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Texas Nursing Home Can't Ditch COVID-19 Death Suits

By **Y. Peter Kang**

Law360 (June 16, 2021, 7:41 PM EDT) -- A Texas appeals court on Wednesday allowed twin suits to move forward accusing a nursing home of causing two patients' COVID-19 deaths, saying the home raised an improper argument that the suits are preempted by a federal law pertaining to public health emergencies.

A three-judge Fourth Court of Appeals panel unanimously upheld a Bexar County judge's rejection of a dismissal bid lodged by Southeast Nursing & Rehabilitation Center in two suits accusing the nursing home of causing the deaths of patients Ruperto Q. Gutierrez and Catalina Romero.

Dr. Mauricio Pinto, a medical expert retained by the estate administrators for the two deceased patients, had opined that Southeast was negligent and caused their deaths because it failed to provide staff with personal protective equipment and allowed infected or exposed staff to continue treating patients, among other reasons.

Southeast then lodged a motion to dismiss, arguing to the trial court that Pinto's report was deficient because it was "conclusory" and also "because federal law preempts claims like theirs involving personal protective equipment," according to the opinion.

The nursing home was referencing the federal Public Readiness and Emergency Preparedness Act, which confers immunity for "covered persons" during public health emergencies, according to an attorney for the plaintiffs.

But the panel on Wednesday affirmed the trial court's ruling, saying the motion to dismiss should have focused on how Pinto's expert report was deficient and failed to explain exactly how it was conclusory.

"Appellants did not develop any specific arguments about how or why Dr. Pinto's report was insufficient or conclusory," the panel said.

The appeals court turned aside the expert report sufficiency arguments Southeast raised on appeal, saying that since the home didn't properly raise such arguments at the trial court, it did not preserve them for appeal.

The panel also rejected Southeast's federal preemption argument, saying only appeals related to the sufficiency or timeliness of an expert report are allowed on an interlocutory basis.

"We only have interlocutory appellate jurisdiction to review an order denying a health care provider's motion to dismiss on the grounds that: (1) it was not timely served with a report; or (2) it was timely served with a deficient report," the opinion states. "Appellants' argument that the causes of action against them are not legally viable because they are preempted, however, is not the same as an argument that Dr. Pinto's expert report was deficient or late."

An attorney for the plaintiffs, Andrew Skemp, said that he was satisfied with the decision.

"Southeast refuses to take responsibility for the injuries to their residents, and they have tried to delay this by any means possible," he said. "We're pleased by the court's clear repudiation of that delay."

An attorney for the nursing home declined to comment.

Justices Rebeca C. Martinez, Patricia O. Alvarez and Beth Watkins sat on the panel for the Court of Appeals.

Gutierrez and Jaramillo are represented by Andrew Skemp and Beth S. Janicek of Janicek Law Firm PC.

The nursing home is represented by Tamara M. Madden, S. Douglas Pritchett Jr. and Cameron Wells of Johnson Trent & Taylor LLP.

The cases are Southeast SNF LLC dba Southeast Nursing Rehabilitation Center et al. v. Ruperto C. Gutierrez Jr. and Southeast SNF LLC v. Delia Jaramillo, case numbers 04-21-00026-CV and 04-21-00027-CV, in the Fourth Court of Appeals of the State of Texas.

--Editing by Daniel King.

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