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AMERICAN TRANSITIONAL V. PALACIOS ET AL.

MCCRACKEN: This is a medical malpractice case that was dismissed pursuant to art. 4590(i), §13.01, which requires an expert report to be filed within 180 days after filing suit. In reviewing that dismissal, the 1st CA used a standard of review that cripples the statute. There are two dispositive issues here. One is, why we should not use the summary judgment standard of review in medical malpractice dismissals, and also why it is dangerous precedent to allow a court to infer some criticism that's not expressly contained in the expert's report.

On the standard of review issue, the judge's decision about whether a report is adequate to defeat a dismissal is what is being reviewed.

HANKINSON: Isn't also being reviewed whether or not the report represents a good faith effort to comply with the definition of an expert report?

MCCRACKEN: It is. And I feel that that is under...

HANKINSON: What does that mean? What does it mean to say that the report does not represent a good faith effort, and how does that provision in the statute ducktail with the requirements of the definition of expert report, which requires a fair summary of the expert's opinion? How does that work?

MCCRACKEN: I believe that the way that works is a fair summary is something that has to be decided by the trial judge in his or her discretion.

HANKINSON: And what would constitute a fair summary? I understand we're dealing with liability issues and causation. But if I'm a trial judge and I have to make the determination of what is a fair summary, what is the standard for that?

MCCRACKEN: I think a fair summary would at a minimum require an attempt to incorporate the three elements that are contained in the definition of an expert report at subsection (r)(6).

HANKINSON: It's sufficient to avoid a directed verdict in a trial of a malpractice case? Would the opinion have to rise to that level of formality or that level of proof?

MCCRACKEN: It would not have to be admissible.

HANKINSON: Putting aside the admissibility, we have lots of case law in this state about what it takes to get a claim against a health care practitioner to a jury. There are a lot of cases out there that tell us what it has to do. Does this expert report have to rise to that level in terms of the content of the opinions that are contained in the report?

MCCRACKEN: I believe that it would rise to that level because under the statute what is

required is a statement about the healthcare practitioner's standard of care, how that standard was breached, and how that breach caused harm.

HANKINSON: Do you have to use magic words?

MCCRACKEN: I don't think so.

HANKINSON: Does it have to look like an affidavit in a summary judgment that's been filed in a malpractice case?

MCCRACKEN: I don't believe it does.

HANKINSON: So what's the difference between this report and what the affidavit must look like in order to meet the requirements in a summary judgment proceeding in a malpractice case?

MCCRACKEN: Well this expert report would not have to be sworn. It could contain hearsay. It would not have to be admissible. All it has to do is make some attempt to address the three elements contained in (r)(6). Whereas, an affidavit in a motion for summary judgment has to be admissible. It's a more formal document. It has to address the specific elements raised in the motion for summary judgment by the defendant in the first place. And I think that there are several distinctions between what the legislature intended under 13.01, and what we have in the motion for summary judgment practice.

HANKINSON: And what are those distinctions?

MCCRACKEN: The distinctions are under 13.01, the expert report need not be sworn; need not be in affidavit form; need not marshal proof; need not contain admissible evidence. There are several extensions available if you need more time to respond. This expert can be a throw down expert that no one ever gets to hear from again for the remainder of the case even though trial.

HECHT: Could it be as conclusory as saying the health care providers standard of care was to do better than it did, it didn't meet that, and the damages resulted? Essentially those many words.

MCCRACKEN: I don't think that would be a fair summary of the standard of care.

HECHT: Why not? It doesn't have to be admissible. It doesn't have to be sworn. It could have hearsay in it. Why isn't that enough?

MCCRACKEN: Because that is tantamount to saying, I think that the defendant should be careful, should use case, should pay attention, should use good judgment...

HECHT: I think you're right. But what's wrong with that?

MCCRACKEN: None of those say what action or inaction on the part of the defendant health

care provider should have been or should not have been taken. And that is what the standard of care is. That's what the standard of care means. As Justice Taft wrote in his dissent in the 1st CA, that there has to be some discussion of the substance of the action that has to be taken or not taken by the defendant health care provider.

HANKINSON: The TC in considering a motion such as the one that you filed in this case where you challenged the adequacy of the expert witness, _____ shall grant the motion only if appears to the court after hearing that the report does not represent a good faith effort to comply. What does that mean? What is it that happens at this hearing and what is it that the TC would be evaluating to determine whether or not the report represents a good faith effort to comply with the definition?

MCCRACKEN: I think first the court would look to see if the three elements of an expert report are contained in the four corners of the report.

HANKINSON: How is that different from the fair summary?

MCCRACKEN: That is the fair summary. Then after the fair summary if it doesn't meet those criteria, then you look to see if there is a good faith effort.

HANKINSON: Now explain to me what that means? What's the judge going to be looking at? Are you going to have testimony at the hearing where the lawyers puts someone on the stand and says, Gosh, I just haven't had a chance to review the records or this is the best I can...I don't understand. I'm not sure what this proceeding looks like and what the proof is of a good faith effort, if any, or if the TC is only looking at the four corners of the report. Explain to me what this means.

MCCRACKEN: If there is an apparent attempt to address all three elements of an expert report, that may be some showing of a good faith effort.

HANKINSON: I don't understand what an apparent effort...I mean either you do or you don't. I don't understand what an apparent effort is.

MCCRACKEN: And I agree with you. I don't understand what it is either. But I think it has to be taken on a case-by-case basis and you need to leave that trial judge some discretion to decide.

HANKINSON: You're writing the opinion in this case. What are you going to say in the opinion that the trial judge must consider in determining whether or not the report is a good faith effort? First of all what is the scope of the trial judge's review? what will the judge look at - just the report, testimony, lawyer's arguments? and if you're the plaintiff trying to avoid this motion to dismiss, then what are you going to tell the trial judge in order to say this is a good faith effort? You're writing the opinion, what's it going to say about good faith effort?

MCCRACKEN: I think that you have to look at the expert report to begin with, and then I do think that there is some inquiry about the conduct of counsel in making a good faith effort to get the expert report.

HANKINSON: But it says the report does not represent a good faith effort. That's what I have a question about.

MCCRACKEN: I don't think that's inconsistent with looking at the report to determine whether there was a good faith effort by the trial counsel to have that expert put everything into the report that is supposed to be there according to the statute. The statute is set up to give that lawyer or that pro se plaintiff 6 months after filing suit to conduct whatever discovery needs to be conducted, to get whatever medical records need to be accumulated in order to have all the information necessary to give to that expert so that she can put her opinions to paper.

HECHT: Is it your position that if the TC had held that this was a good faith effort, that that would have been within her discretion?

MCCRACKEN: Yes.

HECHT: She could have gone either way on this?

MCCRACKEN: I think it's in her discretion. I think that is a call that the trial judge has to make.

HANKINSON: Is this a factual inquiry or a legal inquiry?

MCCRACKEN: I think there is a mixture of legal and factual inquiries that...

HANKINSON: What is the fact question that the trial judge must decide?

MCCRACKEN: The fact question the trial judge must decide has to do with the conduct of the lawyer or the pro se plaintiff in putting together an expert report that comports with the statute.

HANKINSON: And what is the legal question that's presented?

MCCRACKEN: Is whether the content of the report is a fair summary. And then you go to the good faith effort argument.

HANKINSON: So we could have testimony at one of these hearings about the good faith effort: what the lawyer did or didn't do; what the plaintiff did or didn't do; what the expert did or didn't do.

MCCRACKEN: I don't see why not.

ABBOTT: What legislative history supports your position?

MCCRACKEN: We looked at the legislative history on this and what was discussed in the legislative history was the purpose of the statute, which was to address the medical malpractice insurance crisis, and to reduce the frequency and severity of suits. What this standard of review that

was applied by the 1st CA does, is in effect turn this 13.01 dismissal motion that would be filed by a defendant into a no evidence motion for summary judgment.

O'NEILL: If we are going to defer to the TC on a factual determination as to good faith effort, what evidence is in the record as to that piece of it that you believe would be in the TC's discretion?

MCCRACKEN: In this record you would look at - well there were several things in the record in this case that discussed the good faith effort.

HANKINSON: If you have a report that wholly lacks any reference to the requirements of a fair summary of causation and liability proof, is that as a matter of law a lack of good faith effort, or is that just as a matter of law no fair summary?

MCCRACKEN: I think that would be a matter of law of no fair summary.

HANKINSON: So what happens if I'm a trial judge and I'm faced with a report that doesn't have anything in it that meets with the requirements? What does my hearing look like then? Take excuses from the plaintiff? How do I determine good faith under those circumstances?

MCCRACKEN: I don't think that you get to the good faith effort argument unless there is some attempt - there needs to be some attempt at least shown by this expert that: Okay, I looked at the standard of care for the hospital, I can't quite make out what the standard of care ought to be. I need this, this and this. Maybe that would satisfy that element.

HANKINSON: Are there any factual disputes in this case with respect to this particular report that's been challenged, or is this purely a question of applying the law to this particular report in making a determination of whether or not it complies?

MCCRACKEN: If you don't take the position that I can infer things from this report, then I might agree with that. But what the CA did here was they went beyond the four-corners of the report, they started making inferences that the trial judge was unwilling to make, and that even the expert was unwilling to make.

HANKINSON: I understand what they did. You said that this was a mixed question of law in fact. And if we are reviewing it for abuse of discretion on a mixed question of law, in fact, we defer to the TC's factual determinations but review the legal determinations de novo. And I'm asking you if there are any factual determinations to be made here or whether we are left purely with a question of law to determine whether or not the statutes been complied with?

MCCRACKEN: In this instance since this expert did not talk about the hospital's standard of care, their breach, or how their breach caused the harm, I think it's a matter of law. No you can't go into that.

HANKINSON: Are you challenging whether or not this report complies with the definition's

requirement that the causal relationship be defined?

MCCRACKEN: Yes, I am.

HANKINSON: It's not in your brief though is it? I'm trying to determine from your brief, it looks like you're only challenging the liability, the standard of care on the breach elements of the report.

MCCRACKEN: I can't recall right off hand exactly what I said in the brief. But I will say, I feel that she didn't address the hospital's standard of care, the hospital's breach and, therefore, how can you get to how the hospital's breach caused the injury?

HANKINSON: So you are challenging all three pieces?

MCCRACKEN: I am.

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RESPONDENT

HOVNATANIAN: I want to begin by responding to a couple of Justice Hankinson's questions. First on exactly what constitutes a good faith effort, because although the legislature used that term, the legislature did not define that. It's not in the legislative history or in the text of 4990i. Happily there are two courts that have addressed that. The first one is the Ft. Worth CA in the Hart case, which was decided in 2000, and the El Paso CA in the Gonzales case, that was also decided this year. Both of those courts said that a good faith effort is a legitimate attempt to incorporate or to address the three requirements of the statute in the expert report.

HANKINSON: How does that differ from a fair summary?

HOVNATANIAN: Because a good faith effort does not necessarily mean success. You can make a good faith effort without actually achieving the fair summary.

HANKINSON: Give me an example?

HOVNATANIAN: If you were to have an expert report that - I'll use Justice Hecht's term. Let's say something that's extremely conclusory, and it addresses the standard of care, the breach of the standard of care, but when it comes to causation it just says causation is clear. Period. And that's all. Now that's not a fair summary of the expert's opinion on causation. However, it might be a good faith effort, it might not be, but it also might be a good faith effort to set out an opinion on causation especially when read in light of the entire expert report.

HECHT: How would you know one way or the other whether it was or wasn't?

HOVNATANIAN: And that's an excellent question, and I guess that's what this case comes down to. That's why the inquiry is a question of law and not a question of fact.

HECHT: Just tell me how you know. Something has to let you know if it is or it isn't.

HOVNATANIAN: Correct. And the answer is in the four-corners of the expert report.

HANKINSON: So you don't look at anything beyond the four-corners of the report to make this determination?

HOVANTANIAN: That's correct.

HANKINSON: Why does the statute say then if it appears to the court after hearing? The court wouldn't need a hearing then.

HOVANTANIAN: For argument. For argument from the parties. And the reason that I say that is because the rest of §L, which you just read from, is if it appears to the court after hearing, the report does...

HANKINSON: So you would not listen to anything that the lawyers have to say about the circumstances surrounding the development of the report or the provision of the report to the court, you would only look at the four-corners of the report?

HOVANTANIAN: That's right. Listen to their argument of course. Listen to testimony and things like that. No. That is contrary to what the legislature set out in §L.

HECHT: If the plaintiff's lawyer comes in and says, Your honor we did our best, we talked to this expert a month ago and this expert assured us that these were going to be her opinions, and that she would write us immediately. And we have called her, we have written her, we have done everything we could, we're depending on this, we got the letter from her 2 days ago, we're worried about whether it meets the standard or not, if we had known that it was going to come out this way, we would have looked elsewhere, we feel like we've been taken advantage of, we need more time.

HOVANTANIAN: Then respectfully the plaintiff loses. If the report isn't, and you only look to the report, if the report does not reflect that good faith effort to provide a fair summary, the plaintiff loses. The excuses or reasons or qualifications or whatever just don't matter. Now they might matter when a plaintiff seeks an extension under another portion of the statute: I need more time to get a proper expert report to opposing counsel and to the court. In that case, certainly it makes all the difference in the world. But when the court is looking at the report itself those kinds of things don't matter. That's not what the legislature wrote. The legislature wrote in §L: Look at the report. If the report constitutes a good faith effort to provide a fair summary, then the plaintiff's got the ticket to proceed in the lawsuit.

HANKINSON: And the TC has no discretion in making that determination. Your position is, this presents a question of law?

HOVNATANIAN: That's right. It's like a contract. The interpretation of a contract, what a

contract means, what a contract says is a pure question of law. This court has said probably literally hundreds of times going back to its origin. An expert report is no different. You look at the report to determine what does this say? what does it mean? is there something in this report that addresses the standard of care, the breach of the standard of care, causation?

BAKER: Your opposing counsel indicated that it was a two-step process by a trial judge. First does it represent a fair summary, that meaning does it include something about each one of the three elements as the report is defined? And secondly, if you're not quite sure, then you look to whether you think it's a good faith effort rather than what you said is this a good faith effort to make a fair summary. Which one do you think is correct?

HOVNATANIAN: I think the legislature would answer that question that my way is correct. Section L says, A good faith effort to comply with the definition of an expert report that's found in §(r)(6). Good faith effort comes first. Now I would suggest in this case it doesn't matter. Good faith effort or not, in this case we have a report that does meet the qualifications.

HANKINSON: Do you agree then that a report that says wholly fails to mention causation, is not a good faith effort as a matter of law?

HOVNATANIAN: I completely agree with that.

HANKINSON: Do you agree that a report that wholly fails to mention the specific alleged breach by a particular defendant: you failed to give this medication when you should have given the medication for example, is not a good faith effort as a matter of law?

HOVNATANIAN: No. I must stop short there. Because there is room in that event for the good faith effort. If the opinion just doesn't mention the element at all, then there is no room for a good faith effort.

HANKINSON: Well isn't the purpose though of this particular provision of 4590i to in fact cause a plaintiff during the early stages of the case to come forward and be able to at least show that they have a viable claim against each defendant that is being sued?

HOVNATANIAN: It is.

HANKINSON: How can a TC determine if the claim is viable against a particular defendant if there is no specific allegation of an alleged wrong?

HOVNATANIAN: That's a question that has a lot of gray area, and I might have been on the wrong side of the gray area. I'm not saying that there doesn't have to be a specific...

HANKINSON: Isn't this designed and there is specific provisions that do make clear we're going to talk about specific defendants. You can't just sue 10 people, lump them altogether and say this person has been hurt, somebody did something wrong in connection with it. You're going to have to take each of the 10 defendants and you're going to have to be able to say this person should

have prescribed the medication, this person should have checked the patient more frequently, this person should have done X, this hospital should have done Y.

HOVNATANIAN: Respectfully the statute doesn't require that. That's something that Mr. McCracken has argued in his brief. The statute does not require. It says each position or health care provider. But it doesn't say that it has to mention them all by name.

HANKINSON: I understand that. It does have to be clear whether the claim against the particular defendant is viable as to that defendant, not as to the group and not as to the event that is alleged to have caused harm.

HOVNATANIAN: I agree. In this case, that's an easy determination. It's clear that Dr. Bontke was shooting at American Transitional Hospital, the petitioner in her report...

O'NEILL: Let's talk about that. I've got her report. And can you tell me where in that report she states the standard of care for the hospital?

HOVNATANIAN: The report states that - it never comes out and says, Here is the standard of care for the hospital.

O'NEILL: So it is omitting a standard of care _____?

HOVNATANIAN: No. I wouldn't say that. It's not omitting it. It just doesn't use that magic language, the standard of care required for the hospital to do X. We might expect that in an affidavit.

O'NEILL: Show me what you think is a good faith effort to state what the standard of care is?

HOVNATANIAN: It's cobbled together from a couple of sentences in the report. Dr. Bontke noted that at 8:20, Mr. Palacios was trying to remove the restraints, and the nurse who attended to him tightened the restraints. Then she said at 8:30, Mr. Palacios was found on the floor, the restraints were on, but they were untied. And then she says 10 minutes before the fall they are on, then 10 minutes later they are not on. It's unclear how he could untie these restraints in less than 10 minutes. Then she says, he had a habit of trying to undo his restraints.

O'NEILL: I understand the facts she recites. But where is the standard of care for a hospital as to this sort of activity?

HOVNATANIAN: It's in those quotes and her conclusion that precautions to prevent his fall were not properly utilized. That addresses the breach and the standard. The standard that we glean from that portion of the report is, Don't just tie the restraints - tie them securely.

ABBOTT: Let's just say we take the language that you are referring to and conclude that it does not establish a standard of care. Do you lose?

HOVNATANIAN: No, I don't as long as this court concludes that it's a good faith effort, which is very low hurdle. If it's a good faith effort, if it's a legitimate attempt, not necessarily successful, but a legitimate attempt, then I still win this appeal.

HANKINSON: Doesn't this report read like it's relying on res ipsa loquitur? The patient was in the bed at this point in time; the patient fell out of the bed at that point in time; therefore, it wouldn't have happened if someone hadn't done something wrong. Isn't that basically what this report does?

HOVNATANIAN: I will admit to the court it reminded me of res ipsa too.

HANKINSON: Well if it reminded you of res ipsa, and res ipsa has very limited purpose in connection with a medical malpractice case, then doesn't this kind of report defeat the whole purpose of 13.01, which is to say to a plaintiff: if you want to go forward, then one you hit the 6-month point in time you've got to have a viable claim? And a viable claim under Texas law means that the standard of care must be established and a basis for a breach and causation must be established as well, not res ipsa loquitur, not you wouldn't be hurt unless somebody did something wrong.

HOVNATANIAN: The answer to that question is no. It gets back to another one of your questions. If I'm here arguing a preponderance of the evidence point, I lose. If it's a motion for summary judgment that was granted against me, I lose with this report. If indeed it's a directed verdict, as in your question to Mr. McCracken, I lose 10 times out of 10. But because the legislature said, we're going to set the bar so low that all you have to do is try, it just has to look like you're trying, you just have to make a good faith attempt, not even to provide an opinion, but to provide a summary of the event.

OWEN: If you don't get there and the TC says, alright you may have made a good faith effort, but I will give you another week to get there and if don't get there, you are dismissed. Does the TC have the discretion to do that?

HOVNATANIAN: No. The TC cannot change what the statute says.

OWEN: So if you've got a defective affidavit, you can continue your lawsuit for the next 6 years?

HOVNATANIAN: No. I misunderstood your question. If the judge concludes that the report does not amount to a good faith effort to provide a fair summary?

OWEN: No. Let's say it's not a fair summary. I agree that you had some good faith. I'm giving you a week to complete the defective portions of the affidavit.

HOVNATANIAN: Even if the plaintiff does not come in within a week and comply with the statute, he or she loses. But the plaintiff loses. At some point, you must produce a report that meets the requirements of the statute. I would argue that in that case the TC's being generous. Because the statute does set out provisions for an extension to be granted...

OWEN: Should we read the good faith provision as giving the plaintiff two bites at the apple, but if they don't get it the second time around, the TC has to dismiss?

HOVNATANIAN: Not exactly. Although I would suggest that because the statute says only one extension, then there really is only two bites at the apple. If the plaintiff doesn't get it right the second time, the plaintiff is out.

OWEN: But you had already gotten an extension in this case. Now where does that leave you if you only get one extension?

HOVNATANIAN: It leaves me in the position that I have to _____ with this report, or I don't get another bite at the apple, because Mr. Ledger, the trial counsel, has had two bites of the apple. The first court concluded that the second bite was a good bite, and that that was sufficient to meet the requirements of the statute. And whether the first court got the issue correct or not on a standard of review, obviously I think they did, I think it ought to be de nova, because it's a pure question of law. But even if that's wrong, if this court says no, we like the abuse of discretion standard better, I believe that Palacios and Century Insurance still get by in this case. Because under any standard, looking at the four-corners of this document it can't fairly be said this is not at the least a good faith effort.

OWEN: But you've already been granted the only extension you said you get. So where does the TC get the authority to grant you a second extension to cure the defect?

HOVNATANIAN: There would be no discretion to grant me a second extension.

OWEN: So if we were to conclude that this is not a fair summary, that it is defective, even under a de novo standard you are out?

HOVNATANIAN: That's absolutely correct. In that case, I would suggest that because Mr. Ledger got on extension, he can't go back and get another one. In fact, the statute is clear, the legislature unlike this portion of the statute, the legislature spoke with very clear intent. They said only one extension. There is another provision in the statute that says, if you use sort of a semi-Craddic v. Sunshine Bus Lines test and show conscious indifference - it was an accident or mistake the reason he missed the deadline, and there is no conscious indifference, then you get an extension for that. But I believe the statute can fairly be read that you only get one extension, and Mr. _____ argued below both the conscious indifference portion and the regular extension. So I regretfully say that's it. We are out of attempts. If we didn't meet it with this report, I think we are through.

BAKER: Would you agree under your view that if a report doesn't have one of the three elements that are defined, that it can't be a good faith effort to present a fair summary?

HOVNATANIAN: I do agree. There is case law that says that. If an element is just completely left out, that's not a good faith effort to address that element.

BAKER: So whether you're reviewing a TC's decision to say that's not a good faith

effort whether it's under abuse of discretion or de novo to say it's not, you can't set that aside on appeal?

HOVNATANIAN: I agree. Regardless of which standard of review you use if there is an element entirely missing from the report under any standard you want that can't be a good faith effort to provide...

BAKER: I'm not really clear why you argued for in essence a directed verdict or no evidence review of this report as opposed to an abuse of discretion.

HOVNATANIAN: There are really two reasons. The first reason is, the expert report the way the legislature has crafted the statute stands on its own. It has no demeanor for instance to weigh.

BAKER: Well then if you akin it to a no evidence summary judgment all you have to do is offer the report and say there's my evidence and the things over. The inquiry is over.

HOVNATANIAN: The inquiry as to whether we have passed 13.01?

BAKER: If you're applying a directed verdict.

HOVNATANIAN: I believe that's right. If the plaintiff shows up and says here's my...

BAKER: Here's my report and it's in there, so I met your standard of review.

HOVNATANIAN: That's correct.

BAKER: I have evidence of a report.

HOVNATANIAN: Not evidence of a report. You actually have the report. In other words, if the plaintiff presents a report to the TC that meets the qualifications of the statute, then under any standard the...

BAKER: I don't disagree with that. So what is the TC doing when it looked at the four-corners of this report in your view?

HOVNATANIAN: It's looking for some effort, a good faith effort, to at least hit the bullet points that the statute sets out. As Justice Hankinson said: standard of care; breach; causation. If it's close, the plaintiff wins. If there is at least a good faith effort this plaintiff is trying or as the...

HANKINSON: Well there has to be - trying is not enough is it? There has to be at least some minimum level that has to be met. And I'm having a hard time understanding what you think that minimum level is.

HOVNATANIAN: I think the minimum level is trying. That's why the statute says a good faith effort.

HANKINSON: You can try and completely fall short and not - you can try but not give a fair summary and that's good enough?

HOVNATANIAN: No. You've hit on the difficulty in this case. There has to be a floor.

HANKINSON: I want to know where the floor is.

HOVNATANIAN: The floor, and happily the legislature said it - a very low floor. The floor is, is there something in the report whether it's expressly set out or whether you must take it from different sections of the report all at once, or whatever, is there something that just comes close to meeting a particular element of the statute.

HANKINSON: Wouldn't it at least need to be able to say what specific care was expected to be given that was not, for what care had been given improperly?

HOVNATANIAN: Yes.

HANKINSON: That has got to be at least the bear minimum in a medical malpractice case. Do you agree with that.

HOVNATANIAN: I do. It doesn't have to expressly say that.

HANKINSON: I want you to put on the defendant's counsel's hat in this case. You now represent the hospital. If you're the hospital's lawyer and you review this report, what do you discern from the report is the care that the hospital should have given but did not?

HOVNATANIAN: To absolutely insure that those restraints were tight. Tight enough to keep Mr. Palacios in his bed. Because the report does say that the nurses knew that Mr. Palacios at least at 8:20 was trying to get out of his restraints, was struggling to get out of his restraints. At that point, they have to make sure they are secure. Now, I will agree with Mr. McCracken in his brief and I presume your honor with you because I think this is the question at which you are going, the report doesn't say, Here's how the hospital should have done it. The hospital should have done X, or to use an example from Mr. McCracken's brief, the hospital should have made sure the restraints were tight by wrapping them with adhesive tape to provide another layer of protection. The problem is, if we are looking at a summary judgment affidavit or a directed verdict or a plaintiff's verdict, that's not enough. It's not enough to say the restraints should have been tighter. It would be necessary to say, here's how you make them tighter. But in this case we're not even approaching that standard. Dr. Bontke was not required to say, Here's how the hospital should have done it. She was only required to speak in general terms and conclusory terms.

HANKINSON: What she recites in her report is that the restraints were tight at 8:20, and that he fell out of the bed at 8:30.

HOVNATANIAN: That's right.

HANKINSON: So what care should have been given that was not, if in fact, what her report recites is that they had tightened restraints and they checked him 10 minutes before. So now we have monitoring and we have restraints that have been dealt with. I don't see what her criticism is of the hospital at that point in time. Again, I go back to what's the floor here, and it seems to me there has to be a floor. It can't just be, I tried, sorry I didn't make it.

HOVNATANIAN: I'm not 100% who you are referring to when you say I tried. Do you mean he nurses or...

HANKINSON: No, I'm talking about someone in doing the report, the good faith effort.

HOVNATANIAN: I think the answer to your question, as the answer to most of the questions, lies within the four-corners of the report. Dr. Bontke's point is, yes they were tightened at 8:30, but they weren't tight enough. If they had been tight enough, Mr. Palacios could not have gotten out of his bed. That's why she expresses shock when she says: How could he do it in under 10 minutes? And I really don't another way to answer that question. I think that is the answer. The floor in this case is they weren't tight enough. If they had been, he would have stayed in bed where he belonged.

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REBUTTAL

O'NEILL: If it would not survive a no evidence summary judgment motion, then what's wrong with requiring a low level _____ and putting the burden on the defendant just to file a no evidence summary judgment motion? What's the difference? Arguably, the purpose the legislature had in this was to put some burden lower than no evidence summary judgment question wouldn't you agree?

MCCRACKEN: I don't think I do agree with that. And I don't think that this 13.01 dismissal procedure is necessarily a higher burden. I don't' think it is a higher burden than responding to a motion for summary judgment.

O'NEILL: If you've got the no evidence summary judgment motion, then why do you think the legislature put this remedy in there if the intent wasn't that it be a little bit lower?

MCCRACKEN: I think it's a whole different ball game. I think that this was carefully honed to zero in on the problems associated with health care liability suits.

O'NEILL: Under your scenario they are the same and you can just go either way?

MCCRACKEN: I think they are very similar. I think that if you review this the way the 1st CA did is, it is a no evidence motion for summary judgment. And it probably does add in an extra element that wouldn't be present in a no evidence partial summary judgment. That is, have to state what the standard of care is.

OWEN: Had you completed discovery could you have filed the no evidence motion

for summary judgment at the end of the 180 day period, plus the extension?

MCCRACKEN: Yes.

ABBOTT: Was this rule passed before the no evidence summary judgment rule was passed?

MCCRACKEN: I think it did pre-date the no evidence summary judgment rule. But summary judgment in some form or other has been alive and well for years and years before 13.01 was enacted, and it did not serve the purposes that the legislature sought to meet when it passed 13.01.

I would like to talk about the two bites at the apple argument that Mr. Hovnatanian talked about. A plaintiff really gets three bites at the apple. They have to file this report after 90 days after suit is filed. If they don't, then they have to file a cost bond. Then at 180 days is their second bite at the apple. If they don't, then they have to ask for an extension. They get one extension, that's their third bite at the apple. There are ways built into this statute that the legislature sought to keep the hurdle low for the claimant. One area where they did not compromise was on the definition of an expert report. And that's not a particularly high hurdle either as to have the defendant's standard of care, how it was breached and how that breach caused harm.

I want to talk too about you just have to try to have a good faith effort. You have to draw the line somewhere.

BAKER: Would you agree that his statement of just one inquiry is the expert report a good faith effort to present a fair summary of the expert's opinion? That's they way he says you are supposed to look at it.

MCCRACKEN: I would agree with that, but I don't think that tells you much.

BAKER: Your answer would be, well that may be so but to determine whether it's a good faith effort must require an inquiry of whether the three elements of what the definition of such report is. And if one or more of those is missing it can't be good faith. Is that your argument?

MCCRACKEN: I think there needs to be an intent. I agree with the Hart case...

BAKER: Well I think he agrees with you. He says an element completely missing, that can't be good faith because it doesn't meet the requirement at all. So I think y'all are in agreement there. The question is, in this case under these circumstances?

MCCRACKEN: I think we have agreed there. I just think that we _____ difference as to how low that bar is set on whether there is...

BAKER: Well you just expressed it. Just giving it a try is not enough in your view?

MCCRACKEN: Right. You have to at least try on each element.