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CAUSE NO. 01-0416

IN THE
SUPREME COURT OF TEXAS

REHABILITATIVE CARE SYSTEMS OF AMERICA,

Petitioner

v.

ROBERT JERRY DAVIS AND KATHY DAVIS,

Respondent.

On Appeal from the 6th Court of Appeals
Texarkana, Texas

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ad1f72a7-503a-42ac-88ad-778879c975dd

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ad1f72a7-503a-42ac-88ad-778879c975dd

INDEX OF AUTHORITIES

Cases

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=ad1f72a7-503a-42ac-88ad-778879c975dd

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Rehabilitative Care Systems of America, Petitioner, files the following Brief on the Merits.

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STATEMENT OF THE CASE

Robert Jerry Davis was undergoing physical therapy with Rehabilitative Care Systems of America while recovering from an injury suffered on the job in 1991 while working as a truck driver. In June, 1992, while performing some exercises pursuant to his physical therapy regime, Robert Jerry Davis alleges that he suffered an injury to his shoulder. He sued Rehabilitative Care Systems of America alleging that this injury was caused by the malpractice of the physical therapists employed by Rehabilitative Care Systems of America. His wife joined in the suit claiming loss of consortium.

A jury in the 115th Judicial District Court of Upshur County, Texas awarded the plaintiff, Robert Jerry Davis, $52,550.00 in actual damages and plaintiff, Kathy Davis, $14,500.00 in actual damages. Judge Lauren Parish entered judgment on the verdict.

Respondents presented no expert testimony that any act or omission on the part of Rehabilitative Care Systems of America caused shoulder injury to a reasonable degree of medical probability. Additionally, respondents presented no expert testimony that Rehabilitative Care Systems of America, or its employees, breached the standard of care for physical therapists in the State of Texas. The trial court overruled a Motion for Directed Verdict by Rehabilitative Care Systems of America which pointed out that respondents had failed in these areas of their burden of proof which are required to be met for the case to be submitted to the jury. The trial court also denied

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a Motion for New Trial re-urging these two points. On appeal the Sixth Court of Appeals affirmed the trial court's judgment in all respects. Its opinion was authored by Justice Grant, joined by Justices Cornelius and Ross, and ordered published. It is published at 43 S.W.2d 649.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 58.7(b) of the Texas Rules of Civil Procedure, Petitioner requests oral argument before this case is submitted.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction over this appeal under Sections 22.001(a)(1) and 22.001(a)(6) of the Texas Government Code.

ISSUES PRESENTED

Issue No. 1

The Court of Appeals erred in affirming the trial court's judgment because the evidence adduced at trial was legally insufficient to support the jury's verdict since the respondent did not offer any expert testimony as to the standard of care, or breach of that standard of care, so that the resulting opinion contradicts that of the Amarillo Court of Appeals in *Flores v. Center for Spinal Evaluation and Rehabilitation*, 865 S.W.2d 261, 264 (Tex. App. — Amarillo 1993, *no writ*).

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Issue No. 2

The Court of Appeals erred in affirming the trial court's judgment because the evidence is legally insufficient to support the jury's verdict since there was no expert testimony that the plaintiff's injuries were caused by the conduct of petitioner based upon a reasonable medical probability.

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STATEMENT OF FACTS

The nature of the case is correctly stated at pages 2 to 10 of the opinion of the court of appeals. However, the Court of Appeals did not set forth that Dr. James Harris, the only expert witness called by the respondent, testified that he could not say, based upon a reasonable medical probability, that the respondent's injuries that he treated after the alleged incident of June, 1992 were caused by that incident. (R.R. Exh. Vol. Harris Deposition—38). Dr. Harris performed a second surgery on respondent's shoulder on October 23, 1992 which revealed a very small rotator cuff tear. (R.R. Exh. Vol. Harris Deposition—pp. 25-26). When asked if respondent was on a course for a second surgery on his shoulder, prior to June, 1992, Dr. Harris testified, "I don't think I could say....He wasn't out of the woods yet." (R.R. Exh. Vol. Harris Deposition—p. 22).

Respondents' suit was one of physical therapist malpractice. Respondents argued at trial that no staff member being physically present in the room while Mr. Davis was exercising on the equipment amounted to caring for him in a negligent manner. (R.R. 4—98-99). Respondents, however, called no expert witnesses and proffered no expert testimony as to the standard of care of a physical therapist. Petitioner, Rehabilitative Care Systems of America, called Eddie Howard, a licensed physical therapist since May of 1975, as an expert witness. He testified that it is

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common practice, once patients have demonstrated efficiency and effectiveness in safety on a machine, to not stand right beside them during the time they are exercising. (RR 4—34). He further testified that physical therapists around the country leave patients who are exercising in the room alone for brief periods of time. (R.R. 4—34-35). Furthermore, respondent's physical therapist, Johnny Lee-on, a licensed physical therapist in the state of Texas, testified that it was acceptable for a physical therapist or a physical therapist assistant to momentarily leave a patient who is exercising, when the patient has demonstrated efficiency and comfort in performing the exercise. (R.R. Exh. Vol. Lee-on Deposition—107-108). Despite the state of the evidence, the trial court denied a motion for directed verdict and motion for new trial presented by petitioner's counsel.

SUMMARY OF THE ARGUMENT

This Court, as well as many others, has held that to recover for personal injuries, those injuries must be proven based upon a reasonable degree of medical probability. Here, the lone medical expert offered by the respondent testified specifically that he could not attribute respondent's shoulder injury to any particular circumstantial cause based upon a reasonable degree of medical probability. Further, in a case against physical therapists for malpractice, Texas law requires that the standard of care for physical therapists and other health care providers be established by expert testimony.

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Here, respondents offered no expert testimony that the standard of care for physical therapists was breached by Rehabilitative Care Systems of America, as the Amarillo Court of Appeals required in *Flores v. Center for Spinal Evaluation and Rehabilitation*, 865 S.W.2d 261, 264 (Tex. App. — Amarillo 1993, *no writ*). Thus, for two separate reasons, respondent failed to establish a case that could be presented to the jury. As a result, the Court of Appeals erred in affirming the trial court's judgment, and this Court should reverse and render judgment in favor of respondent. Otherwise, there will be conflicting published opinions from two intermediate courts of appeal on the evidence required in a physical therapist malpractice lawsuit.

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ARGUMENT AND AUTHORITIES

I. The Court of Appeals erred in affirming the trial court's judgment because the evidence adduced at trial was legally insufficient to support the jury's verdict since the plaintiff did not offer any expert testimony as to the standard of care, or breach of that standard of care.

In determining whether there is no evidence to support a jury's finding, an appellate court should consider all the record evidence in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonably inference is to be indulged in that party's favor. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A legal insufficiency point may be sustained when 1) there is a complete absence of evidence of a vital fact; 2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove the vital fact; 3) the evidence offered to prove a vital fact is no more than a mere scintilla; or 4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 711. More than a scintilla of evidence only exists when the evidence in the record rises to a level that would make reasonable people to differ in their conclusions. *Id.*

Respondents' lawsuit against Petitioner, Rehabilitative Care Systems of America alleged negligence in the discharge of petitioner's responsibilities in providing physical therapy to Robert Jerry Davis. As such, this is a physical therapist malpractice case. There are four essential elements of a medical negligence cause of action, and they are:

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1) a legally cognizable duty requiring conformity to a certain standard of conduct; 2) a failure to conform to the required standard; 3) actual injury; and 4) a reasonably close causal connection between the conduct and the alleged harm. *Tilotta v. Goodall*, 752 S.W.2d 161 (Tex. App. — Houston [1st Dist.] 1988, *writ denied*). In determining issues of medical negligence, the trier of fact must be guided solely by the opinion evidence of a qualified expert witness. *See Gibson v. Methodist Hospital*, 822 S.W.2d 95, 98 (Tex. App. — Houston [1st Dist.] 1991, *writ denied*).

A physical therapist malpractice action is treated exactly like a traditional physician malpractice action. *See Flores v. Center for Spinal Evaluation and Rehabilitation*, 865 S.W.2d 261, 264 (Tex. App. — Amarillo 1993, *no writ*). In a physical therapist malpractice action, just as in a medical malpractice action, the failure to meet the applicable standard of care and proximate cause must be proven by expert testimony. *Id.* Lay witness testimony on these elements has no probative value in a malpractice action against a physical therapist. *Id.*; *see also, Duncan v. Horning*, 587 S.W.2d 471, 475 (Tex. Civ. App. — Dallas 1979, *no writ*).

In the instant case, respondent produced no expert testimony at trial as to what standard of care exists for physical therapists providing therapy such as that given to Robert Jerry Davis. Further, the respondents called no expert witness to establish that any standard of care of physical therapists was breached in the instant case. Indeed,

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Johnny Lee-on and Eddie Howard, the only licensed physical therapist to testify at trial, testified that the actions of physical therapist assistant, Penney Downey, were satisfactory based upon their knowledge of physical therapist standards. (R.R. 4—66); (R.R. Exh. Vol. Lee-on Deposition—55).

The testimony before this court is extremely similar to that before the court in *Flores* 865 S.W.2d 261. There, the court had before it deposition testimony from two physical therapists that the defendants in the court below had complied with the standard of care of physical therapists in rendering their services and that no act or omission on the part of the defendants below caused any injury to Flores. *Id.* at 265. Flores presented no expert testimony to controvert that of the two physical therapists proffered by the defendant in the trial court. In light of the testimony which was not controverted by any other expert opinion, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of the physical therapy center, because viewing the evidence in the light most favorable to Flores, there was nothing in the record demonstrating that a deviation from the standard of care was a proximate cause of his injury. *Id.* Likewise, there is nothing in this record for this court, even if viewed in the light most favorable to the jury's verdict, to establish whether the standard of care for physical therapists in the State of Texas was breached by Petitioner. The 6th Court of Appeals has itself stated that when a plaintiff fails to offer any reliable

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evidence of general causation as defined by this Court, any award of actual damages to that plaintiff must be reversed and judgment rendered for the defendant. *See Minnesota Mining and Manufacturing v. Atterbury*, 978 S.W.2d 183, 202 (Tex. App. — Texarkana 1998).

However, in this case, the 6th Court of Appeals ignored its own precedent and that of the Amarillo Court in *Flores*, relying instead on three cases from outside this state: *Mathis v. New York Health Club*, 690 N.Y.S.2d 433 (N.Y. App. Div. 1999); *South Ripley Cmty. Sch. Corp. V. Peters*, 396 N.E.2d 144 (Ind. Ct. App. 1979); *Matteucei v. High School Dist.*, 281 N.E.2d 383 (Ill. App. Ct. 1972). None of these cases is even written by a court of last resort, nor does any of the three address malpractice actions against physical therapists. The Court of Appeals erred in relying on foreign jurisdiction case law and not Texas law as announced in *Flores*. Further, the Fourteenth Court of Appeals suggested that expert testimony is required for the trier of fact in a physical therapy context in *Griffin v. Methodist Hosp.*, 948 S.W.2d 72 (Tex. App.-Houston[14th Dist] 1997, no writ).

Respondents contend certain standards were breached in the execution of the exercise program prescribed by his physician. As *Griffin* and *Flores* suggest, a layman is not qualified to ascertain if petitioner executed that program consistent with the standard of care for physical therapists. Further, a layman cannot ascertain how any

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breach of this standard caused the injury in question. This is why expert testimony is needed. Nothing either expert said under oath below would give a rational juror cause to believe the standard of care was breached or that this breach caused the injury. Thus, this Court should reverse the judgment of trial court and render judgment in favor of the petitioner.

II. The Court of Appeals erred affirming the trial court's judgment because the evidence is legally insufficient to support the jury's verdict since there was no expert testimony that the respondent's injuries were caused by the conduct of petitioner based upon a reasonable medical probability.

The respondent testified in the court below that the Total Gym machine caused his arm to be pulled above his head, injuring his shoulder. (R.R. 3—41-45). The respondent then testified that he later learned there was a rotator cuff tear in his left shoulder for which he had to have surgery. (R.R. 3—46). The only medical expenses proved up at trial pertained to treatment of his shoulder injury. (R.R. Exh. Vol. Harris Deposition—32-33).

However, the burden was on the respondent to prove that this injury and the expenses derived thereof were proximately caused by the complained of conduct of Appellant based upon a reasonable degree of medical probability. *See Shook v. Herman*, 759 S.W.2d 743, 746-47 (Tex. App. — Dallas 1988, *writ denied*) (expert's

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opinion on the causation must be based on a reasonable degree of medical probability). When a plaintiff fails to offer expert testimony regarding causation based upon a reasonable degree of medical probability, a defendant is entitled to judgment as a matter of law. *See Hernandez v. Calle*, 963 S.W.2d 918, 921 (Tex. App.— San Antonio 1998).

In the instant case, respondent called only one expert witness, his orthopedist, Dr. James Harris.[1] Dr. Harris testified that during an MRI conducted on June 30, 2000, that there were findings consistent with a partial tear of respondent's rotator cuff. (R.R. Exh. Vol. Harris Deposition—19). When asked if this finding was consistent with the incident complained of by Appellee in this lawsuit, the doctor testified as follows:

> Question: Is that a finding doctor, consistent with the exercise incident that he--that was related to you June 15th, 1992?
>
> Answer: Well, it wouldn't be inconsistent with it is the way I would put that.
>
> Question: It wouldn't surprise you, someone who had hyperabducted their shoulder surgery, to now have an MRI finding such as we are talking about now, would it?
>
> Answer: The way I would read this is that there is increased inflammation there, and that wouldn't surprise me that, if he hyperabducted it, he

[1] Dr. Harris appeared by video deposition and his testimony is contained in the exhibit volume of the Reporter's Record, along with an index indicating which portions of his deposition were offered at trial. The same is true for physical therapist, Johnny Lee-on.

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would stir things up again.

Question: Alright. The evidence of suggestion of partial tear, doctor, would that also be a condition that would be consistent with the hyperabduction incident as described to you?

Answer: It--it could be.

Question: Would these findings on an MRI be consistent with the types of pain complaints that he was relating to you as he was coming into your office and you were seeing him during this period of time?

Answer: Could you say it one more time?

Question: The--the findings that were discussing were--on the MRI study, would they be consistent finding who was relating the type of problems that Mr. Davis was relating to you during this period of time?

Answer: They wouldn't be inconsistent.

(R.R. Exh. Vol. Harris Deposition—19-20). This exchange clearly reflects that respondent's expert was carefully avoiding stating anything other than equivocations about whether respondent's exercise incident "could" have caused his shoulder injury. Later in his deposition, the following exchange took place:

Question: Up to this point in time, October 7, 1992, they were actually getting to the point where surgery was being scheduled for him, before June, before you saw June 15, 1992, wherein he related the exercise incident to you, did it appear to you that at that time that he was on a course for a second surgery?

Answer: I don't think I could say....

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(R.R. Exh. Vol. Harris Deposition—23). Thus, respondent's expert testified that he could not say if subsequent surgeries were made necessary by the injury allegedly sustained by respondent in June, 1992.

More compellingly and more directly, the issue was put to Dr. Harris by petitioner's trial counsel:

Question: Okay. Is there any chance, the tear being that small, that the tear was there and ya'll just would not be able to see it because of the limitations of the scope?

Answer: Yes.

Question: Okay. So, just because you don't know that there was a tear before the first surgery, doesn't mean that it wasn't there. Is that correct?

Answer: That's correct.

Question: And you certainly can't say that any incident at physical therapy, if there ever was an incident, caused that tear, can you?

Answer: Can't say that.

Question: Can't say that based on reasonable medical probability, can you?

Answer: You can't—you can't say how it was caused.

(R.R. Exh. Vol. Harris Deposition—37-38). Thus, when asked, petitioner's expert testified that it cannot be said that Appellee's injury was caused by the incident he alleges based upon a reasonable degree of medical probability. This case is similar to the issues raised in *Klug v. Ramirez*, 830 S.W.2d 801 (Tex. App. — Corpus Christi

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1992). There, as here, the plaintiffs recovered damages at trial from a jury for medical negligence against the defendants. There, as here, the defendants moved for an instructed verdict which the trial court denied. *Id.* at 803. On appeal, the medical defendant argued that there had been "legally insufficient evidence" as causation of harm. The Court of Appeals reviewed the expert testimony and concluded that there had been no evidence proving that the plaintiff's ultimate harm could have, in probability, been avoided but for the physician defendant's omissions. *Id.* The Court of Appeals then ruled that it was error to deny the Motion for Directed Verdict and rendered judgment for the physician defendant on appeal. *Id.* at 806-807.

In light of the expert testimony in this case, just as the physician defendant in *Klug* was entitled to a reversal of the jury's verdict and rendering of judgment in his favor, Appellee, Rehabilitative Care Systems of America, is entitled to a reversal of the trial court's judgment and rendering of judgment in its favor by this Court. Indeed, in *Minnesota Mining and Manufacturing Co. v. Atterbury*, 978 S.W.2d 183 (Tex. App. — Texarkana 1998), the court was faced with a jury verdict based upon the testimony of multiple medical experts on behalf of the plaintiff as to causation. However, because these experts based their testimony upon unreliable scientific data, principles and practices, this court reversed and rendered for the defendants. *Id.* Here, there is no dispute as to the expert's qualifications or methods, but even more compellingly

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than in the *Minnesota Mining* case, that expert testified under oath that causation cannot be determined based upon a reasonable degree of medical probability. Thus, just as that case was reversed and rendered in that case, the same result should follow in the instant case.

PRAYER

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For these reasons, Rehabilitative Care Systems of America, Petitioner, requests that this Court grant review in this case; that the Court of Appeals' judgment which affirmed the trial court's judgment be reversed and rendered in favor of Petitioner; and that a final take nothing judgment be ordered to be entered by the trial court. Petitioner also requests any other relief to which it may be entitled.

Respectfully submitted,

HAYS, McCONN, RICE & PICKERING

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Review was sent to all counsel of record by messenger delivery, certified mail, return receipt requested, and/or facsimile this _____ day of September, 2001.

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