ORAL ARGUMENT - 11/28/95
95-0168
BRODERS V. HEISE

LAWYER: May it please the court. The issue in this case is whether or not Texas Rule of Evidence 702 allows any witness with a medical doctor degree to testify in a medical malpractice case about any medical subject whatsoever. We are here to argue to this honorable court that the answer to that question has to be no.

CORNYN: Isn't it a little bit more narrow than that even whether that Judge Hartman abused his discretion?

LAWYER: Well that certainly is the nub of the issue. It is an abuse of discretion case. We contend most strongly that the trial judge...

GONZALEZ: The same issue that was in DuPont - abuse of discretion?

LAWYER: It is an abuse of discretion like DuPont v. Robinson. And I tend to call that case Robinson. So forgive me if I do that as we go along. But I believe that this case like Robinson is a case involving abuse of discretion. This is really the second-half of the expert witness question that has to be answered. In Robinson of course the issue was: Does the trial judge have a role as the gatekeeper in examining the scientific methodology in its reliability in evaluating the validity of expert testimony? A majority of this court answered that question in the affirmative.

This case is really the front half of that question. And that is the threshold question of admissibility in terms of the qualifications of the expert under Rule 702.

PHILLIPS: And so it doesn't make any difference to your argument before us what the trial judge did? In other words if the trial judge had admitted this witness's testimony you would still contend that was error?

LAWYER: In this case on these facts if Judge Hartman had admitted the testimony of Dr. Fred Condo on cause and fact, we would be here making the same argument. And that is that he did not have the...that it would have been an abuse of discretion on these facts to admit that testimony.

PHILLIPS: This is not like the Roberson case where the majority strongly hinted that if the trial judge had let the evidence in that would have been the end of it.

LAWYER: In that respect this case is not like the Roberson case. I think that's correct. But I think the majority of this court has now recognized that the trial court when it comes to expert testimony does have this gatekeeper role, this gatekeeper responsibility in evaluating the scientific reliability of the testimony. Well it seems to me that it is very obvious that if the trial court is supposed to go into the scientific methodology that the expert uses in arriving at a conclusion, then certainly the TC has the discretion and in fact has the duty to examine the expert's qualifications to testify. And I think really in an indirect way the dissenting opinion recognizes that in some language that we quoted in our brief, that the TC has a function as a screener or a gatekeeper when it comes to the expert qualifications.

Now I am sure the court is well aware of the facts. I am not going to dwell on the facts. But I want to hit on a few key facts that I think are particularly important to this case. Cathy Heise

was walking home from her boyfriend's apartment in North Dallas, a distance of about 3 to 3-1/2 miles on the evening of April 7, 1988, when she was assaulted by an unknown man who according to eyewitnesses struck her on the neck or choked her. She was taking by paramedics to the emergency dept. at Presbyterian Hospital in Dallas where she remained for slightly over 16 hours. During that time she gave no history of having been hit on the head; no history of her having been hit on the head was reported by the paramedics; there was no physical sign of a head injury that was observed by any of the physicians. The only history that was given, the only mechanism of injury that was described was some red marks on the neck. The physicians initially were not even able to examine Ms. Heise because she would not allow an examination. She was very uncooperative and admitted at some point in the evening to being under the influence of alcohol. There was no reason according to the physician's testimony to do a cat scan during that admission. But what this case really boils down to is the plaintiff's allegation that a CT Scan should have been performed during that first admission.

She was released into the care of her boyfriend about 1:30 the following afternoon after a stay of about 16 hours. He took her to his apartment, kept her there that afternoon. Later on in the early evening hours she began to vomit and developed an excruciating severe headache. According to the boyfriend a very different display of symptoms than she had had before. She was brought back to the ER room; seen by a different physician. A Cat scan was ordered, which revealed a basilar skull fracture. She died the following morning. The autopsy reported that she died as a result of cranial cerebral injuries apparently sustained when she was assaulted. Both the autopsy and police report describe this event as a homicide. In other words what we have is although there was a delay between the initial assault and her death, what we have here is a murder.

OWEN: Assuming we were to agree with you that the TC correctly excluded the testimony in this case, and we were looking to articulate clearly a rule in these medical malpractice cases for trial courts and courts of appeals, you've cited us language out of Van Zandt and language of Milkey can you think of a way that we could articulate the standard in these cases any more clearly, or have we clearly enough articulated it?

LAWYER: I think the Dallas CA in its two decisions: Milkey v. Netny(?) and Roberson v. Factor do articulate the standard. And that is that under Rule 702 it's really just logical from reading Rule 702 it's really a 2 element analysis: the first element is whether or not the expert possesses the training skill, experience, etc. that gives him "specialized knowledge," about the very subject matter that's involved in the case.

OWEN: Well of course the ER physician has specialized knowledge as opposed to me or you. But is there any language that you would suggest or that this court consider or that you would offer up to us saying that this would clarify for the TC's and for the CAs where the line should be drawn in medical malpractice cases?

LAWYER: Where I think some courts have missed the mark a little bit and have sort of muddied the water is this talk about if the expert brings more than a lay person knows. That should not be the test. And I don't think that is the test. And I think in Milkey v. _____; Roberson v. Factor they talk about specialized knowledge as being more than somebody who just knows more than a lay person knows. As a lawyer who handles a lot of medical cases I suppose I know more than lay people about medicine. But I should not be able to testify as an expert witness. So I really think it's a two-part test, and I think the first part is this requirement of specialized knowledge. And then I think the second part of the test is that it has to assist the trier of fact. And I really think that element has not been discussed as much and as much in depth as it should have been. And I think this case really presents a great opportunity to for the court to clarify that.

OWEN: Let me take you to another issue in the case. Let's assume that we do not agree with you. We agree that it was error for the TC to exclude this testimony. You have said in your brief that it doesn't really matter in this case because the plaintiff could not show harmful error because of the broad form submission. How would you show where key testimony, the only testimony virtually on causation has been excluded, how would you ever show harmful error in a broad form submission case such as this?

LAWYER: Well in this case we've argued, and I realize the court didn't grant the writ on this point, but one of our points of error which has been brought to this court is that on these facts with that evidence having been excluded, that it was incumbent on the respondents on the plaintiffs to request a separate submission of negligence and proximate cause.

OWEN: But it would not have been error for the TC to deny that submission and to submit it as the TC did?

LAWYER: If properly requested we believe in this case it should have been submitted that way. It wasn't requested. No request was made.

OWEN: You're saying it would have been error for the TC to deny a broad form submission in this case?

LAWYER: I would argue that if the plaintiff asked for it and the TC denied it, that would be error.

OWEN: On what basis?

LAWYER: Because on these facts there was either no evidence, or a very, very tiny bit of evidence on the causation issue. And the only way that a reviewing court can even determine whether the jury believed there was no negligence or no proximate cause is to submit the issue separately.

OWEN: So you're saying where it's a close call it's error for the TC to submit in a broad form that's it's a close call?

LAWYER: I don't think it's a question of whether it's a close call. I think that in a case where it is requested I think the TC should submit the issues separately. And I realize this court has written many opinions endorsing broad form submissions.

OWEN: Assuming that we were not to go that route, and we were to say we have broad form submission and we are going to continue that practice in Texas, how would you propose that we preserve in error a point of error when you have exclusion of testimony that goes to an ultimate issue?

LAWYER: I don't see how the court could ever determine what the jury's answer meant, whether it was no negligence or no proximate cause. So I think in this case in order to find harm you would have to look at the record as a whole. We've got another harmless error point against which the court did not grant. And that is that when you compare the very detailed testimony that we offered from two board certified neurosurgeons: Dr. Sampson called by the hospital, and Dr. Winer called by the physicians explaining in detail the autopsy findings showing the deep white matter brain injury that this woman had that was undetectable on a Cat Scan and that was detectable only on autopsy. And the fact that based on the injury that we now know that she had, that no treatment could have saved this young woman's life any way. When you compare that with the magic word testimony of Dr. Condo, which just goes straight to the bottom line conclusion there was no proximate cause, that's the testimony that Judge Hartman excluded, when you look at the record as a whole there is no showing of harm here. Again I realize that's a point the

court did not grant the writ on.

I think it's important for the court to realize that in order to evaluate and analyze the cause and fact issue in this case any medical doctor testifying about that issue would have to have some opinion of what the Cat Scan that he says should have been ordered would have shown had it been done. There is nothing along those lines from Dr. Condo. He then says a neurosurgeon should have been called. He doesn't know what a neurosurgeon would do when he got there. Again that's a big missing evidence in the cause and fact picture here. We called two neurosurgeons that said if they had been called nothing could have been done short of making this same woman comfortable. But nothing could have been done to save her life, and that there was a 95% probability that she was going to die regardless of any intervention on the part of a neurosurgeon.

BAKER: But isn't that a separate defense - the survival percentage defense?

LAWYER: No your honor that is the heart of the cause ad fact issue.

BAKER: But your argument now is the second part of the 2 part _____. Aren't you trying to zero in that it's the trial court's prerogative to determine the qualifications, and then from that determination decide how far this witness can go with his or her testimony?

LAWYER: Well that's certainly correct.

BAKER: That's the first part. But you are asking us to decide and to articulate a specific rule. What would you propose the rule to be?

LAWYER: What I propose the rule to be is that the witness must have specialized knowledge on the particular subject matter that's involved in this case.

BAKER: Would you then say that your whole argument is what Milkey v. Medley(?) says on page 679: The person offered must possess special knowledge as to the very matter on which he proposes to give an opinion. Is that it in a nutshell?

LAWYER: Exactly. Plus the helpfulness to the jury. It has to assist the trier of fact.

BAKER: But if he doesn't have specialized knowledge it doesn't float(?)?

LAWYER: First he has the specialized knowledge. Dr. Condo didn't have the specialized knowledge.

BAKER: So isn't that the end of the inquiry?

LAWYER: That should be the end of the inquiry.

BAKER: Stop right there?

LAWYER: But also even in this case if it is not the end of the inquiry, the testimony that he offered in this bill of exception isn't helpful to the jury. It's not helpful to a jury for an expert witness to get up there and say magic words: namely in this case proximate cause, without any explanation, without any basis for it whatsoever.

PHILLIPS: But the world's best neurosurgeon have offered on a bill of exception that his study

was that certain procedures should have been done, and if they had been done it would have resulted in a different outcome here. That would be excludable because it doesn't have enough detail to be helpful to the jury?

LAWYER: But you've added something to the equation your honor. You've added what would have been done? Dr. Condo doesn't know and didn't say what would have been done by a neurosurgeon if a neurosurgeon had been called in. So not only does he lack the specialized knowledge, but also his testimony is not helpful to the jury because all he gave the jury was a bald conclusion of proximate cause.

GONZALEZ: As I understand the facts, Dr. Condo's theory of why he should be allowed to testify, and the plaintiff's theory is that not only was he an ER physician, but he worked for years closely with neurosurgeons and he knew the _____; and, therefore any fool would have known, any ER physician would have known that works with neurosurgeons that you do CT Scan for head injury under these symptoms.

LAWYER: He was allowed to testify that you do a Cat Scan. He was allowed to testify that a neurosurgeon should have been called. What he was not allowed to testify about is whether a neurosurgeon could have saved her life. Because he didn't know what a neurosurgeon would have done if he had been called. That's really where he crosses the line. What the Can Scan would show, what the neurosurgeon would have done when he got there, and whether it would have worked he is not qualified to talk about those things.

GONZALEZ: Why couldn't he testify to those matters if he had closely worked with neurosurgeons? Not that he was going to do it, but he knew what could be done by somebody that is capable with specialized training?

LAWYER: He never claimed to know what the neurosurgeon would have done. He merely said that he had stabilized head injury patients including stabilizing head injury patients on helicopters, being taken in by air ambulance from the city of an accident, or an assault, or something, but that he would just turn the patient over to a neurosurgeon for treatment, that he was not involved in treating head injuries.

GONZALEZ: So Judge Hartman said you are qualified to give an opinion about the standard of care, but you are not qualified to tell the jury what a neurosurgeon would have done, and that's where we are?

LAWYER: That's right.

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RESPONDENT

WINER: May it please the court. I am David Winer, counsel for the respondents, the Heises in this case. It was Emerson who said that this time like all times this is a very good one if we but know what to do with it. I think that the challenge for me here today is knowing what to do with the time that I have before the court.

I don't believe that I can afford to stand here today and insist that Park v. Van Zandt which was decided 30 years ago by this court provides a simple, quick and complete answer to the issue that is presented. But nevertheless I believe that Hart v. VanZandt must be dealt with before the court can determine and articulate as Justice Owen has noted should be the case here what the standard should be for determining an expert's qualifications in a medical malpractice case with respect to the issue of

causation. The fact is that Hart v. VanZandt did say exactly what the CA said that it says. And it said: That in a medical malpractice case that in order to prove a case against a defendant doctor, the plaintiff must show through the testimony of a doctor of the same school of practice both negligence, or the breach of the standard of care, and proximate cause. The court in Hart v. VanZandt also made it quite explicit that the same school of practice means that if the defendant doctor is a medical doctor it is sufficient that the expert witness is also a medical doctor.

BAKER: In Hart the expert was Dr. Scott is that correct?

WINER: That's the expert.

BAKER: Is it significant that the opinion states that Dr. Scott held an MD degree and was licensed to practice neurosurgery which is exactly the same practice that Dr. VanZandt had in Texas? Is it significant in this case because Dr. Condo was not a neurosurgeon?

WINER: I don't think it's significant because in Porter v. Puryear, which was also cited by the court in Hart v. VanZandt, the same school of practice requirement was made very explicit as in distinguishing between typically doctors of medicine on the one hand, and doctors of osteopath on the other hand.

BAKER: But in the Puryear case wasn't there evidence that both schools of medicine did exactly the same thing under the same circumstances, the same practice even though they were different schools?

WINER: Yes that true. And it was an exception to the same school of practice requirement. But I am citing to the court through Porter v. Puryear for the fact that it made explicit what the same school of practice actually means. Now there are exceptions to it. And what I am saying in this case is that if we start off with Hart v. VanZandt from the same school of practice requirement it does appear to clearly hold that it is sufficient if the defendant doctor is a medical doctor that the expert witness is also a medical doctor.

Now the fact is and I think the question is: Is that same school of practice requirement not only necessary as Hart v. VanZandt indicates, but is it also sufficient? If it is necessary and sufficient, then it does appear to set forth a standard of error such that if the expert witness is a medical doctor, that's all that's required. It is required and that's all that's required and, therefore, the court must admit the testimony. If on the other hand it is necessary but not sufficient, then we leave room for the trial court's discretion. And it appears that under modern medical practice as well as under the rules of evidence that have been developed and enacted frankly since Hart v. VanZandt was decided, that the question of determining an expert witness's qualifications is one of the TC's discretion. And the review standard is abuse of discretion standard. In addition the case law...

GONZALEZ: So up to this point you are not disagreeing with anything that your opposing counsel has said?

WINER: I am not exclusively disagreeing with anything that they've said. That's correct. Because I think that rule 702 together with the case law that not only applies rule 702, but even apart from rule 702 has said that the question of the qualifications of a medical doctor to testify is a question that is a matter of the TC's discretion.

GONZALEZ: Where do you join issue?

WINER: Well I join issue on the application. I join issue on exactly what this court believes needs to be done with respect to Hart v. VanZandt.

GONZALEZ: If Hart v. VanZandt can be read that any doctor can testify about anything in medicine, a general practitioner can testify about neurology, or cancer or ophthalmology or whatever, if Van Zandt can be read for that that broadly, you are saying leave it alone?

WINER: Well I think it can be read broadly, but I don't believe that this court had granted the writ of error in this case to endorse the CA in reaching that holding if in fact that was how the court reads the bases for the CA's holding.

PHILLIPS: We do have a rule of evidence that has come into play since VanZandt was written. And whatever evidence is admitted or excluded it has to come through the screen of those rules rather than through whatever common law cases we can find in our jurisprudence.

WINER: Well it has to come through that. And I don't think that however that that completely eliminates the presidential value in the stare decisis effect of common law decisions such as Hart v. VanZandt. If I may point out and admittedly I am standing here today entering into a dialogue with the court. I am certainly an advocate for my client but at the same time I don't believe that I can take a hard line and advocate a position that I don't truly believe to be completely well grounded, which would be the position that Hart v. VanZandt is the first and the final word on the issue of an expert's qualifications.

I am saying it's grounded. I just don't know that it's all that well grounded. And the fact is take what has happened with respect to the question of testimony as to the standard of care and breach of the standard of care. If that was ever governed by Hart v. VanZandt it has now certainly been legislatively supplanted by article 4590i(14.01), which sets forth quite specifically the standard that must be met in order for a witness to testify both as to the standard of care that is applicable as well as to the breach of that standard of care. It seems to incorporate the same school of practice requirement that's in Hart v. VanZandt, but it goes beyond that same school of practice requirement and it in effect creates a heightened school of practice requirement. Both in the version that was in effect at the time this case was tried as well as the new version that just was passed by the legislature. So as to that aspect of the 2-prongs of medical malpractice must be proved negligence, there is a legislative standard that we have now that we work with. But as to causation the legislature didn't do anything. Didn't do anything originally, hasn't done anything now, and has left it either to the common law as we have through Hart v. VanZandt, the common law as we have it with the cases that say that an expert witnesses qualification including those of a medical doctor to testify are a question to be determined within the TC's discretion, and as a matter of the rules of civil evidence namely rule 702, which seems to mesh with and comport with the case law that talks about determination of qualifications as a matter of discretion.

OWEN: If we were to apply §4590i, that standard that you've described as a heightened standard to the causation prong in this case what should the result be?

WINER: The eversion of art. 4590i, that was in effect at the time of this case provided that the expert witness could testify on whether a physician departed from accepted standards of medical care only if the person was practicing at the time such testimony is given or was practicing at the time the claim arose, and has knowledge of accepted standards of medical care for diagnosis of care, or treatment of the illness, injury or condition involved in the claim. Now frankly if you look at that and it says: "Has knowledge of accepted standards of medical care for the diagnoses, care or treatment of the illness or injury, or condition," I think that the testimony of Dr. Condo would meet that standard that is legislatively set forth. And I think that the court can turn to that standard. I think that the court can borrow that standard from the legislature even though on the other hand of course you have the fact that the legislature

has apparently made a conscious decision to not to enact a standard with respect to the causation issue. But I think that this is certainly very instructive as to what should be a proper standard of care.

GONZALEZ: What does it do to your argument when the Texas College of Emergency Physicians has aligned themselves with opposing counsel in amicus brief in which clearly to me adopts the position taken by the hospital and the doctors whom you are suing or to allow Dr. Condo to testify as to causation would be mere speculation because he had no specialized training or knowledge as to neurosurgery particularly speculative as to possible outcomes?

WINER: Well obviously they join in that because they agreed that a witness in a case like this has to either be a neurosurgeon, or at least have some greater specialized knowledge of matters involving neurosurgery than Dr. Condo had. I don't see any particular oddity in them joining in with that position. I suppose that they just want to see the best proof possible or the highest standard possible adopted before members of their group can be found responsible for their negligence both with respect to their deviating from the standard of care as well from the consequences of their deviation from the standard of care.

ENOCH: Let's assume for a moment that a mere medical degree does not qualify an individual to express an opinion about a certain factual circumstance. What additional proof should be made to demonstrate that an individual is qualified to express an opinion? And I am talking about in the medical malpractice context let's assume for a moment that the mere possession of a medical degree isn't sufficient to qualify a person to express an opinion about a medical malpractice circumstance. What additional proof do you think should be shown, and do you think that that proof was demonstrated through Dr. Condo?

WINER: I think that what has to be shown is some knowledge of the matter on which the witness is offering the testimony. That's in this case causation. Your question is couched in terms of assuming that it's not sufficient that the witness has a medical degree. But I take it that in your question you do believe that it's necessary that the witness has a medical degree as some minimum or some threshold.

ENOCH: Well for the purposes of our discussion let's say that a medical degree is simply a shorthand adopted by the courts demonstrating educational achievement. And the discussion between whether or not a medical doctor could testify against an osteopath or something, one has a medical degree another one does not, that the degree is simply a shorthand of a comment that in the medical context where we are going to require someone to have an educational background in medicine, the degree simply represents having achieved that. So for that purpose let's assume that the medical degree itself was not necessary but what's necessary is at least a threshold showing of education in that field.

WINER: Well if that's the case, and you for purposes of your question it's not sufficient, still it goes a long way toward establishing the qualifications. Because it does go a long way towards establishing the kind of specialized knowledge that the laymen cannot be assumed to have, and that therefore the witness is in a position to help or assist the jury with. But what is sufficient is some knowledge of the particular matter upon which the witness is offering, the testimony.

OWEN: You keep using the phrase some knowledge. Is taking a course in medical school enough in that particular area? Let's say that the doctor you have proposed to put on has taken a course in neurosurgery, but has never practiced it is simply taking a course in medical school adequate under your test?

WINER: Perhaps not, but if we come back to the facts of the case to Dr. Condo's qualifications I don't know that I can offer the court a bright line rule as to exactly what would be sufficient.

Frankly if there were such a bright line rule and at different points throughout this case and throughout this appeal, the defendants have offered such a bright line rule claiming that Dr. Condo couldn't testify because he was not a neurosurgeon, if there were such a bright line rule I believe that that would equally eliminate the TC's discretion, because that would create again an error standard that requires that the testimony be admitted if the witness were a neurosurgeon, and that would require exclusion of the evidence if the witness were not a neurosurgeon. But the fact is in this case if discretion is to play a part, and I don't think that there is any question that discretion is a key part of the analysis here if discretion is to play a part as applied to Dr. Condo it wasn't that he just learned about neurosurgery and neurosurgical matters in medical school, but that he had been working in an environment for years and years as an ER physician around head injury patients. As he testified he worked closely with neurosurgeons in these matters, he knew what neurosurgeons do.

Again that's not to say that there might be another case in which a witness with less experience, less involvement or less knowledge might not be qualified...

GONZALEZ: But that's not the problem at issue here. He was allowed to testify for the standard of care. He was not allowed to testify or speculate as to causation, and whether early intervention would have made any difference. Why don't you focus on that.

WINER: I am focusing on that because I am saying that these things that I point out his having worked in this area, and worked closely with neurosurgeons and stating that he had knowledge about what neurosurgeons did and could do was sufficient to show that he was qualified on the issue of causation. Now the defendants take the position that all he did was offer this conclusory opinion about proximate cause. But the narrow issue is his qualifications. Not really the factual basis that he had for the opinion. The Bill of Exceptions was offered after the objection had been sustained to Dr. Condo's testimony on causation because of his supposed lack of qualifications. So the point of the bill of exceptions was to show that he had qualifications, not to show the factual basis that he would have had for his testimony, that under rules 703, 704 and 705 could have been brought out by the defendants on crossexamination, that is the factual basis for his opinions, had the testimony been admitted.

ENOCH: Was Dr. Condo qualified to treat head injuries drawing the distinction between an ER contact stabilizing head injury verses the neurosurgeons context of treating a head injury?

WINER: No. He didn't claim that he was qualified to actually treat head injuries himself. But he had been around enough, he had worked closely enough with and knew enough about it that he was qualified to express an opinion as to what a neurosurgeon could have done.

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REBUTTAL

CORNYN: Would it have been enough here if Dr. Condo had been a neurosurgeon? Would you lose if he had been a neurosurgeon?

LAWYER: Probably. If he had been a neurosurgeon who had experience practicing as a neurosurgeon and who was knowledgeable about and knew how to treat somebody with a deep laceration in the white matter of their brain was not visible on a CT Scan.

CORNYN: Let me try to ask you a better question. I think my question wasn't what I meant to ask exactly. Under Hart v. VanZandt the argument is that if perhaps someone with just a medical degree ought to be able to testify to all matters involving medical knowledge, are you arguing for a narrowing of that rule that all the TC need determine is whether the physician who seeks to testify is a specialist or a

subspecialist in the same area in which they offer their testimony, or are you offering for a more nuance than that?

LAWYER: First of all I don't think that's what Hart v. VanZandt holds. I don't think Hart v. VanZandt holds that an MD can testify about any medical subject. And it was really not until this case 30 years later that any court thought that it did. We've got two excellent decisions out of the Dallas CA: Roberson and Milky, which articulate a very clear rule, that the expert witness must have knowledge about the specific medical technical subject that's involved in that case.

CORNYN: So you are not arguing that all that's required is they be a member of the same subspeciality? You are saying they must have particular knowledge?

LAWYER: No. In fact that's a good point. The basis for our objection really was not and is not the same school of practice type of objection that one might have made back before Rule 702 and looking at cases like Bohls v. Borden and Porter and Hart v. VanZandt. Our objection is really based on lack of qualifications under Rule 702 of the Texas Rules of Evidence.

CORNYN: Is this necessarily if your argument prevails will result in a proliferation of expert witnesses in medical cases wont it, because unless we allow let's say an internist to testify about orthopaedic injuries and that sort of thing you are going to have to call an orthopaedic surgeon to testify about orthopaedic injuries perhaps a gastroenterologist about some of their aspect of the case, a neurosurgeon about some other. Is that a natural consequence?

LAWYER: I don't agree with that at all your honor. I can tell you that in many malpractice cases experts are called to deal today with the specific medical issues involved. After all we've got two Dallas CA's decisions that at least in my part of the state we have been relying on for years, that say that's the law. Unfortunately this case although tried in Dallas got transferred under docket equalization to another jurisdiction. So I don't see it as a proliferation of experts. What I see is better civil justice for this state by requiring that experts be qualified to know what they are talking about before they come into court.

We are talking about a man here who failed his medical boards twice. Lied about it when he came to court. And said he only failed it once. We are talking about a man who could not admitted to any medical school in the United States. We are talking about a man who admits unashamedly if the law firm that represented the plaintiffs at trial: "If they need me I am available." And there is too much expert witness abuse going on in the civil justice system in this state. This court I believe in your concurring or dissenting opinion in the Havener v. Easy Mart case, and Chief Justice Phillips also commented about the proliferation of unscientific expert testimony in those cases. And really I think this is an important case for that reason.

CORNYN: As I understand your argument you are not arguing for a bright line rule. You are arguing in favor of the TC's discretion?

LAWYER: I am in favor of the TC having a reasonable amount of discretion. Certainly the TC can abuse that discretion. As I indicated earlier I think if Judge Hartman had allowed this gentleman to testify about cause and fact in this case, that would have been abuse of discretion. But there are many other cases where it would be within the TC's discretion to let it in or to keep it out.

ENOCH: Assuming that this knowledge has to be about the specific subject matter, which is was in the Milkey case, so this person has to know about treating head injuries. How do we get substance to the statement they have to have specialized knowledge about the specific subject matter? Dr. Condo says: I went to medical school; I learned how to treat brain injuries in medical school.

LAWYER: He didn't say that.

ENOCH: Well it said he had the same training that the other doctor had and dealt with head injuries didn't it?

LAWYER: No. I don't believe that's correct at all. He says he went to medical school. He made some vague statement about being taught about head injuries. We've got the amicus briefs, we've got the testimony from Dr. Sampson and Dr. Winer, they go 5 extra years of specialized training in neurosurgery. There is no evidence from Dr. Condo that he knows about the type of injury that this young woman had, or that he knows what a neurosurgeon would have done if he had been called in.

ENOCH: I understand. That comes at the other end. My comment is drafting this rule on dealing with specialized knowledge what's the threshold on specialized knowledge? At what point is specialized knowledge make an abuse of discretion to allow the testimony in or an abuse of discretion to kick it out? We go beyond simply having medical school, medical training, we now move into an area of subject matter treating head injuries, what would be a threshold for saying that this is sufficient knowledge, that they have to have specific knowledge to be able to treat, or could I be just simply assisting for 10 years in treating brains. I've just never bothered to get qualified as a "neurosurgeon", but I've assisted in treating brain injuries; is that enough or is that enough?

LAWYER: I would argue that just watching somebody else do it isn't enough. I might watch a real estate lawyer close a deal. That doesn't make me qualified to close the next one. By knowledge, skill, experience, training or education he has to have specialized knowledge of the very medical subject matter that's involved in the case. And I am not sure you can...the legislature has tried to draw a rule as Justice Owen asked about with regard to standard of care. That piece of legislation does not apply to the causation issue. I am not sure you can draw any more of a bright line test than that.

I disagree with his answer with regard to 4590i. I don't think Dr. Condo is qualified under the old 4590i even if that provision applied to causation. He certainly would not be qualified under the new one, because one of the factors the court is bound to consider is whether he is board certified or not.