

No. 19-\_\_\_\_\_

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In the  
Supreme Court of the United States

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SANDRA G. HALE,

*Petitioner,*

v.

UNITED STATES OF AMERICA;  
DEPARTMENT OF VETERANS AFFAIRS;  
STEPHEN SEDER, DOCTOR;  
RAJANI POTU, DOCTOR;  
BAYLOR UNIVERSITY SYSTEM;  
MICHAEL DEBAKEY MEDICAL CENTER  
(VA HOSPITAL),

*Respondents.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Ms. Hale is a veteran that went to a Veteran's Administration (VA) Dental Clinic for routine fitting of dentures that had been cleaned with a pesticide cleaning product, which on its label forbids such usage. After wearing the dentures home, Ms. Hale developed chemical burns and sued under 28 U.S.C. § 1346, Federal Tort Claims Act (FTCA) and provided an expert Toxicologist report which was disregarded because it was not from a dentist. The VA dentist was fined \$600 for violation of federal pesticide statutes even though he was following VA dental policies, which when investigated, were found to be unlawful and outdated since 1995 and is knowingly supported by Respondent.

1. Whether an expert Toxicologist can testify regarding chemical burns.

2. Whether cleaning dentures is practicing dentistry and therefore a dental treatment under the health care liability statute requiring an expert dentist report.

3. Whether both courts violated all known statutes, precedence and case law by finding Dr. Seder's federal pesticide conviction and the intentional use of outdated and unlawful VA hospital policies are not negligence per se as a matter of law.

## LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 19-20164

*Sandra G. Hale*, Plaintiff-Appellant, v. *United States of America; Department of Veterans Affairs; Stephen Seder, Doctor; Rajani Potu, Doctor; Baylor University System; Michael Debakey Medical Center (VA Hospital)*, Defendants-Appellees.

Decision Date: July 11, 2019

Rehearing Denial Date: August 9, 2019

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United States District Court for the  
Southern District of Texas, Houston Division

Civil Action No. 4:16-CV-1189

*Sandra G. Hale*, Plaintiff, v. *United States of America, Et Al.*, Defendants.

Decision Date: March 13, 2019

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## PETITION FOR WRIT OF CERTIORARI

Sandra Hale, a veteran petitioning pro se, respectfully prays that a Writ of Certiorari issue to review the July 11, 2019 judgment of the United States Court of Appeals for the Fifth Circuit affirming the United States' Motion to Dismiss for lack of a dental expert and excluding a Toxicologist expert report for a cleaning product.



## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals appears at App.1a to this petition.



## JURISDICTION

The decision by the Fifth Circuit Court of Appeals denying Ms. Hale's direct appeal is reported as *Sandra Hale vs. USA, et al*, No. 19-20164 (July 11, 2019) unpublished and a copy is attached at appendix A. The Fifth Circuit Court of Appeals denied Ms. Hale's Petition for Rehearing on August 9, 2019; a copy is attached at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed.



### STATUTORY PROVISIONS INVOLVED

- FIFRA 7 U.S.C. 136 § 12(a)(2)(G):

“It is unlawful for any person “to use any registered pesticide in a manner inconsistent with its labeling.” When this part is referenced on a label, users must comply with all of its requirements except those that are inconsistent with product-specific instructions on the labeling. For the purposes of this part, EPA interprets the term “use” to include:

- (2) Application of the pesticide.
- (3) Post-application activities necessary to reduce the risks of illness and injury resulting from handlers’ and workers’ occupational exposures to pesticide residues during the restricted-entry interval plus 30 days. These activities include, but are not limited to, responsibilities related to worker training, notification, and decontamination.
- (4) Other pesticide-related activities, including, but not limited to, providing emergency assistance, transporting or storing pesticides that have been opened, and disposing of excess pesticides, spray mix, equipment wash waters, pesticide containers, and other pesticide containing materials.

(b) A person who has a duty under this part, as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section

12(a)(2)(G) and is subject to a civil penalty under section 14. A person who knowingly violates section 12(a)(2)(G) is subject to section 14 criminal sanctions.

- **Tex.Civ.Prac. and Rem. Code § 74.001:**

(10) “Health care” . . . any act performed or furnished, or that should have been performed or furnished, by any health care provider . . . during the patient’s medical care, treatment, or confinement

(12)

(A) “Health care provider” means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:

(ii) a dentist;

(13) “Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.

(19) “Medical care” means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed

to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

- **Texas Occupations Code-OCC § 251.003.—Practice of Dentistry**

(a) For purposes of this subtitle, a person practices dentistry if the person:

(2) performs or offers to perform by any means the

(c) diagnosis, treatment, operation, or prescription for a disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, oral cavity, alveolar process, gums, or jaws; prescribes, makes, or causes to be made or offers to prescribe . . . ;

(3) make, or cause to be made by any means an impression of any portion of the human mouth, teeth, gums, or jaws:

(b) the practice of dentistry under Subsection (a)(9) does not:

(2) exempt a dentist who is a member of a hospital staff from following hospital bylaws, medical staff bylaws, or established policies approved by the governing board and the medical and dental staff of the hospital."



### STATEMENT OF THE CASE

Plaintiff, Sandra Hale, a disabled veteran, went to a VA dental clinic for routine fitting of her dentures by VA dentist Dr. Seder; However, prior to the appointment, her dentures were cleaned twice with the pesticide CaviCide™. (ROA.1285) according to a 1995 VA policy (ROA.1121 & 1123, line 16) which was found to be outdated and unlawful and the cause of chemical burns to Ms. Hale after she wore her dentures home. (ROA.1377-79). The courts ruled cleaning dentures is a health care liability claim and demanded an expert dentist report (Appendix A, pg.2) and rejected Ms. Hale's expert Toxicologist report (ROA.902-928). The United States' (USA) motion to dismiss in district court was affirmed on appeal for lack of a dentist expert report to establish chemical injuries from a dental cleaning product after Ms. Hale had established the VA dentist and Respondent USA were negligent per se as a matter of law. (ROA.1589-91) (Appendix A, pg.2). Both courts rejected expert Toxicologist findings that established the standard of care for utilizing pesticide chemicals according to manufacturer data, labeling and the Occupational Safety and Hazard Act (OSHA) required Material Safety Data Sheet (MSDS) and scientifically documented injuries these chemicals cause when they contact mucous membrane that line the oral cavity, throat and lungs and Food and Drug Administration (FDA) incident reports of other victims with the same injuries as Ms. Hale experienced by the use of this same pesticide (CaviCide™) .(ROA.963-74).

The toxicologist calculated thru approved scientific methods, the approximate dose of chemicals that Ms. Hale would have received according to the OSHA approved MSDS description of the composition and the percentage of these chemicals in the base formula used by the manufacturer and the absorption rate of the material used to manufacture Ms. Hale's partial dentures. (ROA.902-928). Expert dentists cannot opine as to the chemicals in CaviCide™, chemical composition of dentures, their material absorption rate or chemical effects on metabolism of chemicals in regards to mucous membrane. The appeals court acknowledges the complaint is misuse of chemicals on dentures, yet demands a dentist be a chemical expert. A dentist is not the appropriate expert for this case of chemical exposure. Dr. Seder was not practicing dentistry according to Texas statute when he cleaned Ms. Hale's dentures and this act is not a health care liability claim. Dr. Seder's conviction for misuse of this pesticide is negligence per se as a matter of law and requires no expert report to establish the standard of care where the statute itself defines the standard of care. Additionally, Respondent USA's two dental experts verify Respondent knowing retained an outdated policy to utilize CaviCide™ to clean dentures which is negligence as a matter of law, (ROA.993-995) not invoking the Texas Medical Liability Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001-.507. *See, Group Hospital Services, Inc. v. Daniel*, 704 S.W.2d 870, 877 (Tex. App.-Corpus Christi 1985, no writ);



## REASONS TO GRANT REHEARING

I. THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION REGARDING MEDICAL EXPERT REPORTS THAT CONFLICTS WITH THE SUPREME COURT OF NEW YORK IN *RODRIGUEZ V. PATHAK*, 2018 N.Y. MISC. LEXIS 2830

The expert Toxicologist report was ignored by both courts under the same specialty rule for medical liability claims, Tex. Civ. Prac. & Rem. Code § 74; However, the New York Supreme Court has ruled that Toxicologist may opine on medical malpractice cases as long as the expert is not making a medical diagnosis nor attesting to any medical processes or procedures. *Id.* An expert may properly include within his expert report any information that will “explain, repel, counteract or disprove” facts offered by the opposing party. *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *Crowley v. Chait*, 322 F.Supp.2d 530, 551 (D.N.J. 2004); Wright & Miller, *Federal Practice and Procedure*, § 2031.1 at 79 (2010). Measured by this standard, Ms. Hale’s expert Toxicology Report is proper in its entirety and should have been considered by the courts, which unlawfully sanctioned a federal statute conviction pointing to the obvious fact that the VA dentist was negligent per se as a matter of law for not observing federal label warnings (ROA.1056) and Respondent USA is negligent per se as a matter of law for retaining and defending an illegal, 1995 outdated policy authorizing this federal crime. (ROA.993-995).

**II. THE DECISION BELOW ESTABLISHES A DANGEROUS PRECEDENCE THAT THE JANITORIAL ACT OF CLEANING DENTURES DONE DAILY BY MILLIONS OF LAY PERSONS IS NOW A HEALTH CARE LIABILITY CLAIM REQUIRING EXPERT DENTIST TESTIMONY**

Both the U.S. District court and the Fifth Circuit Court of Appeals required an expert dentist to do what every person able to read and understand the English language should be able to do: simply read a product label and determine it cannot be used on skin or anything that contacts mucous membrane. (ROA. 1569).

Dr. Seder's federal conviction under FIFRA 7 U.S.C. § 136, Section 12(a)(2)(G) holds him to the "same standard of care" as "any person" using a pesticide. Tex. Agric. Code § 76.201(b)(3) and TAC § 7.71 were intended to prevent the misuse of registered pesticides and provide emergency assistance after exposure, demonstrating Defendant United States' negligent training and supervision and illegal hospital policies. *Group Hospital Services, Inc. v. Daniel*, 704 S.W.2d 870, 877 (Tex. App.-Corpus Christi 1985, no writ); *Union Transports, Inc. v. Braun*, 318 S.W.2d 927, 941 (Tex. Civ. App.-Eastland 1958, no writ). Dr. Seder was not practicing dentistry according to Texas Occupations Code-OCC § 251.003. The act of cleaning dentures is done by millions of lay persons daily and is purely janitorial, not requiring a dental license or training under any medical or dental statute. There exists no standard of care for cleaning dentures except label instructions and a hospital policy or agency recommendation cannot be a defense for a federal crime.

**III. THE DECISION BELOW CONFLICTS AND UNDERMINES THE LEGITIMACY, RELIABILITY AND STABILITY OF JUDICIAL PROCESSES AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER**

The FTCA authorizes civil actions for damages against the United States for personal injury or death caused by the negligence of a government employee under circumstances in which a private person would be liable under the law of the state in which the negligent act or omission occurred. 28 U.S.C. §§ 1346(b)(1), 2674; *See Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008). Further, this is a claim of ordinary negligence, not a departure from accepted standards of health care. *See* § 74.001(a)(10) (“Health care’ means any act or treatment performed or furnished . . . by any health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.”) Emphasis added. Nor is there any doubt Ms. Hale complains chemicals caused her injuries. Basically, the claim is misuse of equipment by staff, which is ordinary negligence, not malpractice. *See, e.g., Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 31-32 (Tex. 1983) (allegation of liability based on failure to equip epileptic patient with life preserver).

Although there does not appear to be any direct Texas authority, and the panel cited none, it seems to be settled that a procedure such as cleaning dentures does not require medical professional expertise, training

or license and departures during such do not constitute medical or dental malpractice. Dr. Seder was not practicing dentistry when he cleaned Ms. Hale's dentures and there exists no "denture cleaning" experts to consult. In short, this is not a dental malpractice case. The Alabama Supreme Court ruled expert testimony does not apply in cases:

"[i]n which the lack of skill is so apparent as to be understood by a layperson and required only common knowledge and experience to understand it."

*Ex parte HealthSouth Corp.*, 851 So.2d 88 (Ala. 2002) restated in *Collins v. Herring Chiropractic Center, LLC*, — So.3d —, 2017 WL 656730 (Ala. 2017). The conviction of a federal pesticide statute requires no expert when the standard of care is set by the statute itself. As explained by the Texas Supreme Court, "[n]egligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person," and "[i]n such a case the jury is not asked to judge whether or not the defendant acted as a reasonably prudent person would have acted under the same or similar circumstances" because "the statute itself states what a reasonably prudent person would have done." *Carter v. William Sommerville and Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979). See *Moughon v. Wolf*, 578 S.W.2d 603, 604 (Tex. 1978).

In a negligence per se action, "the trial court merely has the fact finder decide if the tortfeasor committed the act proscribed by the statute and if the act proximately caused injury." *Borden, Inc. v. Price*, 939 S.W.2d 247, 250 (Tex. App.-Amarillo 1997, writ denied). The expert

Toxicologist provided the district court with FDA data that the injuries experienced by Ms. Hale are the same as others whose dentures were cleaned with the same product in the same manner used by Dr. Seder in the cleaning of Ms. Hale's dentures. (ROA.902-928).



### CONCLUSION

The conviction of VA dentist Dr. Seder for violation of federal pesticide statutes, with a fine of \$600 for the misuse of CaviCide™ to clean Ms. Hale's dentures is clearly negligence per se as a matter of law and Respondent United States is vicariously liable under the Texas Tort Claims Act.

Additionally, Respondent's two dental expert witnesses testified via their expert reports that Dr. Seder's was following a VA hospital policy to illegally use CaviCide™ off label, which when this crime was investigated by the Texas Dept. of Agriculture, it was found the VA hospital policy had been outdated since 1995, yet still in use by Respondent USA, which provides independent gross negligence per se as a matter of law.

Respectfully submitted,

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