TADC MEDICAL MALPRACTICE LAW NEWSLETTER

Spring, 2008

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I. TEXAS SUPREME COURT DECISIONS

A. NO OPEN COURTS VIOLATION WHERE PLAINTIFF FAILED TO USE DUE DILIGENCE TO INITIATE SUIT WITHIN STATUTE OF LIMITATIONS

In *Yancy v. United Surgical Partners International, Inc.*, 236 S.W.3d 778 (Tex. 2007), Carlitha Yates underwent a surgical procedure at Value Surgical Center. During the procedure, Yates suffered a cardiac arrest that left her in a comatose state. Approximately eighteen months after the event, Yates' mother and guardian, Yancy, sued Dr. Ramirez and Dallas Pain & Anesthesia Associates, alleging that Yates' cardiac arrest was caused by the failure of the medical personnel to monitor her oxygen while she was under general anesthesia. Two years after that, Yancy added appellee as a defendant. Appellee moved for summary judgment, arguing that Yates' claims were barred by limitations. Yates countered that limitations were tolled because Yates had been in a comatose state continuously since the incident, and produced the affidavit of a physician verifying Yates' condition. The trial court granted summary judgment in favor of appellee, and the Court of Appeals affirmed. *Yancy v. United Surgical Partners International, Inc.*, 170 S.W.3d 185 (Tex. App.—Dallas 2005).

On petition to the Texas Supreme Court, Yancy argued that Article 4590i, section 10.01, which prohibited tolling of the statute of limitations in health care claims, violated the open courts provision of the Texas Constitution as applied to mentally incapacitated plaintiffs. The Court disagreed, pointing out that Yancy had been well aware of Yates' injury and had already retained a lawyer and filed suit against certain defendants well within the limitations period, and that she had failed to offer any explanation for her failure to name appellee for almost twenty-two months after filing her original petition. The Court noted that "[a] plaintiff may not obtain relief under the open courts provision if he does not use diligence and sue within a reasonable time after learning about the alleged wrong." *Id*. at 785 (*citing Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). Thus, the Court held that under the circumstances of this case, the open courts provision was not violated, and Yates' claims against appellees were barred.

B. EXTENSION AVAILABLE FOR "DEFICIENT BUT CURABLE" EXPERT REPORT

In *Ogletree v. Matthews*, ___ S.W.3d ___, 2007 WL 4216606 (Tex. 2007), 51 Tex. Sup. Ct. J. 165, Plaintiffs filed suit against Dr. Jan Ogletree and Heart Hospital of Austin, alleging that the negligent insertion of a urinary catheter by Dr. Ogletree caused John Burke Matthews to suffer bladder perforation and acute renal failure, causing his death. Plaintiffs timely served the expert reports of a radiologist and two nurses. Dr. Ogletree timely objected to the reports and moved to dismiss, arguing that the radiologist was not qualified to opine as to the standard of care applicable to a urologist, and that there was no curriculum vitae attached to the radiologist's report. Dr. Ogletree also argued that the nurses were not "practicing medicine," as required for them to render a report against a physician. Finally, Dr. Ogletree argued that, because the radiologist's lack of qualification could not cured, the trial court was without discretion to grant an extension. The Court, however, found that Dr. Ogletree's argument in this regard ran contrary to the intent of the Legislature in enacting Chapter 74. The Court noted that, while the amendments "were intended to decrease claims, they do not mandate dismissal for deficient, but curable, reports." The Court held that

> Because a report that implicated Dr. Ogletree's conduct was served and the trial court granted an extension, the court of appeals could not reach the merits of the motion to dismiss. We conclude that the court of appeals correctly determined it lacked jurisdiction over Dr. Ogletree's appeal.

The hospital did not object to the reports, but did move for dismissal, claiming that the nurses' reports failed to explain (1) the standard of care, (2) the alleged breaches, and (3) causation. On appeal, the hospital agreed that the reports were sufficient as to standard of care and breach, but it argued that, because the nurses were prohibited by law from

testifying as to causation, their reports constituted "no reports," and that no objections were required. The Court disagreed, noting that all of the hospital's complaints about the reports went to their sufficiency, all of which complaints could have been argued within the twenty-one day time for objections. The Court found that because the hospital failed to object, its motion to dismiss was properly denied by the trial court.

C. Plaintiff May Cure Deficiency in Expert Report by Obtaining New Expert in the 30-Day Extension Period

From the inception of Chapter 74, Texas appellate courts have consistently held that, while Chapter 74 allows a trial court to grant a plaintiff a 30-day extension in which to cure a deficient expert report, the plaintiff may not cure the deficiency by obtaining a report from an entirely new expert. *See Cuellar v. Warm Springs Rehabilitation Foundation*, 2007 WL 3355611 (Tex.App.-San Antonio 2007, no pet.) (memorandum opinion); *De La Vergne v. Turner*, 2007 WL 1608872 (Tex.App.-San Antonio 2007, no pet.); *Methodist Health Center v. Thomas*, 2007 WL 2367619 (Tex.App.-Houston [14th Dist.] 2007, no pet.); *Nexion Health at Oak Manor, Inc. v. Brewer*, 243 S.W.3d 848 (Tex. App.—Tyler 2008, pet. filed).

On April 11, 2008, the Texas Supreme Court issued two important opinions that changed that rule, although it did so with very little in the way of explanation for its rationale. In *Lewis v. Funderburk*, ___ S.W.3d ___, 2008 WL 1147188 (Tex. 2008) (not yet released for publication), DeWayne Funderburk filed suit against Dr. Rory Lewis for allegedly negligent treatment of Funderburk's daughter's broken wrist. Funderburk originally filed no expert report, pointing instead to a letter in the medical records wherein one physician thanked another for his referral of the patient. The letter did not address the standard of care, alleged breaches, or causation. After Dr. Lewis moved to dismiss the claims, the trial court granted a 30-day extension, during which time Funderburk filed the expert report of an osteopath. Dr. Lewis again moved to dismiss, and the trial court denied the motion.

The Court first spent the majority of its opinion addressing the fact that two of the fourteen courts of appeal in Texas, the Second and Tenth, have held that appellate courts lacked jurisdiction to conduct interlocutory review of allegedly inadequate reports, while all other appellate courts had routinely conducted such interlocutory reviews. The Court held that because Dr. Lewis sought dismissal and attorney's fees, his motion fell under 74.351(b) (motion to dismiss for failure to serve an expert report), rather than 74.351(l) (challenging the sufficiency of expert report served), and that review was available for a denial of relief under that section. In so finding, the Court rejected Funderburk's argument that subpart (b) referred only to cases in which no report was served as at all.

After finding jurisdiction over the appeal, the Supreme Court went on hold that the Plaintiff could cure a deficient report with the report of a new expert in the thirty-day extension period. Without addressing any of the arguments made by the appellate courts that had previously held such a new expert was impermissible, the Court held simply that "the statute allows a claimant to cure a deficiency, and that requirement like all others may be satisfied by serving a report from a separate expert."

On the same day, the Court also issued a second opinion with the same holding. In *Danos v. Rittger*, ___ S.W.3d ___, 2008 WL 1172183 (Tex. 2008) (not yet released for publication), the court had granted Danos thirty days to cure a report that it deemed deficient as to causation. Danos filed a supplemental report by the same expert as well as a report by a new expert. The trial court dismissed Danos's claims, determining that the supplemental report from the original expert still did not adequately address causation, and ruling that Danos could not file a report from a new expert during the extension period to cure the deficiency in the original expert's report. The court of appeal affirmed, noting that the provision of Chapter 74 which allows a claimant an extension to cure a deficient report spoke to the need to cure the deficiency in the report already provided, and that a new report from a different expert was not permitted. *Danos v. Rittger*, ___ S.W.3d ___, 2007 WL 625816 (Tex.App.-Houston [1st Dist.] 2007). The Texas Supreme Court again chose not to specifically address any of the arguments made by the party or by the prior appellate courts. Rather, it cited simply to its opinion in *Funderburk* to reverse the appellate court and remand the matter back to the trial court for consideration of the adequacy of the report of the new expert.

D. Summary Judgment Unavailable on Good Samaritan Defense for Physician Rendering Services as Part of Labor and Delivery Team

In *Chau v. Riddle*, ___ S.W.3d ___, 2008 WL 400399 (Tex. 2008), 51 Tex. Sup. Ct. J. 523, Dr.

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D. Summary Judgment Unavailable on Good Samaritan Defense for Physician Rendering Services as Part of Labor and Delivery Team

In *Chau v. Riddle*, ___ S.W.3d ___, 2008 WL 400399 (Tex. 2008), 51 Tex. Sup. Ct. J. 523, Dr. Riddle administered anesthesia to Thao Chau during Chau's emergency cesarean section. One of the twins born to Chau was not breathing on delivery, and the nurses were unable to resuscitate the baby. On the request of the attending obstetrician, Dr. Riddle intubated the baby, then returned to resume care for Chua. Continued attempts to resuscitate the baby were unsuccessful, and when the neonatologist arrived shortly thereafter, she discovered that the tube in the baby's esophagus, rather than his trachea. The baby began breathing as soon as the tube was moved to the proper location, but suffered permanent brain damage from the interim lack of oxygen.

Chau and her family sued Dr. Riddle and his professional association, alleging that he failed to perform the necessary follow-up steps after intubation to ensure proper placement of the tube. Dr. Riddle moved for summary judgment on the Good Samaritan defense. The trial court granted the motion, and the ruling was upheld by the court of appeal. 212 S.W.3d 699. The Texas Supreme Court reversed, finding that Riddle failed to conclusively establish his entitlement to the defense.

The Court noted that three of the exceptions to the Good Samaritan defense were applicable to the case: (1) "a doctor performing his orher work in an emergency room," (2) "a doctor associated by the admitting or attending physician," and (3) "a doctor who charges for his or her services." The Court determined that because Riddle rendered services as part of the labor and delivery team, whether he was "associated by the admitting or attending physician" was a question of fact that precluded summary judgment.

D. Chapter 74 Prohibits Rule 202 Pre-Suit Depositions for potential Health Care Liability Claims

On March 28, 2008, the Texas Supreme Court weighed in on an issue that had split Texas appellate courts since the enactment of Chapter 74: whether the limitations on discovery before service of an expert report apply in the context of pre-suit discovery conducted under Rule 202 of the Texas Rules of Civil Procedure. It did so by denying petition for review in a case that held such pre-suit discovery was prohibited, *In re Raja*, 216 S.W.3d 404 (Tex. App.—Eastland 2006, pet. denied), and by granting petition for writ of mandamus in a case that had permitted pre-suit discovery, *In re Allan*, 191 S.W.3d 483 (Tex. App.—Tyler 2006, orig. proceeding). The Court issued its opinion on the latter case in *In re Jorden*, ___ S.W.3d ___, 2008 WL 820704 (Tex. 2008) (not yet released for publication).

In *Jorden*, Nancy Allan suffered a fatal heart attack at home more than a week after seeking treatment for chest pain. Allan's son, Dr. Christopher Allan, filed a Rule 202 petition individually and as the representative of his deceased mother's estate. As part of the petition, he listed as potentially adverse parties, and sought leave to depose, two physicians that rendered care to his mother, the medical practice for the physicians and the hospital at which the care was rendered. The trial court denied the request, but the Twelfth Court of Appeals reversed, and the intended deponents petitioned for writ of mandamus. The Texas Supreme Court held that the plain language of section 74.351(s) prohibited Rule 202 pre-suit depositions with regard to health care liability claims, and that the Legislature had explicitly provided that Chapter 74 would override any conflicting laws or rules of procedure. The Court also rejected the Tyler appellate court's rationale that chapter 74 only applies after a lawsuit has been filed, holding that nothing in the definition of a "helath care liability claim" limited the term to claims that had already been filed. Finally, the Court rejected the idea that the "nonparty" exception in section 74.351(s) could apply, holding that "if everyone qualifies as a "nonparty" until the suit is filed, then the statute places no restriction on pre-suit discovery whatsoever."

II. Texas Appellate Court Decisions Regarding Chapter 74 of the Texas Civil Practice & Remedies Code

A. Definition of "health care liability claim"

In *Hare v. Graham*, 2007 WL 3037708 (Tex. App. – Fort Worth 2007, pet. filed), Betty Reed Graham file suit against Dr. Richard Hare, a pathologist, for performing an unauthorized autopsy on the body of Graham's husband. After Graham failed to serve a timely expert report, Dr. Hare moved to have the suit dismissed. The trial court first

granted, then denied Dr. Hare's motion. On appeal, Graham argued that the suit was not a health care liability claim because the issue was not whether the autopsy was performed according to acceptable standards, but whether it was done without consent. At the outset, the appellate court rejected Graham's argument that just because it was a "consent" case, it could not be a health care liability claim. Nevertheless, the court affirmed the trial court's denial of Dr. Hare's dismissal based on the statutory definition of "health care," which the court held clearly implied that a person must be alive in order to qualify as a "patient." The court held that "a cadaver cannot be a patient and a dead body does not receive medical care or treatment after death." Accordingly, the court held that Graham's claim could not be a health care liability claim, and no expert report was required.

In *Brazowski v. Southeast Baptist Hospital*, 2007 WL 3003141 (Tex. App. – San Antonio 2007, pet. denied), the trial court dismissed Matthew Brazowski's claims for failure to file an expert report pursuant to Chapter 74. Brazowski had sustained injuries in an automobile accident and was taken by police to Southeast Baptist Hospital. Brazowski, claiming that he consented only to the taking of a blood sample, later sued the hospital for damages arising from the hospital's provision of other medical services to him, which he claimed were provided without his consent. Specifically, Brazowski plead causes of action for false imprisonment and assault and battery, for which Brazowski argued that a Chapter 74 report was not required. The Court of Appeal upheld the trial court's dismissal, noting that "a healthcare liability claim cannot be recast as another cause of action to avoid the requirements of Chapter 74."

The San Antonio court reached a similar conclusion in *Mata v. Calixto-Lopez*, 2007 WL 3003139 (Tex. App. – San Antonio 2007, no pet.). In that case, Mata had been arrested for DWI. Because he had exhibited altered mental status and complained of nausea, vomiting and abdominal pain, the jail required Mata to have medical clearance. Mata filed suit against the Defendants, alleging that they performed blood and urine tests on him after he refused consent. His initial claims were for medical negligence, false imprisonment, and civil rights violations. After Mata failed to timely serve an expert report, the Defendants moved to dismiss the claims. The day before the hearing on Defendants' motion, Mata amended his petition to delete his medical negligence claims and replace them with claims for assault and battery. The trial court dismissed the case, and the court of appeal affirmed, holding that Mata could not recast his claims as something other than health care liability claims. The court rejected Mata's argument that no physician-patient relationship had existed, holding that the creation of a physician-patient relationship did not require the formalities of a contract. The court noted that the Defendants' professional duty to examine Mata and diagnose the source of his medical complaints was sufficient to establish a physician-patient relationship. The court further held that the Defendants' actions of taking urine and blood samples were an inseparable part of the rendition of medical services, rendering the entire cause of action a healthcare liability claim.

In *Omaha Healthcare Center, LLC v. Johnson*, ___ S.W.3d ___, 2008 WL 339838 (Tex. App.—Texarkana 2008, no pet. h.), the court undertook an analysis of whether claims involving a nursing home resident being bitten by a brown recluse constituted a "health care liability claim," requiring an expert report to be filed. After conducting an extensive analysis of the grammatical construction of changes made by the legislature to the statutory definition of a of a "health care liability claim" as it relates to safety issues, the court of appeal determined that the plaintiff's claim was not a "safety claim directly related to health care." The court distinguished the case from the often cited Texas Supreme Court case, *Diversicare Gen'l Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005). First, the court noted that injuries from a spider bite did not relate to the patient's treatment or lack of treatment and did not "implicate a medical duty to diagnose or treat." Further, the court noted that it was not convinced that expert testimony would necessarily be required to prove the claims. Finally, the court held that, even though the Texas Administrative Code contained regulations related to a nursing home's duties with regard to pest control, such regulations were not necessarily related to health care. Accordingly, the trial court held that the claims were not health care liability claims, and that no expert report was required.

In another case citing *Diversicare*, *Holguin v. Laredo Regional Medical Center, L.P.*, ___ S.W.3d ___, 2008 WL 312716 (Tex. App.—San Antonio 2008, no pet. h.), a patient brought suit against a nurse and medical center, claiming that the nurse sexually assaulted him while he was a patient. The court first held that Holguin's claims against the nurse were not health care liability claims, pointing out that it was illogical to suggest that an intentional sexual assault could be "'an inseparable part of the rendition of medical care' or a departure from

accepted standards of care." The court held that, as distinguished from *Diversicare*, Holguin's injuries had "nothing to do with a health care provider's lapse in professional judgment or failure to protect a patient due to an absence of supervision or monitoring." On the other hand, the court held that Holguin's claims against Laredo Regional for negligent hiring, training and supervision were health care liability claims, in accordance with the rule set forth in *Diversicare*.

In *Vanderwerff v. Beathard*, 239 S.W. 406 (Tex. App.—Dallas 2007, no pet.), the court addressed another attempt to circumvent Chapter 74 by pleading assault. Kristina Beathard filed suit against Dr. Vanderwerff, a chiropractor, alleging that he rubbed her genitals during a routine chiropractic knee exam. After Beathard failed to serve an expert report upon Vanderwerff, he filed a motion to dismiss, which the trial court denied. The court of appeal reversed, holding that Beathard's claims were health care liability claims under Chapter 74. The court pointed out that Vanderwerff had alleged that he was performing a routine exam when the alleged assault took place and that he had been using subjective means to manipulate Beathard's musculoskeletal system. They also noted that when Vanderwerff asked Beathard to describe the location of her pain on an anatomical chart, Beathard had indicated that she had pain running from her knee to her upper thigh. The court held that the threshold questions in Beathard's claims were "whether she had consented to treatment and whether Vanderwerff's examination was within the scope of a chiropractic examination." Because the conduct occurred during the course of treatment, the court held that the complaints were inseperable from the rendition of health care services, and that they thus fell within the definition of health care liability claims, requiring an expert report be filed.

In *Lee v. Boothe*, 235 S.W.3d 448 (Tex. App.—Dallas 2007, pet. denied), Tammie Kay Lee filed suit against Dr. Booth in relation to a laser vision procedure he had performed on her. Lee claimed that she sought out Dr. Boothe's services after hearing his advertisements that the procedure was "virtually pain free" and was free if the patient's vision was not corrected to 20/20. In her petition, Lee claimed that Boothe failed to properly anesthetize her and that the surgery was both very painful and unsuccessful in correcting her vision. After Dr. Boothe failed to refund her money as advertised, Lee filed suit, alleging breach of contract, violations of the Texas Deceptive Trade Practices Act, assault and fraud. When Lee failed to file a timely expert report, Dr. Boothe moved to dismiss the claims. The court of appeal affirmed the trial court's dismissal of the claims, holding that a plaintiff could not recast health care liability claims as a different cause of action in order to circumvent the requirements of Chapter 74. The court concluded that "[a]ll of Lee's injuries arise out of the allegedly wrongful manner in which Boothe conducted the operation," and that even her alleged DTPA claim was actually claim for negligence in the rendition of medical services. Finally, with regard to the claims of assault, the court concluded that what Lee characterized as an "attack" was nothing more than an allegation of excessive use of force during the operation, and that proving such an allegation would require expert testimony as to whether the force used was, in fact, excessive.

B. DEADLINE FOR SERVING EXPERT REPORTS

1. NO TOLLING OF 120-DAY DEADLINE

In *PM Management-Windcrest Nc, LLC v. Sanchez*, ___ S.W.3d ___, 2008 WL 506281 (Tex. App.—San Antonio 2008, no pet. h.), the court held that the Defendant's failure to have a registered agent designated with the Secretary of State, which failure caused a delay in Plaintiff's service of process, did not provide equitable grounds for an extension of time within which Plaintiff was required to serve her expert reports. The court of appeal rejected Plaintiff's argument that "good cause" existed for granting an extension, holding that that, where no expert was served within 120 days of the date of filing, the trial court was without authority to grant any extension.

The Beaumont court of appeal reached the same conclusion in *Bohannon v. Winston*, 238 S.W.3d 535, (Tex. App.—Beaumont 2007, no pet.) In Bohannon, the plaintiffs filed suit but were unable to effectuate service until 127 days later. There was some evidence that the constable's failure to serve the defendant physician was due in part to the physician's practice of closing his office at noon every Friday. There was also some evidence that the failure to serve was due in part to the physician's scheduled move of his office to a new location and a written notice placed on the door to advise patients of the anticipated move before the move actually took place. The court rejected Bohannon's argument that a defendant's "evasion of service" provided equitable grounds for tolling of the 120-day deadline in which to file an expert report, holding that "[t]he potential for gamesmanship does not vest the courts with the power to legislate; instead, we must apply the statute as it is written and address a party's misconduct in an

appropriate manner when it occurs." The court then noted that the record revealed no evidence of gamesmanship on the part of the defendant in this case.

In *Shaikh v. Plaza Medical Center of Fort Worth*, 2007 WL 3208592 (Tex. App.—Fort Worth 2007, no pet.), the court of appeal confirmed that abatement of a case for failure to provide the statutorily-required authorization with notice of suit did not operate to toll the 120-day deadline within which Plaintiff was required to file an expert report. The court pointed out that allowing such a result would, have the effect of rewarding a plaintiff's failure to comply with statutory requirements by allowing extra time to file a report.

2. SERVICE ISSUES

In *University of Texas Health Science Center at Houston v. Gutierrez*, 2007 WL 2963689 (Tex. App. – Houston [1st Dist.] 2007, pet. filed), the Houston court had an opportunity to consider the service requirements of Chapter 74. In November of 2005, Plaintiffs brought suit against various healthcare providers, including a physician employed by UTHSCH, although they did not sue UTHSCH directly at that time. Within 120 days, Plaintiffs served an expert report upon the employee physician, and counsel for the physician provided a courtesy copy of the report to UTHSCH's counsel. Plaintiffs subsequently non-suited all named Defendants and substituted UTHSCH as the sole Defendant. After 120 days passed without service of an expert report, UTHSCH filed a Motion to Dismiss. The trial court denied the motion, and UTHSCH appealed.

The appellate court reversed, holding that the trial court abused its discretion in denying UTHSCH's Motion to Dismiss. Noting that Section 74.351 did not contain a definition for the term "serve," the court determined that the legislature intended that claimants comply with Rule 21(a) of the Texas Rules of Civil Procedure in serving expert reports. In this case, the Plaintiffs did not serve the expert report on UTHSCH before the deadline by any of the methods authorized by Rule 21(a). The court rejected the Plaintiffs' assertion that service upon the hospital's physician employee constituted timely service on the hospital, holding that the employee and the healthcare provider are treated as separate Defendants for purposes of Chapter 74 as well as Section 101.106 of the Texas Civil Practices and Remedies Code. The court also rejected Plaintiff's assertion that there was only one 120-day time period to serve expert reports, noting that a plaintiff has the right to add additional claims or Defendants, and to furnish an expert report within the deadline as to those additional claims or Defendants.

In *Acosta v. Chheda*, 2007 WL 3227650 (Tex. App.—Houston [1st Dist.] 2007, pet. filed), Mary Acosta filed suit against Hemlata Chheda, D.D.S. related to Dr. Chheda's removal of a wisdom tooth. Acosta non-suited her claims 114 days after filing suit, then re-filed her suit eight months later. At the time of re-filing, Acosta filed her expert report with the trial court. Several days before re-filing, she had also sent Dr. Chheda's attorney, via facsimile and regular mail, a "courtesy copy" of the report, although no curriculum vitae was attached. Acosta then sent the curriculum vitae to Dr. Chheda's attorney via e-mail. On Dr. Chheda's motion, the trial dismissed Acosta's claims. The court of appeal affirmed, holding that Rule 21a authorized facsimile transmission of the expert report, but that the service was deficient because it did not include the curriculum vitae as required by statute. The court further held that e-mail is not a method of service recognized by Rule 21a. In an interesting note, given its finding that Accosta's service was deficient even within the timeline she urged, the trial court expressly reserved the question of whether Acosta's non-suit had tolled the statute of limitations to give her six days to file a report once she re-filed her petition.

C. JURISDICTIONAL ISSUES

In *Tenet Hosp., Ltd. v. Gomez*, ___ S.W.3d ___, 2008 WL 199733 (Tex. App.—El Paso 2008, no pet. h.) Christina Gomez filed suit against various healthcare providers, alleging that they had negligently cared for her husband. Gomez timely filed three expert reports, two from physicians and one from a nurse expert. Appellant, Sierra, objected that neither of the physicians' reports addressed Sierra and that the report from the nurse could not address causation as a matter of law. Sierra also moved to dismiss, claiming that the reports constituted "no report" as to it. The trial court denied Sierra's motion to dismiss and granted Gomez a 30-day extension to cure the deficient reports. Sierra sought an interlocutory appeal, but the court of appeal held that no interlocutory appeal is permitted where the trial court finds a report deficient and exercises its discretion by granting an extension of time to cure the deficiency.

In a related mandamus proceeding, *Tenet Hosp., Ltd. v. Gomez*, ___ S.W.3d ___, 2008 WL 199735 (Tex. App.—El Paso 2008, orig. proceeding), Sierra again argued that the trial court had abused its

discretion in granting a 30-day extension because the expert reports constituted "no reports" as to it. The court of appeal held that mandamus was not available because it was within the trial court's discretion to determine whether a report was deficient, and that Sierra had failed to demonstrate a "clear abuse of discretion" under the facts of the case. The court further held that mandamus relief was precluded by the hospital's ability to file an interlocutory appeal after the expiration of the thirty-day extension.

The Corpus Christi court of appeal reached the same conclusion given similar circumstances in *McKeever v. Cerny*, ___ S.W.3d ___, 2008 WL 802347 (Tex. App.—Corpus Christi 2008, no pet. h.). In *McKeever*, as in the case cited above, the trial court found an expert report filed by Plaintiff deficient, and granted a thirty-day extension to cure the deficiency. The two appellants brought parallel interlocutory appeals and petitions for writ of mandamus, all based on the same order. The court of appeal dismissed an interlocutory appeal for want of jurisdiction and denied the writ of mandamus. The court pointed out that the legislature had explicitly decided that orders granting extensions under Chapter 74 are not appealable, and that any review of a grant of extension must be by mandamus. The court then denied mandamus relief under the facts of the case, holding that trial courts enjoy broad discretion to grant an extension under the current statute, and that the appellants had failed to show a clear abuse of that discretion.

D. Adequacy of Expert Reports

1. Qualifications of Proffered Experts

In *Davis v. Webb*, ___ S.W.3d ___, 2008 WL 190054 (Tex. App.—Hous. [14th Dist.] 2008, no pet. h.), the court held that a report by an optometrist could not satisfy the expert report requirement as to an ophthalmologist. The court noted that an optometrist is not licensed to practice medicine, and is thus not a "physician" as that term is defined by Chapter 74. Further, because an ophthalmologist is a physician, only another physician can issue a report as to the standard of care applicable to him. Thus, any report by a non-physician constituted "no report," making Plaintiff ineligible to receive a 30-day extension to cure the deficiency in the report.

In *Baylor University Medical Center v. Rosa*, 240 S.W.3d 565 (Tex. App.—Dallas 2007, pet. filed), Dianna Rosa filed suit against Baylor and a nurse, claiming that their use of an eye pack on her to control post-operative swelling after eye surgery caused her to lose sight in the eye. Rosa filed expert reports from a nurse and a physician, and also filed excerpts from the deposition of the physician that performed the surgery to satisfy the Chapter 74 requirements. Within twenty-one days of service of the reports, Baylor and the nurse filed very general objections to the qualifications and the sufficiency of the reports and the deposition excerpts. They later filed a motion to dismiss, which elaborated on the specific arguments concerning the objections they had previously raised. After the trial court denied the motion to dismiss, Baylor and the nurse appealed. The court of appeal, after reciting the qualifications of the experts and the details of their respective reports, affirmed the trial court's ruling that the experts were qualified and that their reports constituted a good faith effort to comply with the statutory requirements. However, importantly, the court noted at the outset that the general objections filed by Baylor and the nurse were sufficient under the statute, and that they had not waived their objections by failing to includ specific details with their initial objections.

2. Reports Deemed Sufficient

In *Patel v. Williams*, 237 S.W.3d 901 (Tex. App. – Houston [14th Dist.] 2007, no pet.), Francis Mitchell, who suffered from dementia related to Alzheimer's disease, was hospitalized for rehabilitation and recovery after hip surgery. After Mitchell removed her gastrostomy tube, the hospital nurses improperly reinserted it, causing Mitchell to suffer leakage of gastric contents into the peritoneum, an abscess and infection, requiring her to undergo multiple operations. After her death several weeks later, the death certificate identified the cause of death as small cut gangrene with the underlying cause of mesenteric artery thrombosis. The family sued Mitchell's primary care physician, Dr. Patel, claiming that he breached the standard of care in prescribing Risperdal, a psychotropic drug to which the family had refused consent. Plaintiff's expert, Dr. Michael Zietlin, issued a report stating that Risperdal had not been approved for treatment for dementia, and that one of the adverse affects of the Risperdal, restlessness or a need to keep moving, had caused Mitchell to pull out her gastrostomy tube, which in turn resulted in numerous operations and infections, and ultimately her death. Dr. Patel moved to dismiss, claiming that the report was insufficient, but the trial court denied the motion. The Court of Appeal affirmed, holding that, although the report could have been more artfully written, it was sufficient to provide Dr. Patel with a fair summary of the standard

of care applicable to him. With regard to causation, the court found that Dr. Zietlin presented a chain of events beginning with Dr. Patel's prescription of Risperdal to Mitchell and ending with her death. The court found that, while there were "many links in this chain of causation" the report was sufficient to fulfill the requirements of Section 74.351.

In *HEB Grocery Co., L.L.P. v. Farenik*, 243 S.W.3d 171 (Tex.App.—San Antonio 2007, no pet.) HEB pharmacist Lori Lynn Smith incorrectly filled Lisa Farenik's prescription for Klonopin, an anti-anxiety medication, with Clonidine, an anti-hypertensive drug. It was undisputed that during the five days Farenik took the wrong drug, she took twice the prescribed amount. Farenik initially experienced blurred vision and dizziness, and eventually became legally blind. Farenik sued HEB, and HEB objected to the expert report provided by Farenik, complaining that it improperly focused on the dosage taken rather than the dosage prescribed, and merely speculated that the same result would have occurred at the correct dosage. The court of appeal affirmed the trial court's denial of HEB's motion to dismiss, pointing out that Ferenik was not required to present evidence in the report as if she were actually litigating the case. The court opined that the expert's report sufficiently opined that Farenik would have sustained the same injuries even if she had taken only the prescribed amount.

3. REPORTS DEEMED INSUFFICIENT

In *U. S. Imaging, Inc. v. Gardner*, 2007 WL 4547506 (Tex. App. – San Antonio 2007, no pet.), the Plaintiffs sued Defendant regarding a lumbar epidural procedure performed on Mr. Gardner. Plaintiffs claimed that Mr. Gardner suffered from meningitis after the procedure, and that the meningitis ultimately caused him to suffer hearing loss. The Plaintiffs filed an expert report that stated essentially that all of Mr. Gardner's injuries were "directly related" to the epidural procedure. Defendant moved to dismiss the case for an inadequate expert report, and the trial court denied the motion.

The court of appeal reversed, finding that, although the expert stated that the meningitis and hearing loss were "directly related to the lumbar epidural procedure" he failed to provide any basis for such an opinion. The court found that the report contained no discussion or authority that the epidural procedure caused the meningitis, or that the meningitis caused the hearing loss. Accordingly, the matter was remanded for entry of an order dismissing Plaintiffs claims.

4. ATTORNEY AS AUTHOR OF REPORT

In *Sepharic Sisters, Inc. v. Dillon*, 2008 WL 647817 (Tex. App.—San Antonio 2008, no pet. h.), Lois Dillon brought health care liability claims against the nursing home at which she had been a resident. Dillon served upon the nursing home the expert reports of Dr. Audrey Jones and Frances Lovett, R.N. Dillon later designated Dr. Jones as her testifying expert, and submitted to the nursing home the same expert report previously filed. At Dr. Jones' deposition, counsel for the nursing home elicited testimony that the original report had, in fact, been authored not by Dr. Jones but by Dillon's attorney. The nursing home moved to dismiss and sought sanctions from Dillon's attorney. At the hearing on the motion, Dr. Jones testified that she had reviewed the records and formed very specific opinions, which she then discussed with Dillon's attorney. She testified that Dillon's attorney drafted the initial draft of the report based on the information and opinions that they had discussed, and that she reviewed and modified the report to ensure that it accuretly reflected her opinions. Finally, she testified that the report accurately established her qualifications and the opinions she had formed and discussed with Dillon's attorney. The court of appeal affirmed the trial court's denial of the motion, finding no legal support for the nursing home's argument that an expert report must be personally written by the expert.

E. STATUTES OF LIMITATIONS / REPOSE

There were two interesting cases questioning the constitutionality of the statutes of limitations and repose found in Chapter 74, each dealing with surgical sponges discovered many years after surgery. The appellate courts in the two cases came to contrary conclusions, each analyzing the case before it in a different way.

In *Walters v. Cleveland Regional Medical Center*, ___ S.W.3d ___, 2007 WL 4465298 (Tex. App.—Houston [1st Dist.] 2007, pet. filed), the court focused almost exclusively on the reasonableness of the Plaintiff's failure to discover the alleged negligence. Tangie Walters filed a medical malpractice claim nearly ten years after a surgical sponge was left in her during a bilateral tubal ligation. Walters claimed that she began suffering chronic abdominal pain immediately after the surgery and that it worsened over the course of the next ten

years. Cleveland Regional moved for summary judgment on the basis that Walters' claims were barred by statute of limitations. Walters responded that the two-year statute of limitations was unconstitutional as applied to her because it cut of her claim before she knew or should have known of its existence. In affirming the trial court's summary judgment against Walters, the court of appeal held that with an open courts challenge, as contrasted with a tolling provision, "courts are to decide what constitutes a reasonable time or opportunity for the plaintiff to discover his injury and file suit." The court went on to hold that Walters had failed to establish that she did not have reasonable time to discover her injury before limitations expired, noting that pain itself can be an indicator of injury. Further, the court rejected Walters' reliance on the fact that the medical records indicated that all surgical sponges had been accounted for, noting that Walters had presented no evidence that she ever saw the records containing the sponge count before filing suit. Finally, the court held that Walters could not rely on the alleged misdiagnosis of other physicians she saw after the surgery, because her first post-surgical doctor's visit occurred more than two years after the surgery, at which point limitations would have already expired.

A contrary result was reached in *Rankin v. Methodist Healthcare System of San Antonio Ltd.*, ___ S.W.3d ___, 2008 WL 587444 (Tex. App.—San Antonio 2008, no pet. h.). Emmalene Rankin filed suit against various health care providers eleven years after a surgical sponge was left in her abdomen during a hysterectomy, and the trial court granted summary judgment in favor of the health care providers. The court of appeal reversed, holding that the ten-year statute of repose under section 74.251(b) was unconstitutional as applied to the facts of the case because it "unreasonably restricted her right to sue before she had a reasonable opportunity to discover the wrong and bring the suit." The San Antonio court focused its analysis on the two-prong test set forth in *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001), to find that (1) Rankin's claims were well established in common law and that (2) the restrictions required Rankin to bring a claim before she had any reason to do so. Interestingly, the court of appeal did not address the "reasonableness" of Rankin's failure to discover the sponge for eleven years, and laid no factual predicate in support of such a finding. Given that lack of factual explanation, it would be interesting to know whether Rankin had experienced the chronic pain and other medical problems of which Tangie Walters had complained in her case.

In *Hill v. Russell*, ___ S.W.3d ___, 2008 WL 399204 (Tex. App.—Austin 2008, no pet. h.), Andrea Hill died during surgery to remove a cyst. Approximately two years and two months later, Hills's father filed suit against Kimberly Ann Russell, the nurse anesthetist who provided anesthesia during the surgery. Russell moved for summary judgment, claiming that Hill's failure to include the statutorily required authorization form with his notice of claim rendered his notice of claim insufficient to trigger the seventy-five day tolling of limitations pursuant to section 74.051(a). The trial court granted summary judgment on limitations grounds. The court of appeal reversed, holding that a plaintiff's failure to include the required but separate authorization "does not bar the tolling of limitations but instead allows the provider to obtain an abatement until sixty days after she receives the authorization form."

II. Other Texas Appellate Court Decisions

A. Occurrence Report as Privileged

In *In re Intracare Hosp.*, 2007 WL 2682268 (Tex.App.—Hous. [14th Dist.] 2007, no pet.), the court found that an occurrence report created by the hospital was privileged and protected from discovery. A hospital employee, Shantha Abraham, sued her employer after she was injured by a psychiatric patient. Abraham sought production of certain documents, including an occurrence report generated by the hospital. The hospital withheld the document, claiming that it was protected by the medical committee and peer review privileges. The trial court ordered the hospital to produce the document, and the court of appeal conditionally granted a writ. The appellate court found that the affidavit presented by the hospital in support of its claim established that the report was required by the hospital's safety committee to be created and reviewed by the committee "in the evaluation of health care services and safety standards at the hospital." The court noted that the document itself indicated that it was for purposes of risk management and quality improvement only, and was not to be placed in the medical records. Accordingly, the court found that the document did not appear to have been generated for "routine business or administrative purposes," such as would bring the document within the statutory business record exception to the medical committee and peer review committee privileges. Moreover, the court held that the hospital's proof established that the report was not "gratuitously submitted to the hospital safety committee," but was

created at its direction and for its review of health care and safety standards. Finally, the court held that the fact that the report was created on the day of the incident did not alter the nature of the report or its place in the committee's evaluation of health care and safety standards.

B. EXCESSIVE DAMAGE AWARDS

In *Hawkins v. Walker*, 238 S.W.3d 517 (Tex. App.—Beaumont 2007, no pet.), Vivian Walker and Alex Strange, the parents of twenty-six year Shiketa Walker, filed suit against several healthcare providers after Shiketa died from an undiagnosed tubal ectopic pregnancy. Evidence at trial revealed that Shiketa had moved out of her mother's house after failing the ninth grade, but that for the last several years of Shiketa's life, she and Vivian saw each other several times a week and spoke frequently on the phone. Evidence further showed that Shiketa had no close relationship with her father. At trial, the jury concluded that the defendants' negligence had caused Shiketa's death and awarded wrongful death damages to Vivan Walker in the amount of $1.7 million, and damages to Alex Strange of $7,000. After finding legally and factually sufficient evidence to support the jury's findings on negligence and causation, the court addressed the jury's award of non-pecuniary damages to both Vivian and Alex. The Beaumont court of appeal conducted a detailed review of jury awards in similar circumstances, both in federal and state cases, and noted that it had located only one prior Texas appellate decision affirming a jury award in excess of $300,000 for a parent "when the evidence did not include testimony consistent with the conclusion that the parent suffered severe mental anguish or grief because of the child's death." The court then pointed out that, in this case, there was "sparse testimony specifying the effect of Shiketa's death on Vivian." The court held that the evidence, which consisted of testimony from Vivian that she and Shiketa had a "close and loving relationship" and that they ate together regularly, was factually insufficient to support the jury's large award of non-pecuniary damages. Specifically, the court found that there was insufficient evidence to establish that Vivian had suffered severe emotional trauma, lengthy depression, or a serious and permanent interference with her daily activities. Accordingly, the court remanded the judgment in favor of Vivian for a new trial. The court then affirmed the award of $7,000 to Shiketa's father, citing the absence of any close relationship between the two.

C. DELAY IN DIAGNOSIS: PRE-DEATH INJURIES VS. LOST CHANCE OF SURVIVAL

In *Escalante v. Rowan*, ___ S.W.3d ___, 2008 WL 190048 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.), Donita Rowan and her husband sued various physicians for failing to diagnose a recurrence of Rowan's cancer. The physicians moved for summary judgment on the basis that Rowan's cancer, even if diagnosed sooner, was terminal and that Texas did not recognize the loss-of-chance doctrine. The court of appeal reversed the trial court's entry of summary judgment. The court stated that, although the Texas Supreme Court had held that a plaintiff could not recover for lost chance of survival, the Court "did not hold, however, that once a person is diagnosed with a terminal illness, they no longer enjoy the protections of Texas tort law as to harms they may suffer other than the ultimate harm . . . ". The court pointed out that in her petition, Rowan had claimed not lost-chance, but pre-death injuries. Specifically, she claimed that between September 2002, when the physicians negligently failed to diagnose her cancer and May 2003, when it was finally diagnosed, she had to "undergo medical procedures and pay medical expense that would have been unnecessary" had the correct diagnosis been properly made in September 2002. Accordingly, the court held that recovery for those damages was not barred.