TADC e-Update
The Texas Association of Defense Counsel, Inc.

IN THIS ISSUE: ***Meetings, Legislative&Election Update, Case LawUpdate***

FROM THE PRESIDENT

Thomas E. Ganucheau,
Beck, Redden & Secrest, L.L.P; Houston

On the heels of a very successful TADC Trial Academy, the TADC held its 2012 Spring Meeting last week in Santa Fe at the fabulous Inn & Spa at Loretto. Program Chairs Sofia Ramon with Atlas, Hall & Rodriguez in McAllen and Randy Grambling with Kemp Smith in El Paso assembled an amazing line-up of speakers, including former TADC member and Justice on the Thirteenth Court of Appeals, Gina Benavides and panel discussions on Paid v. Incurred and Expedited Jury Trials. Members and their guests were treated to a special event prior to the welcome reception in the historic Loretto Chapel. Soprano soloist with the Santa Fe Opera, Monika Cosson, performed selected pieces including Ave Maria and Con ti Partiro.

The 2012 Summer Seminar is just around the corner! This year's seminar will be held at the beautiful Sandestin Beach and Golf Resort in Sandestin Florida. Sandestin is the perfect family destination with every activity one can name from golf, to sailing, to zip lining, etc. The program, put together by Program Chairs Greg Binns with Thompson & Knight, L.L.P. in Dallas and Darin Brooks with Beirne Maynard & Parsons, L.L.P., in Houston, features over 9½ hours of CLE and topics including Electronic Discovery, Effective Presentations for Bench Trials and a panel discussion by young lawyers on "What your young lawyers are thinking, but not saying". Speakers include former TADC President Russell Serafin and Judge R.K. Sandill with the 127th District Court in Harris County. Registrations

have been mailed and are available on the TADC Website or get your registration material HERE.

The TADC has been busy engaging in local events statewide. On April 12th, the TADC joined the Hidalgo County Bar Association, TEX-ABOTA and TTLA in McAllen to discuss "Paid v. Incurred" and "Expedited Jury Trials". On May 3rd, a reception honoring newly appointed Federal Judge Rodney Gilstrap and Magistrate Judge Roy Payne will be hosted by East Texas TADC members in Longview at the Pinecrest Country Club. Monthly events continue in Houston, with the next being a "meet the Judicial candidates" event at Hughes Hangar on May 23rd. Fort Worth continues to host their monthly membership luncheons and events are being planned in Beaumont for late May and Austin in mid-June. Also, the second installment of the West Texas Seminar is scheduled for August 10-11, 2012 in Ruidoso, New Mexico. This seminar is an excellent opportunity to get younger lawyers involved in TADC as it is designed with a very low registration fee and affordable accommodations and travel so younger lawyers can attend and bring their families. If you would like a program to be held in your area, contact the TADC office (tadc@tadc.org) and we will do our best to accommodate your request.

The TADC remains very active on the legislative front. Interim study hearings continue in Austin and around the state. The House Civil Jurisprudence Committee met on April 18th in Austin to discuss its charge on "alternative litigation financing". The TADC was present and provided written testimony to the committee. WRITTEN TESTIMONY Your TADC legislative committee stands ready to protect and preserve the Texas civil justice system by addressing any issue that may come up which may impact our system of justice. If you have a question or an issue on the legislative front, don't hesitate to contact the TADC office or your legislative Vice Presidents Pamela Madere (pmadere@coatsrose.com) or Jackie Robinson (Jackie.Robinson@tklaw.com).

Finally, and as I end all my messages, I encourage you to sign up a new member in the TADC. The education is beyond compare, the services are top notch, and the professional contacts and friendships are only a few of the reasons to join, and right now, there is a special promotion going on for membership. Any member who recruits a new TADC member will be entered into a drawing for a new IPad! Talk to your law partners, colleagues and friends about the benefits of membership. The TADC is the largest state organization of its kind in the United States and the ONLY voice of the defense bar in Texas. Help keep it strong by signing up a new member today.

** Reminder**

Your TADC dues statement was mailed in early November and were due by January 1, 2012. If you've not yet paid your dues, drop your payment in the mail today! If you have questions or require a duplicate dues statement, contact the TADC office at tadc@tadc.org or 512/476-5225.

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2012 TADC Summer Seminar

July 18-22, 2012 – Sandestin Golf & Beach Resort – Sandestin, FL

Don't miss this Seminar ***(program link below)***

A 9.5 hr (with 2.0 hrs ethics) CLE Program Featuring:

The Honorable J.K. Sandill, 127th District Court, Harris County

Past TADC President Russell Serafin

and topics ranging from

New Technologies in Electronic Distcovery to

Effective Presentation Techniques for Bench Trials to

a Panel on "What Your Young Lawyers are Thinking, but Not Saying!"

REGISTRATION MATERIALS HERE **Sign up today!**

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CALENDAR OF EVENTS

May 3, 2012
Reception Honoring Judge Rodney Gilstrap
Pinecrest Country Club – Longview

May 23, 2012
Houston Area Members Event – with the Harris County Judiciary
Hughes Hangar - Houston, Texas

July 18-22, 2012
TADC Summer Seminar
The Grand Sandestin Resort – Sandestin, Florida
Darin Brooks & Greg Binns, Co-Chairs
REGISTRATION MATERIAL

August 3-4, 2012
Budget/Nominating Committee
Austin, Texas

August 10-11, 2012
TADC West Texas Seminar
Ruidoso, New Mexico

September 26-30, 2012
2012 Annual Meeting
Westin St. Francis – San Francisco, California
Gayla Corley & Mike Hendryx, Co-Chairs

TADC MEMBERS:

The Rainmaker Institute, the nation's largest attorney and law firm marketing provider, is coming to Texas, and the TADC is pleased to sponsor a Rainmaker Retreat in Houston on May 18-19, 2012. The two-day retreat is an intense, marketing boot camp where you will discover tested, proven methods and systems to drive referrals and revenues. TADC Members will receive a $100.00 discount upon registration. This program is conducted in an intimate setting, allowing for one-on-one participation, and is designed for attorneys who must generate business, regardless of firm size. Spaces are limited. Take advantage of this unique opportunity.

You are invited to join us on
May 18th and 19th!

The Rainmaker Retreat
Sponsored by the Texas Association of Defense Counsel, Inc.

Date:
Friday, May 18th
7:30am-5:00pm
&
Saturday, May 19th
7:30am-5:00pm

Cost:
$997 Early Bird Rate

Discount:
$100 off for TADC members with promo code TADC

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Location:
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Houston, TX 77027

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See what your colleagues (and even your competitors) have to say about the Rainmaker Retreat.

"Excellent program with very specific information and strategies for implementing a successful marketing and business development plan!"
- Scott Templeton, Partner (TX)

LEGISLATIVE/ELECTION UPDATE

The House Judiciary & Jurisprudence Committee held a hearing on April 18 on its interim charges related to alternative litigation finance and the discoverability of communications between a corporate ombudsman and an employee. TADC presented written testimony at the hearing providing some of the historical and ethical background for the practice, but we have been unable to identify any TADC member with first-hand experience in a case involving a third party financing entity. TADC took no position on the policy issues surrounding ALF at the hearing, but will continue studying the issue. The U.S. Chamber of Commerce testified in opposition to alternative litigation financing, while an in-house attorney for the Baltimore and Sante Fe Railroad detailed his company's experience with third party financing in a series of toxic tort cases in Somervell County. BNSF called for disclosure of third party financing agreements and fees to determine whether a third party is interfering with the attorney's judgment in the case. The Texas Civil Justice League presented detailed testimony regarding Texas law and ethical rules relating to the use of ALF. On the other side of the issue, a representative of Oasis Financing spoke on the kinds of nonrecourse loans they make in plaintiff's cases. A client of Oasis also testified that she could not have brought her claim without the ability to finance the lawsuit. The committee will now prepare a report to the next legislative session. The committee appeared most interested in the possibility of allowing discovery of ALF agreements, but did not seem persuaded to ban the practice altogether.

Early voting for the May 29 primary election begins on May 14. In races for the Texas Senate, the open seat in Tarrant County is drawing a lot of attention, with Governor Rick Perry endorsing State Rep. Kelly Hancock (R-North Richland Hills) over State Rep. Todd Smith (R- Bedford). Rep. Smith has been endorsed by most local officials and the Dallas Morning News in the race, while Rep. Hancock has a number of endorsements from business groups. The other race of great interest is in San Antonio, where incumbent Sen. Jeff Wentworth (R-San Antonio) is locked in a bitter contest with former Railroad Commissioner Elizabeth Ames Jones and physician Donna Campbell. In the Texas House, Speaker Joe Straus (R-San Antonio) is expected to win re-election against a primary challenger.

In the U.S. Senate race, Lt. Gov. David Dewhurst has a comfortable lead in most polls, though former Texas Solicitor General Ted Cruz has been gaining ground. Also in the race are former Dallas Mayor Tom Leppart and ESPN analyst Craig James. It appears right now that Dewhurst and Cruz may be headed for a runoff, which would be held on July 31.

LEGAL NEWS

* Case Summaries prepared by Milton Colia, Sean White and Valerie Auger with Kemp Smith LLP, El Paso

INSURANCE LAW

Gamma Group, Inc. v. Transatlantic Reinsurance Co., — S.W.3d — , 2012 WL 1025781 (Tex.App. – Dallas, 2012).

This case was the second appeal in a breach of contract suit involving an insurance agent and an insurance company and re-insurance company. At the trial level, before the first appeal, judgment was rendered against the insurance agent (Gamma Group, Inc.) awarding $1.3 million in damages to the insurance company and re-insurance company. In the first appeal, it was determined that, under the agreement, damages were improperly based on reasonable losses rather than incurred losses. The judgment was reversed and remanded to address damages, but before the remand a new trial judge was elected. At an evidentiary hearing on damages, the trial court received uncontroverted evidence on incurred damages. In the second appeal, Gamma Group, Inc. complained about the admission of certain evidence and the award of damages and interest to the insurance company and re-insurance company.

In the first two of four issues on appeal, Gamma complained that some of the evidence was "outside the mandate" and "no evidence" since it was not part of the original trial and outside of its obligation to be considered proper damages. The court disagreed. In the third issue, Gamma complained about the denial of its motion to exclude certain cancelled checks used to support damages and said the court abused its discretion in admitting them. The cancelled checks were the result of discovery conducted post remand. The court said regardless of whether they were produced promptly, the trial court did not abuse its discretion by implicitly concluding Gamma was not unfairly prejudiced or unfairly surprised by admitting the cancelled checks. In the fourth issue, Gamma challenged post-judgment interest. The issue was whether interest was calculated based on the rate of 6.5% in effect at the time of the original judgment or the 5% in effect on the date of the "supplemental judgment." The trial court had included in its findings of fact and conclusions of law that the original judgment was still in full force and effect on the liability issue and the remand was only for damages. Therefore, the court held the date of the original judgment was the proper date from which the interest rate should be determined. **Read this opinion HERE**

Warmbrod vs. USAA County Mutual Insurance Company, – S.W.3d – , 2012 WL 1202203 (Tex. App.-El Paso)
(Subject to revision or withdrawal)

Amy Warmbrod sustained severe injuries in a car accident on July 28, 2006 and was treated free of charge at the United States Army Hospital. Her damages were in excess of both the tortfeasor's insurance coverage and the underinsured motorist's provisions of her own

USAA Auto Policy. The Army submitted a reimbursement claim to USAA for the medical treatment in the amount of $26,404.96. USAA paid the full amount of the $100,000.00 UIM benefits but split the money between Warmbrod and the US Army. She sued USAA claiming that USAA engaged in unfair claim settlement practices and that they mishandled her underinsured motorist claim to the extent that it amounted to it "taking" of her private property without due process of law. USAA filed a Traditional Motion for Summary Judgment which was granted by the Trial Court.

Warmbrod contended that the Army was not entitled to reimbursement to her UIM benefits, that she was entitled to be "made whole" before her UIM benefits were paid to the Army and that the Trial Court's Summary Judgment ruling amounted to a "taking" of her private property without due process law.

The Court concluded that the Summary Judgment was proper although the United States Government did not have a right to a first party insurance proceeds under the Federal Medical Care Recovery Act.

The Court went on though to look at another section of Federal Law, 10 U.S.C.§1095. This section authorizes the United States claims for recovery in states with no fault statutes and against the medical payments, UI/UIM personal injury protection portions of her insurance as well as medicare supplemental insurance. The Court, after finding that recovery was permissible under 10 U.S.C. §1095 did not address the remaining issues regarding an "unconstitutional taking of property without due process." **Read this opinion HERE**

ALTERNATIVE DISPUTE RESOLUTION

Bison Bldg. Materials, Ltd. v. Aldridge, – S.W.3d – , 2012 WL 1370859 (Tex. 2012).

Aldridge was a truck driver employed by Bison Building Materials. As a condition of his employment, Aldridge was required to sign an arbitration agreement agreeing to resolve any claims for "work-related illness or injury" by arbitration. The parties agreed the arbitration agreement was governed by the FAA. Aldridge was injured on the job and, as consideration of receiving benefits under the company's workplace injury plan, signed a post injury waiver and release. Aldridge expressly gave up the right to file a legal action against Bison. Bison paid Aldridge approximately $80,000 in medical and wage replacement benefits under the plan.

Aldridge subsequently filed a demand for arbitration seeking to recover damages for lost wages, medical expenses, pain and suffering, mental anguish and loss of earning capacity. During the arbitration, Bison moved to dismiss the claim, raising waiver and release. Aldridge submitted an affidavit saying he did not remember signing the release, or alternatively, that he did not understand the consequences of the release. The arbitrator found Aldridge signed the release and waived his right to arbitrate his personal injury claim and, accordingly, dismissed

the arbitration.

Based on the enforcement clause in the arbitration agreement, Aldridge petitioned the court to set the award aside and remand the case to the arbitrator, while Bison moved to confirm the award. The trial court confirmed the award in part and vacated it in part, concluding there remained fact issues that precluded confirmation of the take-nothing award. The trial court confirmed the arbitrator's finding that Aldridge signed the release, but vacated the finding that the post-injury waiver precluded arbitration due to the unresolved fact issue. The court did not, however, direct a rehearing to resolve the fact issues.

On appeal, Bison argued the court's order was appealable since it confirmed part of the award and vacated part of the award. Aldridge argued it was not appealable and should be dismissed for want of jurisdiction since the trial court order does not dispose of all issues and contemplated further resolution of fact issues. Neither party argued the TAA's interlocutory appeal sections were applicable. The court noted that Texas law favors arbitration and the scope of judicial review is narrow. Policies disfavoring partial resolution by arbitration preclude appellate intrusion until the arbitration is complete. Since there remained issues in this case, the order cannot be considered a confirmation or a denial of the arbitration award. The court also expressed concern that granting appellate review of an incomplete FAA arbitration by mandamus would tend to afford an FAA matter a greater scope of review in a Texas state court than it would get in a federal appellate court. Federal cases indicate the FAA would not allow an interlocutory appeal in federal court of a district order determining an arbitration is not final but is incomplete.

The Supreme Court affirmed the appellate court's decision to dismiss the case for want of jurisdiction. A dissenting opinion was written by Justice Hecht and joined by Justices Medina and Willet, arguing the order was final and that it fully and finally resolved Aldridge's claims. The majority distinguished this case from authority argued by the dissent that circumstances calling for re-evaluation of the entire controversy are appealable. **Read this opinion HERE**

DEFAMATION

Salinas vs Salinas, ------S.W.3-------, 2012 WL 1370869 (Tex)

Norberto Salinas, the mayor of Mission Texas, sued Maria Salinas for slander alleging three slanderous statements. The first directed at Norberto "You have stolen and lied and killed." The second "Norberto Salinas is a drug dealer and a corrupt politician" and the third which was on Telemundo television, "The mayor in La Joya told me that Norberto Salinas went to talk to him to say that they were going to kill me." The trial court concluded that all three statements were defamatory per se.

The jury found that all three statements were false and were made with actual

malice. They went on to further find that the first two statements caused the Plaintiff to suffer mental anguish. As to the third regarding the television program the jury said "no."

A single mental anguish damages question was submitted and the jury found $30,000.00 in mental anguish damages.

The Court of Appeals affirmed the Trials Court in favor of Norberto based on the Telemundo statement alone. This was the one where the jury answered no as to the mental anguish damages. The Court of Appeals went on to say that it was not necessary to prove specific mental anguish damages where the words used are slanderous per se because the law presumes actual damages. The Supreme Court overturned the Court of Appeals because the jury rejected the claim as to the Telemundo statement. The jury found that the statement did not proximately cause injury to Norberto.

The Supreme Court went on to say that the law does not assume any particular amount of damages beyond nominal damages. Therefore there was no jury verdict in support of an award of damages of $30,000.00 for the Telemundo statement. The Court did not reach the question about whether the judgment should stand based on the other two allegedly defamatory statements because there were other issues that were not reached by the Court of Appeals. In looking at this case one needs to just single out what was looked at by the Court of Appeals. Basically the Court in trying to uphold the trial court judgment allocated the $30,000.00 to the statement which the jury found did not proximately cause mental anguish damages. This case is going back to the Court of Appeals where it may be determined that the other two statements support the finding of damages. **Read this opinion HERE**

PROCEDURE

Arvizu vs The Estate of George Puckett, – S.W.3d – , 2012 WL 1059363 (Tex. Sup Ct J 550)

(Subject to revision or withdrawl)

Puckett Auto Sales buys used cars and sells them at public auctions. Puckett had a long standing commercial relationship with Montgomery County Auto Auction. Montgomery County Auto Auction would auction off Puckett's vehicles and if they were not sold would also transport the unsold vehicles to other auction houses or back to Puckett's car lot.

One of Puckett's vehicles was at the Montgomery County Auto Auction and did not sell. Puckett instructed Montgomery County Auto Auction to deliver it to another auction house. Montgomery County Auto Auction assigned its employee, Edward Cantu, to accomplish this task.

As he was doing this Mr. Cantu, while driving the pickup truck struck a vehicle occupied by Juana Arena Arvizu and her son. The jury awarded 1.2 million dollars in damages.

Jury issues were submitted which found that Cantu was Montgomery County Auction's employee and not Puckett's. They also found that Cantu was transporting the pickup for Puckett's benefit and was subject to Puckett's control as to the details of the mission. The jury further found that Montgomery County Auto Auctions was transporting the vehicle for Puckett's benefit and was subject to Puckett's control as to the details of the mission. A verdict was entered against Cantu, Montgomery County Auto Auction and Puckett jointly and severally.

On appeal, Puckett argued that the jury findings fatally conflicted because Puckett and Montgomery County Auto Auction could not both have had the right to control Cantu's work.

The Court, in reviewing the jury finding for a fatal conflict, looked first as to whether or not the findings were about the same material fact. The Court went on to say that they would not question whether the "control" findings were inconsistent if the verdict still supported the Court's Judgment. Findings can be "inconsistent or in conflict or even irreconcilable conflict" and still not be fatal to the entry of judgment. The Court went on to analyze the various findings and determined that neither one of the findings necessarily required a judgment different from the trial courts. The Court analyzed the case by disregarding each finding separately and then determined that the Judgment could still have been rendered as it was by the Trial Court. Under one theory there was vicarious liability, under another theory there was a principal agent relationship, either of which would have supported the Judgment. Because neither finding would have necessarily required the entry of another Judgment, the Court determined that there was no fatal irreconcilable conflict and reinstated the Trial Court's Judgment. **Read this opinion HERE**

HEALTH LAW

***University of Texas Medical Branch at Galveston v. Qi*, — S.W.3d —, 2012 WL 1406466 (Tex. App.—Houston [14th Dist.] Apr. 24, 2012) (subject to revision or withdrawal).**

Kai Hui Qi sued the University of Texas Medical Branch at Galveston, asserting a medical doctor and registered nurse provided negligent medical care, which resulted in the death of Qi's unborn child. Qi filed the report of her expert pursuant to Texas Civil Practice and Remedies Code section 74.351. UTMBG objected to the expert report and moved to dismiss with prejudice. The trial court, 212th District Court, denied the motion to dismiss, and UTMBG filed an interlocutory appeal.

On appeal, UTMBG argued that Qi's expert report was deficient in five respects. First, UTMBG argued the report did not identify the standard of care that UTMBG, the doctor, or nurse violated. Second, it argued the report did not address Qi's negligence claim based on negligent use of blood pressure cuffs, testing equipment, and urine testing strips. Third, it argued

the report did not identify the standard of care UTMBG violated with respect to Qi's claims that UTMBG failed to counsel her on the possibility of preeclampsia. Fourth, it argued the report failed to identify the specific standard of care UTMBG, the doctor, or the nurse violated with respect to any alleged failure to diagnose preeclampsia or admit Qi for elevated blood pressure. Finally, it argued the report failed to address Qi's claim for deviation of standard of care for the treatment of high blood pressure and preeclampsia and failing to refer Qi to a specialist.

The Court of Appeals explained section 74.352's requirements: a healthcare liability claimant must serve an expert report that provides a fair summary of the expert's opinions regarding the applicable standard of care, how the medical care rendered failed to meet that standard, and a causal connection between any failure and the alleged damages. It pointed out that a trial court must grant a motion challenging the adequacy of the section 74.352 report it if does not evince "an objective, good-faith effort to comply with the definition of an expert report . . . ." *Id.* at —, 2012 WL 1406466 at *1. It explained that a "good-faith effort" meant the report provided sufficient information to: "(1) inform the defendant of the specific conduct the plaintiff has called into question and (2) provide a basis for the trial court to conclude that the claims have merit." *Id.* at —, 2012 WL 1406466 at *2. It noted that "[a] report that merely states the expert's conclusions about those three elements does not constitute a good-faith effort." *Id.* at —, 2012 WL 1406466 at *2.

In addressing the report's failure to identify a standard of care for UTMBG specifically, the Court of Appeals explained that the report was not required to do so as long as UTMBG's liability was based entirely on the actions of its resident physicians and nurses and not a direct liability claim against UTMBG. With respect to the report's failure to identify standards of care for the nurse and the medical doctor, the Court of Appeals held that the expert report did not sufficiently describe the standard of care applicable to each medical provider because it merely stated that the "clinicians" who saw Qi that day violated the standard of care and did not state that it applied to both the medical doctor and the nurse.

With respect to UTMBG's argument regarding the report's failure to identify a standard of care as to Qi's negligence claim based on counseling her on the possibility of preeclampsia and the alleged failure to diagnose preeclampsia and admit Qi for elevated blood pressure, the Court of Appeals found that although the report set forth a standard of care for communication of the risks and symptoms of preeclampsia to the patient, the report failed to specify to whom the standard of care applied, the doctor or the nurse or both. Finally, with respect to UTMBG's arguments that the report failed to address Qi's negligence claim based on the blood pressure cuff, testing equipment, and urine strips, and her claim based on failing to refer her to a specialist, the Court of Appeals concluded the report did not address the applicable standard of care, breach, or causation. Nonetheless, the Court of Appeals noted that those claims fell within the same cause of action, and therefore, was not a failure to comply with section 74.351 sufficient to warrant dismissal of her health care liability claim. The Court of Appeals concluded the report was inadequate because it failed to sufficiently describe the standards of care breached by either the doctor, the nurse, or both, and remanded the case to the trial court to determine whether Qi should be granted a thirty-day extension to cure any deficiency. **Read this opinion HERE**

***McKellar v. Cervantes*, — S.W.3d —, 2012 WL 1330270 (Tex. App.—Texarkana Apr. 18, 2012) (subject to revision or withdrawal).**

Maria Cervantes, who was pregnant with twins, was treated by two obstetricians, Dr. Moore and Dr. McKellar. Cervantes was admitted to Titus Regional Medical Center in August 2008 with a suspicion of preeclampsia and delivered the twins via Caesarian section the day after she was admitted. One of the twins was subsequently diagnosed with encephalopathy. Cervantes filed suit, asserting health care liability claims against Drs. Moore and McKellar.

Cervantes filed two expert reports pursuant to Texas Civil Practice and Remedies Code section 74.351. Both doctors timely objected, moved to dismiss, and requested sanctions. As to the expert reports, Dr. Moore argued that neither report included opinions regarding any negligent acts vis-a-vis him. With respect to Dr. McKellar, the motion argued the reports did not provide sufficient opinions directly establishing his purported negligent acts proximately caused the twin's injuries. The trial court, 276th Judicial District Court, overruled the objections to the report and denied the motion to dismiss. Drs. McKellar and Moore filed an interlocutory appeal. On appeal, the doctors argued that neither report met the statutory definition of an expert report.

The Court of Appeals explained that the trial court must grant the motion to dismiss pursuant to section 74.351 if the report does not evince a good faith effort to comply with the statute or does not sufficiently set forth a basis for the trial court to conclude the plaintiff's claims are meritorious. It set forth that "[a] good faith effort further requires that the report discuss the standard of care and breach of that standard with sufficient specificity to inform each defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude the claims have merit." *Id.* at —, 2012 WL 1330270, at *2.

On review, the Court of Appeals found that one of the reports, made by Dr. Gatewood, did not represent a good faith effort to comply with the statute with respect to Dr. Moore because it did not set forth any acts committed by Dr. Moore. According to the Court of Appeals, "[i]n the complete absence of any alleged negligent acts or omissions by Moore, the report fails to provide notice of what conduct allegedly committed by Moore forms the basis of Cervantes' complaints against him." *Id.* at —, 2012 WL 1330270, at *3. Dr. McKellar argued the Gatewood report did not sufficiently set forth proximate cause. The Court of Appeals explained that the expert report must provide a fair summary of the causal connection between the breach of the applicable standard of care and the alleged damages. It pointed out that the report may be sufficient if it sets forth a chain of events that begin with a healthcare provider's alleged negligence and ends in personal injury. It concluded that the Gatewood report set forth a sufficient chain of events which resulted in brain damage to the twin for purposes of Dr. McKellar.

With respect to the second report, made by Dr. Atlas, Dr. Moore argued the report was inadequate because the alleged acts of negligence in the report could not be attributed to him by mere mention of his name in the report. The only mention in the report of Dr. Moore referred

to his putting together a plan of care for Cervantes, and no facts related to the subject admission and subsequent delivery referred to him. In looking at the four corners of the report, the Court of Appeals found there was nothing in it that indicated Dr. Moore was involved in Cervantes's hospitalization or subsequent treatment. It found that "a 'passing mention' to a defendant and a failure to state how that defendant breached the standard of care or how the alleged breach caused injury is insufficient to constitute a report compliant with the statute." *Id.* at —, 2012 WL 1330270, at *7. It further concluded that "even though the report indicates Atlas' opinion that the claim against Moore had merit, the report fails to discuss the required elements of the standard of care, breach, and causation with sufficient specificity to inform Moore of the conduct called into question." *Id.* at —, 2012 WL 1330270, at *7.

As to Dr. McKellar, Dr. McKellar argued the Atlas report did not sufficiently set forth causation. Cervantes in response argued that the Atlas report was sufficient in that it was not required to address all the liability and causation issues with respect to Dr. McKellar. The Court of Appeals agreed with Cervantes and explained that the Atlas and Gatewood reports must be read together to determine if they represent a good faith effort to comply with the statute. In construing the reports together, the Court of Appeals found them to sufficiently put Dr. McKellar on notice of the conduct about which Cervantes complained and provide a basis for the trial court to conclude her claims against Dr. McKellar had merit.

Finally, the Court of Appeals reviewed whether Cervantes should have the opportunity to cure either report with respect to Dr. Moore. Because it concluded that the Gatewood report never mentioned Dr. Moore and was devoid of any substance regarding the applicable standard of care, breach, and causation, the Court of Appeals held that Cervantes was not entitled to an extension to cure that report. On the other hand, the Court of Appeals found that because the Atlas report indicated Cervantes's claim against Dr. Moore had merit, remand to the trial court was appropriate to determine if Cervantes should be granted the opportunity to cure the Atlas report regarding Dr. Moore. **Read this opinion HERE**

TORTS

Magee v. G & H Towing Co., — S.W.3d — , 2012 WL 1065856 (Tex.App.– Houston [1st Dist.],2012).

This case arises out of an automobile accident involving one of G&H Towing's employees. G&H Towing employed tugboat quartermasters who would work on the same tugboat, but different shifts. Since there was no set route for the boats, employees could not leave vehicles at a set location. While disputed, there was some evidence G&H Towing's policy and practice was for employees to share personal vehicles with one another to drive home at the end of each shift. One evening, and per their practice, one of the quartermasters drove his co-worker's vehicle home and then used the vehicle to go to a bar. After leaving the bar intoxicated, he caused an automobile accident when he failed to yield the right of way and killed a husband and wife. The adult children of the couple sued G&H Towing and others on theories of negligence, negligent hiring and negligent entrustment. The claims against G&H Towing

were both direct and vicarious.

G&H Towing filed a motion for summary judgment, which was granted. Summary Judgment was also granted to the coworker who owned the vehicle, which was affirmed on appeal since he did not have an independent duty to investigate his coworker as a driver. However, the court of appeals reversed and remanded the summary judgment favoring G&H Towing because the motion failed to address the vicarious liability claims based on negligent entrustment by the coworker. The court reversed and remanded without considering any other grounds since it found G&H Towing's failure to address the vicarious liability claim rendered the motion "legally insufficient."

On appeal by G&H Towing, the Texas Supreme Court held reversal was in error since summary judgment was granted to the vehicle's owner and an employer cannot be vicariously liable in tor when its agent or employee has not engaged in tortious conduct. The case was then remanded to the court of appeals to address the other issues in the appeal, to include the negligent entrustment claim. One claim in support of negligent entrustment was that G&H Towing had a duty, stemming from the employer-employee relationship, to check the driving record beyond whether the employee had a driver's license. In this case, the employee who caused the accident apparently had a history of violations, citations and other accidents. However, the employee did have a valid driver's license and there was no evidence G&H Towing had actual knowledge the employee may be an unsafe driver. The court affirmed summary judgment holding G&H Towing did not have a general duty to investigate the employee's driving record absent other indicators that he may be an unsafe driver. **Read this opinion HERE**