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Supreme Court of Texas.
Jose Carreras, M.D., P.A.
v.
Carlos Francisco Marroquin, et al.
No. 09-0857.

October 14, 2010.

Appearances:

Ronald G. Hole of Hole & Alvarez, LLP, for petitioner.
Fernando G. Mancias of Law Office of Fernando G. Mancias, PLLC, for respondents.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09- 0857, Jose Carreras, M.D. v. Carlos Francisco Marroquin, from Hidalgo County in the 13th District.

MARSHAL: May it please the Court, Mr. Hole will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RONALD G. HOLE ON BEHALF OF THE PETITIONER

ATTORNEY RONALD G. HOLE: May it please the Court, this is my fifth. This is your second case today on notice. I'm beginning to pick up on a theme here, but if the Court will remember back when Article 4590i was first passed and there was an expert report requirement, this Court had to deal with what is required in an expert report. The legislature gave you some guidelines. You had to set out standard of care, approximate cause and a breach of the standard of care, but you all had to interpret that in Palacios. And this is the Palacios case for notice. Under 4590i, there really wasn't much required for notice. You just had to send a letter. So now, under 74.351, the legislature has changed it a bit and in 2003, it added a requirement of having an authorization. So what exactly is required for notice under 74.351? The quick answer is not much. Not much. You don't have to

set out what the allegations are. You don't have to set out the defendant you're suing. You don't even have to set out that you're suing under 74.351. If you did, this case is already gone because their notice actually said it was under 4590i. You don't have to set out the strict requirements like you have under 89.0041 that you just heard about, about date of suit, things like that. There's not much required. There's only one thing required, an authorization. That's the only thing that's required under 74.351. I'm sorry, 74.051 and if you look at it, it says any person asserting the healthcare shall give written notice and then specifically says the notice must be accompanied by an authorization for release of protective health information as provided by Section 74.052. Now, yesterday, I think you all dealt with the situation, the interaction of the statute of limitations coupled with under Chapter 33, responsible third parties and so basically that's a different situation and, Justice Green, before you ask, I am familiar with the Flack case and I don't agree with the result. But at any rate, in that case, you're talking about keeping somebody from being able to file a lawsuit, a statute of limitations. In this case, this is a granting by the legislature of 75 additional days. They're saying, look, if you do this and you know what? If you do this as to only one defendant, we'll give you an extra 75 days and that's the only requirement. They had to provide an authorization and if you talked about well what is the, what is the basically why is the purpose behind this to encourage settlements and reduce costs? Well, since the notice doesn't have to give you anything else, it's imperative you get this authorization so you can get the medical records. Yes, Justice Lehrmann.

JUSTICE DEBRA H. LEHRMANN: What's the purpose of the 60-day abatement in 74.052 if limitations isn't tolled under 74.051. In other words, why abate a claim that's time barred? Why is that in there?

ATTORNEY RONALD G. HOLE: Why? Why? I didn't quite follow that.

JUSTICE DEBRA H. LEHRMANN: Okay.

ATTORNEY RONALD G. HOLE: Why does it toll it for 60 days?

JUSTICE DEBRA H. LEHRMANN: What's the purpose of the 60-day abatement?

ATTORNEY RONALD G. HOLE: Oh, the abatement is if you have a lawsuit and the statute hadn't run, but you've got a lawsuit and they didn't give you notice? Then you can abate it for 60 days. You can get the medical authorization. You can go out and get medical records and see if you can settle the case. This talks about and it assumes you're going to file it in time before the statute runs. Now if the statute's already run, well then you've got a problem because you didn't give notice.

JUSTICE DEBRA H. LEHRMANN: So you're saying it just applies in that narrow situation.

ATTORNEY RONALD G. HOLE: Actually, that's the broad situation. The narrow one is when they didn't do and the statute's run already. And it's kind of like what's a report and not a report. I remember you all dealing with that *In re Watkins*, a situation where it was brought up on a writ of mandamus and it says well this is just a piece of paper really and I believe it was Justice Brister who said this is no more an expert report than my son's tricycle is a Harley, colorful language, but it made the point. And what is a notice letter? Could it just be a letter just saying we're going to sue you? Evidently, yeah. There's only one requirement. You have to provide an authorization. And if you do, then the legislature grants you an extra 75 days in which to file the lawsuit. Now, it's not saying that if you don't give the notice you can't file it. That's already been determined under 4590i. I think it was *Schepps v. Presbyterian* basically said, look, if you don't get it, it is mandatory, but we're not going to kick the case out. What we're going to do is say the resolution is an abatement and now the legislature has incorporated that in here and said, look, it will be an abatement, but that has nothing at all to do with whether or not you get the 75 days. And so, basically, what we're dealing with here is a situation where if you get the authorization and then you're able to get the medical records, then maybe the case can be resolved and the whole point of this is to resolve the case or try to resolve it before the lawsuit's file. Once it's filed, the doctors got a lot of things. It's public record now. It can go against his reputation and that's why it's encouraging you, the plaintiff's attorney, to do the notice correctly and it's really a carrot approach, a stick and a carrot if you want to. The

stick is if you'd filed the lawsuit and you don't give notice, then it's going to be abated for 60 days, assuming you still have time and the statute hadn't run, but if you do do it right, you know what? We're going to give you an extra 75 days in which to file the lawsuit and so that's--

JUSTICE DALE WAINWRIGHT: What if you serve the notice, but your authorization is defective?

ATTORNEY RONALD G. HOLE: That's the interesting case that's come up. I think that's the Rabatin case or something like that. I disagree with that. I think if it's defective, it's defective and you know you have strict requirements that are supposed to be done. And as Justice Johnson might say. It's a hoop you have to jump through and I'm one of those attorneys that's all about, as our former President say, strategy and I will look for the ways to find a way to use the statute to get my client dismissed. I think that's what we as lawyers are supposed to do and I think even the Chief Justice said that. You look at the statute and develop a litigation strategy to get your client out of the case and in this particular case, that's what we were doing and if you don't give a proper authorization, then it doesn't really help you any. And if you look at the, I think the difference they made in that case was they said, well, look, they were able to get some records, but, again, you could get records all kinds of different ways. Is that what's required? No, it says the strict requirement, give the authorization and then it even goes so far as to say the authorization in the form prescribed by 74.052 and then it, just like some of the other things, it actually sets out a form that you're supposed to file, follow, excuse me. And if you look at the form, it even says it's to facilitate investigation and evaluation of the healthcare claim described in the accompanying notice of healthcare claim and later on and also the defense of any litigation arising out of the claim made the basis of the accompanying healthcare liability claim. There are no requirements for the notice other than the authorization and if you get that, there's nothing left. You don't even have to give a notice.

JUSTICE NATHAN L. HECHT: Your argument in this case is that because the authorization was not with the notice, limitations was not tolled.

ATTORNEY RONALD G. HOLE: Absolutely.

JUSTICE NATHAN L. HECHT: Let me ask you, suppose authorization had been with the notice, but a few days later, it was revoked, which 74.052(b) allows. It says the authorization can be modified, if it is modified or revoked then you have some more time and so on, but it seems to contemplate revocation. What would be the effect on tolling at that point?

ATTORNEY RONALD G. HOLE: I think under the statute, it would be tolled. I think you have to look at the plain medium. This Court, I think--

JUSTICE NATHAN L. HECHT: If you file, just so I'm clear, if you file the notice and the authorization accompanies it, but then you wait five days and revoke the authorization, that would effectuate the 75-day tolling.

ATTORNEY RONALD G. HOLE: 74.052 gives you the right to do that. This Court has said in Fitzgerald that they assume and that's you all assuming that the legislature tends to say what it means. I'm not sure that they necessarily do, but that's what they say and if they say as long as you have the authorization with it in the form we prescribed and you give that notice before the statute runs, it tolls it for 75 days.

JUSTICE NATHAN L. HECHT: But if you don't, it's not tolled.

ATTORNEY RONALD G. HOLE: That's right.

JUSTICE NATHAN L. HECHT: I wonder what sense that makes if all you get is an authorization you can't use.

ATTORNEY RONALD G. HOLE: None. But then again, this is the legislature and, again, does it really encourage settlement anyway? No, it really doesn't, but this is what the legislature said. This is what they set out

and it's just like the statute of limitations. You know you could have a case that everybody remembers everything. Pristine memories, but if it's one day past it, it doesn't matter. It doesn't make any sense, but those are the laws because we have to have bright lines and this is a bright line situation. Actually, that's all I have. I thought there'd be more questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there are any further questions? Thank you, Mr. Hole.

ATTORNEY RONALD G. HOLE: Thank you.

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

MARSHAL: May it please the Court, Mr. Mancias will present argument for the respondent.

ORAL ARGUMENT OF FERNANDO G. MANCIAS ON BEHALF OF THE RESPONDENT

ATTORNEY FERNANDO G. MANCIAS: Good morning.

CHIEF JUSTICE WALLACE B. JEFFERSON: Good morning.

ATTORNEY FERNANDO G. MANCIAS: My name is Fernando Mancias and with Fabian Guerrero we represent the Marroquin plaintiffs. I introduce Ms. Cynthia Marroquin who is here behind me. For this reason, the summary in the court's brochure this morning has the deceased as the wife. The deceased is her daughter actually. Mrs. Marroquin is here on behalf of herself, her husband, and also the deceased daughter, Priscilla Ann Marroquin, who died at the age of 23 after seeing Dr. Carreras. Now in this case, we're asking the Court to deny the petition for review and this [inaudible] case, this Court about two years ago also denied a petition for review involving the issue of the expert report and we ask the Court to do the same thing in this case on this request for review and the reason is very simple. We ask you to follow the reasoning and the logic and the decision in the Hill v. Russell case out of Austin and also the opinion given by Judge Rose Vela in the Carreras v. Marroquin, which is the 13th Court of Appeals opinion in this case and the reason is this. Ms. Marroquin to us gave notice to Dr. Carreras and it's true, but did not include the medical authorization. We did include the authorization right after that and the authorization was complete.

CHIEF JUSTICE WALLACE B. JEFFERSON: How long after?

ATTORNEY FERNANDO G. MANCIAS: I'm sorry?

CHIEF JUSTICE WALLACE B. JEFFERSON: How long after?

ATTORNEY FERNANDO G. MANCIAS: A couple of weeks or so.

JUSTICE NATHAN L. HECHT: Sorry now? How long?

ATTORNEY FERNANDO G. MANCIAS: About a couple of weeks or so, maybe longer than that, maybe a month after the.

JUSTICE NATHAN L. HECHT: It was about seven months.

ATTORNEY FERNANDO G. MANCIAS: Maybe seven months.

JUSTICE NATHAN L. HECHT: Why was that?

ATTORNEY FERNANDO G. MANCIAS: I'm sorry?

JUSTICE NATHAN L. HECHT: Why did it take seven months?

ATTORNEY FERNANDO G. MANCIAS: To be honest with you, I had somebody else working on the case and I don't know if I bypassed it or missed it or whatever the case may be, but it's still our position that the tolling in this case was proper that the court, trial court denying the motion for summary judgment was proper and the court affirming that denial is also proper and the reason is very simple. We believe and we feel that the legislature if they wanted the result that Mr. Hole is asking for Dr. Carreras, they could have placed in 74.051 language that if the authorization is not included, it does not, it will not toll the 75-day period. In this case as the Hill court reasoned and also the court with Judge Vela in Corpus Christi, they reasoned that there's a separate remedy for not including the medical authorization and that's in 74.052 where they say that failure to include the authorization can cause, you can get a [inaudible] abatement in this case. If the Court, the lawmakers wanted to get the result that Mr. Hole is asking for, all they had to say is that 74.051 failure to include the authorization does not toll the 75 days on the statute of limitations. And we're asking this Court to also adopt the Hill reasoning and the Court of Appeals opinion in the Carreras Marroquin case out of Corpus Christi.

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

REBUTTAL ARGUMENT OF RONALD G. HOLE ON BEHALF OF PETITIONER

ATTORNEY RONALD G. HOLE: But going back to what Justice Hecht was asking about, what's the point if you have an authorization that's given and then revoked, what's the point of just providing it to one defendant and not the other and it still tolls it. That doesn't make much sense either because you can't get the records? The other defendant you may not even know about, but that's just the way it is. The only thing I want to respond to is the Hill v. Russell case and that's where both basically that court, the Austin court as well as Corpus Christi adopted the approach that, hey, if the legislature wanted to say this, they could have easily put it in there. But the bottom line is the legislature did put it in there in two different places. It says if it's done as provided by this statute. If notice is given as provided by this statute and then says in two different places it is mandatory that the authorization be attached to it. So, clearly, Hill, I think is based on faulty logic saying that it's, the legislature could have put it in there. They're basically saying the legislature should have said and if you don't give the notice and authorization, then the statute doesn't toll. But it says specifically if you don't give notice as provided by the statute. It doesn't just say if you don't give notice. So that has that language in there.

JUSTICE DALE WAINWRIGHT: Mr. Mancias makes the point that 74.052 provides the specific and separate remedy for failure to provide the authorization, not the notice, and that's abatement.

ATTORNEY RONALD G. HOLE: And that's abatement, I'm sorry.

JUSTICE DALE WAINWRIGHT: The argument then being that abatement is the remedy for failure to provide the authorization. Dismissal or not obtaining tolling is the remedy for failing to provide the notice, that they're separate.

ATTORNEY RONALD G. HOLE: There's no dismissal here at all. It's just they don't get the advantage.

JUSTICE DALE WAINWRIGHT: Absence of tolling.

ATTORNEY RONALD G. HOLE: Right, the absence of tolling. That's their, the legislature says you want tolling? Do this. And if you don't provide the notice, well then we're going to do this which is we're going to abate it. That's all. Any other questions? Justice Medina, nothing? Thank you.



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CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you both, Counsel, for your very concise argument. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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