Why isn't that a deficiency? Why isn't, was there enough to be a fair summary, such as to constitute a good faith effort, and then move to the next prong which is, is it so deficient that it's no report, or is it simply deficient and we should go back and give them 30 days to connect it? Why is it in this report that's not enough?

ATTORNEY KAY E. ELLINGTON: Well, I think that the report is deficient to the extent that it is not a good faith effort, and that's what the court of appeals even agreed with. The court of appeals attempted to -- we haven't even talked about this -- but the court of appeals attempted to establish a new standard, which is a good faith attempt as opposed to a good faith effort. And as Chief Justice Gray in his dissent indicated, that he didn't see that that could possibly be a distinction with a difference, and I agree with that.

JUSTICE HARRIET O'NEILL: But you agree we're going to have to figure out some way to reconcile the cure provision and the good faith attempt?

ATTORNEY KAY E. ELLINGTON: Right. And I think that --

JUSTICE HARRIET O'NEILL: But it strikes me that the whole Healthcare Liability Act says, here's the purpose of the Act -- and I don't remember the language, I wish I had it in front of me, but something about to be interpreted so as to not unnecessarily restrict claims. Why can't we use that piece to bridge the gap between these two and not completely read out the cure provision?

ATTORNEY KAY E. ELLINGTON: Well, and I agree with you on that, as far as saying that there are some circumstances where an extension may be granted, that's what the statute says, even though it's not a good faith effort, and as in this case. But it's not the burden, as the Waco court said, it's not the burden of the defendant to establish that there is a reason not to grant the extension. It is on the plaintiff to establish that there is some reason to grant the extension.

JUSTICE PHIL JOHNSON: Actually what they said, we're talking about abuse of discretion.

ATTORNEY KAY E. ELLINGTON: Right. Well, I guess --

JUSTICE PHIL JOHNSON: The trial court denied, and the question is did they abuse its discretion by denying?

ATTORNEY KAY E. ELLINGTON: How can you say the trial court abused their discretion when you don't have a record before you that would establish any reason why an extension should be granted? You start with the fact that it is not a good a faith effort, then it can be dismissed.

JUSTICE PHIL JOHNSON: I didn't mean to extend your time. You're running into your rebuttal time.

ATTORNEY KAY E. ELLINGTON: Oh, I've run out of time.

JUSTICE DAVID M. MEDINA: And in honor of Justice Brister, we ask the questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ATTORNEY KAY E. ELLINGTON: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. McCoy will present argument for the Respondent.

ORAL ARGUMENT OF BARNEY L. MCCOY ON BEHALF OF THE RESPONDENT

ATTORNEY BARNEY L. MCCOY: Chief Justice, Honorable members of the Court, and privileged guests, may it please the Court. First of all, contrary to what my brief said, I do concede that there's a deficiency in the report. Now the first three times I read it, I didn't spot it, and it wasn't until I got the objection and then read 130 cases that had been decided over about a nine-year period, most of which were decided in the time period after House Bill 4, that I finally came to the conclusion that, yes, there was a defect in this report. But I'd like for the Court to look at this in the context of the real world, and that is this. When we get one of these cases, I'm not going into the details of the screening process in my office, I kind of outlined it in my brief, but I would like for you to look at it from Dr. Pattman's standpoint. Here we have a person who teaches at UT in Dallas. He also is a staff member at Baylor College of Medicine where he takes residents and they participate in surgeries with him, so he's teaching Baylor medical students. He also has an active surgical practice in this process, and essentially his primary focus is on his teaching duties, his medical students, and his patients. Way down on his list of priorities is my expert witness report. We send him a big stack of medical records, he goes through them thoroughly, he tell us by phone that he thinks that there's a serious case here and that it would actually be worth our while for him to thoroughly review it and to write a report.

JUSTICE HARRIET O'NEILL: Let's grant you that, that he writes what he thinks is a thorough report. I think the question we're struggling with is what are the parameters of the "may."

ATTORNEY BARNEY L. MCCOY: I agree.

JUSTICE HARRIET O'NEILL: How do we address the trial court's discretion in this regard?

ATTORNEY BARNEY L. MCCOY: Exactly. And in this case when you read the report, though, you realize that this case has merit. It has met the test that the legislature intended to screen out frivolous lawsuits.

JUSTICE PHIL JOHNSON: But, Counsel, isn't the question whether the trial court has properly exercised its discretion in this case?

ATTORNEY BARNEY L. McCOY: Yes. Because that's the standard that this Court has set that --

JUSTICE PHIL JOHNSON: And regardless of what we think -- what we think --

ATTORNEY BARNEY L. McCOY: Sure.

JUSTICE PHIL JOHNSON: -- Regardless of what you think or anybody else the trial court is the one who made the decision.

ATTORNEY BARNEY L. McCOY: Correct.

JUSTICE PHIL JOHNSON: And the trial court, as I understand the statute, when there's a defect, the statute mandates dismissal. But the statute says the trial court may grant an extension.

ATTORNEY BARNEY L. McCOY: That is correct.

JUSTICE PHIL JOHNSON: So I guess the question that comes to mind is, how does the trial court who made this --, it's all in the trial court's discretion, had a statute that said, "you shall dismiss."

ATTORNEY BARNEY L. McCOY: Right.

JUSTICE PHIL JOHNSON: And so the trial court shall dismiss, and how did it abuse its discretion by following that mandate?

ATTORNEY BARNEY L. McCOY: The problem is that neither the legislature nor the Courts as have as yet set up some guidelines for the trial judge to go by. And this case, and granted there is no record because actually we were at a docket call and nobody asked for a court reporter. And that was probably maybe my fault as it turned out, but I could not anticipate, since every other instance -- of course, I've only had one case where a judge has found a record to be inadequate and he gave me 30 days to cure, but that was a different situation. That was in Harris County where you have millions of people, the odds of the judge and the doctor knowing each other are nill. And then you have a small town of Cleburne of 30,000 people where we discover afterwards that the doctor's wife and the judge's wife are close friends, but that's not an issue in this case. We briefed it, we did not put it in our brief. But so you have a situation though where in the context of the real world again, the judge actually never even considered the 30-day extension. There was very little discussion.

JUSTICE EVA GUZMAN: Well --

ATTORNEY BARNEY L. McCOY: Yes, Your Honor.

JUSTICE EVA GUZMAN: Let me ask you a question though, about the abuse of discretion and the judge having abused its discretion by failing to grant the 30-day extension. You led your argument with a recitation of all of the qualifications and the expertise of Dr. Pattman.

ATTORNEY BARNEY L. McCOY: Right.

JUSTICE EVA GUZMAN: You also said this is low on his priority. Is that one of the factors that the court could have considered? Here we have a doctor that knows exactly what is required, knows exactly what causation means, and simply failed to put it in this report. And how is that an abuse of discretion if that's one of the factors the court considered?

ATTORNEY BARNEY L. McCOY: Well, the problem is that the doctor doesn't know what the law requires about the exactitude of his report.

JUSTICE EVA GUZMAN: You have nine complaints about the treatment.

ATTORNEY BARNEY L. McCOY: Correct.

JUSTICE EVA GUZMAN: And you have life-threatening complications, avoidable operations, et cetera. How difficult would it have been to tie any of those nine breaches to the avoidable operations or the organ failure or the multiple hospital admissions?

ATTORNEY BARNEY L. McCOY: Right. Well, after we sent these to him, essentially we got the report, there was just a very short time between there and the end of the 120 days, and with Dr. Pattman's schedule, it would have taken me another several months to have gotten a cure from him as a matter of practicality. But with regard to the issue of -- I mean there's case law that says that the court shouldn't arbitrarily or unreasonably withhold a 30-day extension. And in this case --

JUSTICE NATHAN L. HECHT: We're trying to get some standards.

ATTORNEY BARNEY L. McCOY: To balance, exactly.

JUSTICE NATHAN L. HECHT: No, we need some standards. We don't want to just flip a coin here. What should inform the trial judge's decision? The interesting thing about this report, you read all the way through it and you keep expecting the doctor to say, "And therefore the surgery was unnecessary," he doesn't even say that.

ATTORNEY BARNEY L. McCOY: Right, right.

JUSTICE NATHAN L. HECHT: Maybe it wasn't.

ATTORNEY BARNEY L. McCOY: Well, I think that was his opinion, but at the same time --

JUSTICE NATHAN L. HECHT: I couldn't tell by reading it. Maybe he needed to do the surgery to find out that there were these other problems and to try to correct them, and who knows?

ATTORNEY BARNEY L. McCOY: Right.

JUSTICE NATHAN L. HECHT: There's no way to know.

ATTORNEY BARNEY L. McCOY: The problem was by the time we got the report, there wasn't really sufficient time to have --

JUSTICE NATHAN L. HECHT: Right. But Justice Johnson's question, what checklist or what ideas should the trial judge have in his mind, this is why I should, this is why I shouldn't?

ATTORNEY BARNEY L. McCOY: Okay. I think that if, like in some of these other opinions where the qualifications aren't there on the part of the expert, or secondly, where he's just glanced over really the three issues with a little attack here and a little attack there, and really hasn't given a well thought out analysis of any of the three, well, that's no report and the case should be dismissed. But where he has really gone into great detail on the issues of standard of care and the breach thereof, and has from time to time in his discussions of them mentioned the complications and the things that can go wrong when you don't do this, and then at the end he does a summary of it that outlines the causation. I think that unless you know there's some really extenuating thing like you didn't ask for the 30 days until nine months after you know the report was filed and the time was past, which is one of the cases that we have before us, that there's -- for one thing, and this is where I think that we need balance is, we have gone to the point on using the expert witness report as a means of wiping out frivolous lawsuits to the extent that what we're doing now is we're actually throwing out the good lawsuits in many cases because of technical deficiencies in the report.

CHIEF JUSTICE WALLACE B. JEFFERSON: But let's assume that when the hearing occurred on the question of a cure before the trial court --

ATTORNEY BARNEY L. McCOY: Correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- but you had started out your argument in that court the way you started it out here. "Judge, I know the expert report is defective, because we don't have causation. I knew that some time ago, I'm sorry. Judge, can I have 30 days and I'll put it in there?" Couldn't the trial court say, "You knew that? I mean you're the lawyer for this client, you knew that this lacked an essential element and I'm not going to give you a cure. You should have cured that long before you came into my court." Wouldn't that be an appropriate exercise of discretion?

ATTORNEY BARNEY L. McCOY: If we had known about that months and months and months before.

CHIEF JUSTICE WALLACE B. JEFFERSON: Sure, right.

ATTORNEY BARNEY L. McCOY: Yeah, I think that -- because that's actually in one of the cases. You know, that's actually you know the fact of one the cases that they cite.

CHIEF JUSTICE WALLACE B. JEFFERSON: But we don't know what the judge's thought process was in this case, I mean it's not in the record.

ATTORNEY BARNEY L. McCOY: Except what's in his order, which is -- and actually it's what occurred during --

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, well, the orders are general --

ATTORNEY BARNEY L. McCOY: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- but that could have been in his thought process and I think that would be a valid exercise. If the judge was thinking, "My wife and this doctor are good friends," well, maybe that's not a good reason --

ATTORNEY BARNEY L. McCOY: Right.

JUSTICE: -- and we would think that's not a good reason to deny a cure, but we don't know. Perhaps in cases like this the judge should detail the reasons for denying.

ATTORNEY BARNEY L. McCOY: Yeah, that probably would be helpful. And I will say this, that what he said there was actually what he said in his order, "That I don't think this is a good faith report, so we don't even need to get to your request for the extension." I mean that's what occurred at the hearing. We never discussed the extension or the reasons for it or the reasons not, it was that this was a deficient, it was not a good faith effort and he was going to rule against us, and next case, please.

JUSTICE DON R. WILLETT: But there's nothing in the record -- I'm sorry.

JUSTICE EVA GUZMAN: Go ahead.

JUSTICE DON R. WILLETT: But there's nothing in the record that shows one way or the other the specific reason or reasons why the trial court judge denied the extension or dismissed, it's just devoid of any explanation?

ATTORNEY BARNEY L. McCOY: Yes. The record is, other than the order itself, is devoid of explanations for failing to rule on the 30-day extension.

JUSTICE PAUL W. GREEN: Well, we have a situation then where the court of appeals is adopting a different standard of review than what the statute says. It's not an abuse of discretion that the court of appeals in this case looks at, it says, "Well, we're just going to do it all over again, because what the record shows then only is the report itself and conducts a de novo review. Isn't that what's happened here?"

ATTORNEY BARNEY L. McCOY: Well, there are actually some lawyers that are urging courts to, and urging this Court in some of their writings to do a de novo review of every medical malpractice case, from the way it looks. But I don't think it's a de novo review, and I don't think that that's what the court of appeals did below. What they did is they looked at the four corners of the report and looked at the intent of the statute, and they said the intent of the statute was to weed out frivolous lawsuits. And in this case, what harm would there have been to have granted a 30-day extension? It was not --

JUSTICE PAUL W. GREEN: That's not the standard, is it? If it falls within the zone of reasonable disagreement, and then the trial court has that discretion, not the court of appeals.

ATTORNEY BARNEY L. McCOY: You know, it's like a ministerial act in a way. Sometimes it's just an abuse not to have rendered the act. And in this case the fact that you have what is obviously a meritorious case, obvious to everyone, that in this case he should have at least considered. He never even considered.

JUSTICE EVA GUZMAN: Let me ask you this.

CHIEF JUSTICE WALLACE B. JEFFERSON: Go ahead, Justice.

JUSTICE EVA GUZMAN: Counsel, the Subsection C speaks to a 30-day extension when elements of the report are found deficient.

ATTORNEY BARNEY L. McCOY: Correct.

JUSTICE EVA GUZMAN: Is there a difference between elements that are deficient and elements that are wholly nonexistent? And if so, if they're wholly nonexistent, do you get a do over? Do you get a 30-day extension when the element is not even there?

ATTORNEY BARNEY L. McCOY: I would think that reading the statute carefully if the elements were totally nonexistent and there had been no attempt to deal with the elements, then, yes, that's probably grounds of dismissal.

JUSTICE EVA GUZMAN: So this trial court, when reviewing this report, could have read what you wrote on causation and said, "That amounts to nothing on this element, it's nonexistent." Then you don't even jump to 30 because you don't have an element that's deficient. Is that correct?

ATTORNEY BARNEY L. McCOY: But the problem is that when you read the report, when the reasonably prudent person reads the person or the reasonably prudent jurist reads the report, there are discussions of causation other than the conclusory statements, they're just not properly tied up.

JUSTICE EVA GUZMAN: Can we draw inferences though from the entire report to support the conclusory statements in the causation aspect of the report?

ATTORNEY BARNEY L. McCOY: I think you can say that the summation was conclusory, I think that a fair reading of the report is that there was an attempt on his part to discuss causation in other parts of the report, but he didn't properly tie it up in a nice orderly fashion that's probably required by the case law.

JUSTICE EVA GUZMAN: So your argument is the element is there, it's simply deficient?

ATTORNEY BARNEY L. McCOY: Correct.

JUSTICE EVA GUZMAN: All right.

ATTORNEY BARNEY L. McCOY: Any further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, I was going to ask, well, couldn't the, might the trial court assume that if the doctor is not

speaking to causation it's because the doctor doesn't believe that these breaches in the standard of care caused the injury or death?

ATTORNEY BARNEY L. McCOY: I think from reading this report, when you read it carefully, it's clear that he does.

JUSTICE NATHAN L. HECHT: But why is that so? That's the part I miss.

ATTORNEY BARNEY L. McCOY: Well, he basically in several points --

CHIEF JUSTICE WALLACE B. JEFFERSON: Hold on, Counsel, hold on.

JUSTICE NATHAN L. HECHT: Let me just explain to you my thinking.

ATTORNEY BARNEY L. McCOY: Okay, sure.

JUSTICE NATHAN L. HECHT: Because when I read it, it seems to me to say, well, there's bad, bad, bad, bad, but thank goodness it didn't result in -- I mean she was going to have all these problems anyway, and she could have gone to the Mayo Clinic or the best doctor in the world, if this person isn't, and she would have still had the same result.

ATTORNEY BARNEY L. McCOY: Sure. And if that had actually been his opinion, we wouldn't even have been in that court that morning. But the thing is, what harm would it be to give 30 days to find out the specifics?

JUSTICE DAVID M. MEDINA: But that's not the standard. Now what harm is there to give anybody 30 days? I mean that's [inaudible].

ATTORNEY BARNEY L. McCOY: In this case though, when you read the attempt that he made in discussing those, you come to the conclusion that the case has merit, and there the purpose of the statute, which is in the intent section of the legislature which shows legislative intent, was that intent was to weed out frivolous lawsuits. And this case is more than a frivolous lawsuit, it's a case with a deficient report.

JUSTICE DAVID M. MEDINA: That gets us right back to where we started. I mean where do we look for guidance? The trial court has that discretion, the trial court has broad discretion whether or not to extend the 30 days or not.

ATTORNEY BARNEY L. McCOY: But I think that with the wide variety of opinions of judges at the trial level and their settings, when they're in that -- I mean that judge has to live with that doctor, and so in that framework, you need more than a merely a -- I mean a failure to even consider --

JUSTICE DAVID M. MEDINA: What should the test be? If we were to write an opinion, what should the test be? What does the trial judge need to do to persuade us that there's not an abuse of discretion?

ATTORNEY BARNEY L. McCOY: That there was no, that essentially that this case did not have merit on the face of the report.

JUSTICE DALE WAINWRIGHT: What do you mean by -- you've said that several times, that the case has merit, grant an extension. What do you mean by "it has merit"? A case that you will win?

ATTORNEY BARNEY L. McCOY: No, it's a case that has a chance for me to go forward with evidence to be considered by a jury.

JUSTICE DALE WAINWRIGHT: What does that mean? Do you survive a summary judgment, is that what you're saying?

ATTORNEY BARNEY L. McCOY: Yes, you could --

JUSTICE DALE WAINWRIGHT: Do you win in front of a jury?

ATTORNEY BARNEY L. McCOY: Survive a summary judgment would be, could be one test.

JUSTICE DALE WAINWRIGHT: Of course, the statute doesn't incorporate summary judgment standards and procedures, does it?

ATTORNEY BARNEY L. McCOY: No, it doesn't, no.

JUSTICE DALE WAINWRIGHT: Are you arguing that the standard should be different for small towns versus large cities?

ATTORNEY BARNEY L. McCOY: No, I'm saying that --

JUSTICE DALE WAINWRIGHT: You're saying that the judge has to live with this doctor and we should understand the practicalities of a small town.

ATTORNEY BARNEY L. McCOY: Yeah, I think, though, that the Court needs to understand the practicalities of dealing with judges who are living in a small town where they probably know the doctor, are going to have to live with that doctor, are going to have to face him at the Kiwanis Club.

JUSTICE DAVID M. MEDINA: That creates a different standard throughout the state then. I mean if you're going --

ATTORNEY BARNEY L. McCOY: No, it should be the same.

JUSTICE DAVID M. MEDINA: Well, if I'm going to Dr. Longmeyer in Hitchcock, Texas, and that's a different standard than going to see a doctor in Harris County.

ATTORNEY BARNEY L. McCOY: No, it actually should be the same standard, you just should recognize that you're going to have different situations where there's a little more pressure on the judge not to grant a 30-day extension merely because of the social pressure.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Counsel do you have anything further? Thank you. The Court is now ready to hear rebuttal.

REBUTTAL ARGUMENT OF KAY E. ELLINGTON ON BEHALF OF PETITIONER

ATTORNEY KAY E. ELLINGTON: Number one, the standard is clear abuse of discretion. That is the standard. Number two, the Court has --

JUSTICE HARRIET O'NEILL: Well, that's a phrase, but we're still looking at what informs that standard.

ATTORNEY KAY E. ELLINGTON: Right. No --

JUSTICE HARRIET O'NEILL: I mean many things have abuse of discretion, but we don't want unfettered discretion.

ATTORNEY KAY E. ELLINGTON: Well, I understand that.

JUSTICE HARRIET O'NEILL: And so we're just looking at, I think your opposing counsel has offered I think a reasonable solution, that if you can look at it objectively and determine that it's not a frivolous suit, then why wouldn't that be a reasonable parameter to inform discretion?

ATTORNEY KAY E. ELLINGTON: Right. No, I am not saying it's unfettered, I am saying, though that --

JUSTICE HARRIET O'NEILL: Could you answer my question? What's wrong with that as a standard? That if you can look at the four corners of the report objectively and you can discern that it's not a frivolous suit, then a trial court abuses its discretion by not allowing a 30-day cure period.

ATTORNEY KAY E. ELLINGTON: Well, I don't know that --

JUSTICE HARRIET O'NEILL: Then what would be a good parameter for discretion? Nobody has given us any parameter for discretion so far, and we're looking at that. We craft those in other contexts.

ATTORNEY KAY E. ELLINGTON: Right.

JUSTICE HARRIET O'NEILL: And I'm proposing that to you as your opposing counsel did in light of the purpose of the statute, you can objectively look at the four corners of the report and see that it's not frivolous, then why wouldn't the trial court then abuse its discretion by not granting the extension? Why is that not a reasonable standard?

ATTORNEY KAY E. ELLINGTON: Because the standard in the statute is it has to be a good faith effort, and I don't think that just looking at the four corners of the report and determining that it's not a frivolous lawsuit meets that standard. I think that, here's -- the way I look at it is that the determination that it is not a good faith effort is the governor, that's where you start. And if you --

JUSTICE HARRIET O'NEILL: But again, this gets us right back to the beginning because the good faith effort means one that meets all statutory requirements.

ATTORNEY KAY E. ELLINGTON: Right.

JUSTICE HARRIET O'NEILL: So I mean that reads out the amendment, that reads out the cure period. So if we're going to try to reconcile these two, why would that not be a good statement of what should inform the trial court's discretion?

ATTORNEY KAY E. ELLINGTON: How can you -- well, I guess I don't understand how you would apply this is not a frivolous lawsuit when you, for example in this report. When you look at this report and see that there's no causation language in the report, I mean there's language, but it doesn't connect with the negligence, how can you say that that is or is not a frivolous lawsuit? I don't know how you use --

JUSTICE HARRIET O'NEILL: Well, you've got all the standards, you've got negligence, you've got standards of care, you've got breach, and you've got the statement that it proximately caused her injuries. It just doesn't say how. Objectively it covers all the elements, it doesn't say how, but shouldn't that be enough to give a 30-day extension? By granting such a short extension period, it seems like the legislature surely intended a liberal use of the amendment standard if you get to a certain point.

ATTORNEY KAY E. ELLINGTON: Yes, and I think that that is what -- I mean this 30-day extension is there for a reason, and I think that's what the, all of the appellate courts and all of the decisions that I've cited, what they have done is they have looked to see -- they have looked at the record because there is a record, unlike this case, to determine whether or not there were extenuating circumstances such as not having time to get the expert report, having some difficulty in getting the expert to render the report. All of what Mr. McCoy articulated in his argument, none of that is in the record.

JUSTICE PHIL JOHNSON: Counsel, if the trial court had granted an extension and there was no record and you were up here trying to say there was an abuse of discretion, isn't that where we are, the shoe is just on the other foot? In this case seems to me like, if you didn't have a record and you were trying to say that the trial court abused its discretion by granting, what are you going to argue?

ATTORNEY KAY E. ELLINGTON: Well, I can come --

JUSTICE PHIL JOHNSON: And that's the position, it seems to me like we have the posture of the case makes all the difference in the world, it seems like.

ATTORNEY KAY E. ELLINGTON: Well, granting of the extension would not be appealable, so I wouldn't be here.

JUSTICE PHIL JOHNSON: But if you were here and trying to claim an abuse of discretion, you would have to have the record also. I mean somebody has to -- the burden of proof has to be on someone.

ATTORNEY KAY E. ELLINGTON: Yes.

JUSTICE PHIL JOHNSON: The burden to bring up something up here, it seems like. It seems like that's what you're saying, there's no record.

ATTORNEY KAY E. ELLINGTON: Well, I am -- well, what I'm saying is that the 30-day extension is discretionary, it is not mandatory. There has to be some explanation as to why it should be granted, not why it shouldn't be granted. And in order for --

JUSTICE PHIL JOHNSON: And then your position, that's not your burden.

ATTORNEY KAY E. ELLINGTON: Exactly. It's the plaintiff's burden.

JUSTICE HARRIET O'NEILL: The plaintiff's burden.

ATTORNEY KAY E. ELLINGTON: I think my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: All right, any further questions? Thank you, Counsel.

ATTORNEY KAY E. ELLINGTON: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

Eberhard Samlowski, M.D., Petitioner, v. Carol Wooten, Respondent.
2009 WL 4823930 (Tex.) (Oral Argument)

END OF DOCUMENT