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Denise I. Gremillion
Orgain, Bell & Tucker, LLP

I. TEXAS SUPREME COURT DECISIONS

A. ATTORNEY'S FEES AVAILABLE ON MOTION TO DISMISS EVEN AFTER PLAINTIFF NONSUITS

The Texas Supreme Court has recently considered several cases involving health care defendants' rights and obligations with regard to attempts to recover attorneys' fees as sanctions. Their holdings in these cases have uniformly supported the rights of such defendants to pursue sanctions.

1. A Nonsuit Does Not Extinguish a Previously Filed Motion for Sanctions

In *Villafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008), the plaintiff filed suit against various physicians and healthcare providers, and timely filed expert reports. One of the physicians sued, Dr. Juan Mario Villafani, moved for dismissal and for sanctions against Plaintiff, asserting that the report failed to meet the statutory requirements. The trial court denied the motion, but the plaintiff voluntarily nonsuited the case as to Dr. Villafani two months later. Dr. Villafani then appealed the trial court's denial of his motion for dismissal and sanctions. The appellate court dismissed the appeal, finding that it had no jurisdiction because the motion was not a "pending claim" at the time the non-suit was granted. *Villafani v. Trejo*, 2005 Tex. App. LEXIS 8265, at **2-3 (Tex. App.--Corpus Christi 2005). The Texas Supreme Court disagreed with that finding, holding that, because interlocutory appeal was not available under the version of the Medical Liability Insurance Improvement Act (hereinafter "MLIIA") applicable to the case, the trial court's severance and dismissal order on the nonsuit did not become a final judgment for purposes of appeal until the trial court entered its dismissal as to Dr. Villafani. The Court then went on to hold that, just as a plaintiff's voluntary nonsuit does not extinguish a non-movant's pending claims for affirmative relief, it also does not deprive the non-movant of the right to appeal the denial of a claim for affirmative relief. Thus, the Court held that Dr. Villafani's motion for sanctions survived a nonsuit and could be the subject of an appeal. The case was remanded for consideration of the merits of Dr. Villafani's appeal.

The Court reached the same conclusion under similar facts in two other cases: *Regent Care Center of San Antonio, II, Ltd. Partnership v. Hargrave*, 251 S.W.3d 517 (Tex. 2008) and in *Barrerra v. Rico*, 251 S.W.3d 519 (Tex. 2008). Additionally, in *Hargrave*, Court also noted that it was of no consequence to the argument whether the non-suit entered by the plaintiff was with or without prejudice.

2. Failure to Pursue Interlocutory Appeal from Denial of Motion for Sanctions Does Not Waive Right to Appeal After Nonsuit

More recently, the Court revisited the three cases cited above to determine whether the Legislature's provision of the right to pursue interlocutory appeal of a motion to dismiss under Chapter 74 altered the principal established therein, and found that it did not. In *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009), Plaintiff filed suit against Dr. Miguel Hernandez and a clinic following complications from a knee surgery performed by Dr. Hernandez at the clinic. Plaintiff filed a timely expert report, and Dr. Hernandez moved to dismiss the Plaintiff's claims based on the inadequacy of the proffered report. The trial court denied Dr. Hernandez's motion, but Dr. Hernandez did not pursue an interlocutory appeal of that order. Six months later, the plaintiff voluntarily nonsuited his claims against Dr. Hernandez. Shortly after the trial court entered its dismissal, Dr. Hernandez appealed the trial court's earlier denial of his motion to dismiss.

The Corpus Christi court of appeal reviewed the matter and issued its opinion before the Texas Supreme Court overturned that court's opinions in *Villafani v. Trejo*, 2005 Tex. App. LEXIS 8265 and *Barrera v. Rico*, 2005 WL 1693698 (Tex. App.—Corpus Christi 2005). Relying heavily on its own precedent, the Corpus Christi court dismissed Dr. Hernandez's appeal for lack of jurisdiction, finding that the order denying Dr. Hernandez's motion to dismiss had been rendered moot by the plaintiff's nonsuit. The Texas Supreme Court, relying in turn on its own recent reversals in *Villafini* and *Barrerra*,

disagreed and found that the nonsuit did not render Dr. Hernandez's motion moot.

The Court then addressed the Plaintiff's argument that Dr. Hernandez's failure to pursue the interlocutory appeal available to him after the trial court denied his motion to dismiss effectively waived his right to challenge the order after the nonsuit was entered. The Court held that, while a defendant "may" appeal an interlocutory order denying a motion to dismiss under section 74.351(b) of the Civil Practice & Remedies Code, there is nothing in either section 51.014(a)(9) or section 74.351 to indicate that there are any consequences to failing to do so. It held that precluding a defendant like Dr. Hernandez from asserting his statutory right to potential reimbursement for attorney's fees and costs would "dilute the deterrent value of the statute." The Court also noted that requiring defendants in health care liability actions to pursue an interlocutory appeal or risk losing any chance of recovering sanctions "surely would slow down the process of disposing of [such] claims" by inducing defendants to take interlocutory appeal where they might not otherwise do so, thereby increasing the cost of resolving claims.

Finally, the Court differentiated the circumstances of a dismissal resulting from a voluntary nonsuit and adjudication at trial. The Court held that if a plaintiff prevails after a full trial on the merits, the defendant would then lose the right to appeal a trial court's previous denial of a motion to dismiss and for sanctions because at that point "the claim could not sensibly be classified as frivolous." As the dissent points out, however, this rule would ostensibly allow a defendant who was successful at trial to "resurrect his complaint about an inadequate report."

3. Motion for Sanctions May Be Filed After Nonsuit

In *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009), the Court took the principal established in *Villafani* a step further. In that case, after failing to file an expert report within the statutory deadline, the plaintiffs filed a notice of nonsuit that was, by its own terms, effective upon filing. The first business day following that filing, the defendant physician filed a motion to dismiss and for sanctions. Approximately two weeks later, the trial court signed an order of nonsuit dismissing the plaintiffs' claims without prejudice. More than a month after that, the trial court denied the defendant's motion for sanctions. The defendant physician appealed the denial, and the appellate court affirmed, holding that a plaintiff may avoid sanctions by nonsuiting before such sanctions are requested.

On review, the Texas Supreme Court examined Rule 162 of the Texas Rules of Civil Procedure, which allows for voluntary nonsuit by a plaintiff, and that rule's effect on a Chapter 74 motion for sanctions. The Court concluded that nothing in Rule 162 limited a trial court's power to act on motions filed after a nonsuit has been taken, so long as the trial court's plenary authority has not expired. In support of its holding, the Court pointed out the difference between Chapter 74 and former article 4590*i*. Specifically, article 4590*i* required a plaintiff to file an expert report within 180-days or to voluntarily nonsuit the claim. In contrast, Chapter 74 does not provide such a choice. "The Legislature removed the reference to the option of filing a nonsuit, yet the statute continues to provide mandatory sanctions if a plaintiff fails to file an expert report by the statutory deadline." Thus, the court concluded that a plaintiff's filing of a nonsuit pursuant to Rule 162 does not preclude a defendant from seeking sanctions under Chapter 74.

B. A DEFENDANT HEALTHCARE PROVIDER MAY RECOVER ATTORNEY'S FEES EVEN WHEN THE FEES WERE "INCURRED" BY AN INSURER

In *Aviles v. Aguirre*, 2009 Tex. LEXIS 466 (Tex. 2009), numerous plaintiffs jointly sued Dr. Wilfredo Aviles for allegedly misrepresenting to them that his physician's assistant was actually a medical doctor. After the plaintiffs failed to file an expert report, the physician moved to dismiss the suit. More than seven years later, after no less than six hearings and $85,000.00 in defense attorney's fees, the trial court dismissed the plaintiffs' claims, but refused to award attorney's fees. The trail court reasoned that Dr. Aviles was not entitled to recover such fees because they had been "incurred" not by Dr. Aviles, but by his insurer. The Corpus Christi court of appeal agreed with the trial court's reasoning and affirmed its decision. The Court reversed, holding that such reasoning reflected "a basic misunderstanding of both the [MLIIA] and liability insurance." It pointed out that Dr. Aviles, as the party sued, was personally liable for the cost of his defense as well as any judgment, and the fact that he "had previously contracted with an insurer to pay some or all of both does not mean that he incurred neither." The Court further noted that one of the primary purposes of the MLIIA was to reduce the cost of medical insurance, and that a court's refusal to award costs unless no

insurance was involved would frustrate the purpose of the statute.

C. CLAIM OF NEGLIGENTLY ASSEMBLED HOSPITAL BED NOT A "HEALTH CARE LIABILITY CLAIM"

In *Marks v. St. Luke's Episcopal Hospital*, 2009 Tex. LEXIS 636 (Tex. 2009), Irving Marks was recuperating from back surgery at the hospital when he attempted to use the footboard of his bed to push himself to a standing position. When he did so, the board came loose, causing him to fall. Marks filed suit against the hospital, asserting various claims involving patient supervision and negligent training of the nursing staff. He also claimed that the hospital's employees had negligently assembled and maintained the bed.

After Marks failed to file a timely expert report, the hospital moved to dismiss. The trial court, finding that all of Marks's claims were healthcare liability claims, granted the motion and dismissed the claims. The Supreme Court reversed, disagreeing as to the trial court's characterization of the claims relating to assembly and maintenance of the hospital bed.

The Court began its review by acknowledging that the definition of a health care liability claim includes a "claimed departure from accepted standards of medical care or health care *or safety*." It then analyzed the meaning of the word "safety" in the context of the MLIIA, and noted that a departure from a standard of safety was implicated under the Act "when the unsafe condition or thing is an inseparable or integral part of the patient's care or treatment." It stressed the significance that a provider's exercise of medical or professional judgment plays in classifying a claim as one involving health care liability, and found that there was no evidence in the case at bar that the assembly and maintenance of the bed involved any medical or professional judgment on the part of the hospital or its employees. Thus, while the bed's footboard was a functional part of the hospital's services in a general sense, the ultimate source of the alleged negligence was not "directly related to the rendition of any medical or health care services, but instead [was] incidental, occurring in the course of the Hospital's general maintenance duties."

As part of its rationale, the Court also pointed out that the purpose of the enactment of article 4590*i* was "to remedy a medical malpractice insurance crisis in Texas." It then noted that "medical malpractice insurance generally does not cover premises liability claims" and that there was no indication in the legislative history "that physicians or healthcare providers were having difficulty obtaining commercial general liability coverage for ordinary, non-medical accidents on their premises."

D. PLAINTIFF MUST SHOW PROVIDER POSSESSED IRRELEVANT, PRIVILEGED INFORMATION TO PROHIBIT COMMUNICATION

In re Collins, 286 S.W.3d 911 (Tex. 2009) concerned a defendant's right to communicate with a claimant's healthcare providers. Kelly Regian and James Regian filed a medical malpractice action against Dr. Lester Collins and provided the statutorily required authorization listing physicians and healthcare providers that had relevant information as well as physicians and health care providers who had only information that was privileged and not relevant. On motion by the Regians, the trial court entered an order prohibiting Dr. Collins from having *ex parte* communications with any of Ms. Regian's nonparty treating physicians. The appellate court upheld the trial court's right to enter such an order, finding that because section 74.052 "neither explicitly authorizes nor explicitly prohibits *ex part*e communications," it was within the trial court's discretion to prohibit *ex parte* communications in this case to protect Ms. Regian's privileged information. *In re Collins*, 224 S.W.3d 798 (Tex.App.--Tyler 2007).

The Texas Supreme Court granted Dr. Collins's request for mandamus relief, finding that the trial court abused its discretion by entering the protective order. The Court held that claimants in health care liability suits face the same burden as any other party seeking to limit ordinary disclosure and that, in this case, the Regians had failed to "make the requisite showing of specific and demonstrable injury." Specifically, it found that the plaintiffs failed to identify which of Kelly Regians's treating physicians possessed irrelevant, privileged information or the dates on which the physicians learned of the information.

The Court also rejected the Regians' argument that section 74.052(c)'s reference to "verbal" information was meant to cover information orally conveyed to the physician by the patient, holding instead that the release required by the statute specifically authorizes non-party healthcare providers to orally convey relavent information to defendants.

Finally, the Court rejected the Regians's argument that the authorization she provided when she filed suit was not a valid HIPAA release because it signed not voluntarily, but rather as a condition of filing suit. The Court acknowledged that the authorization was required to allow Ms. Regian to proceed with her suit, but pointed out that it was the Regians's choice to file suit in the first place.

II. TEXAS APPELLATE COURT DECISIONS RELATING TO CHAPTER 74

A. CLAIMS AND PROVIDERS SUBJECT TO CHAPTER 74

In *Norgaard v. Pingel*, 2009 Tex. App. LEXIS 6955 (Tex. App.—Fort Worth 2009, no pet. h.), the Plaintiff went to a hospital complaining off abdominal pains, vomiting, headaches, and trouble speaking. A licensed professional counselor ("LPC") performed a consultation, including a psychiatric and chemical dependency screening and evaluation and assessment. Plaintiff later filed suit against the LPC and the LPC's professional association. After plaintiff failed to file an expert report within the statutory time allowed, defendants moved to dismiss the claims against them. The trial court denied the motions. The court of appeal reversed. The appellate court found that the statute that required LPCs to be licensed provided that "an LPC may evaluate and treat a mental, emotional, or behavioral, but not a physical, disorder." The court noted that "health care" includes treatment of mental conditions and that, because "LPCs are licensed to treat mental or emotional conditions that interfere with mental health, and are therefore licensed to provide health care, LPCs are health care providers under the [MLIIA]." Accordingly, plaintiff's claims were subject to Chapter 74, and he was required to provide an expert report. Having failed to do so, his claims were required to have been dismissed by the trial court.

In *Turtle Healthcare Group, LLC v. Linan*, 2009 LEXIS 4123 (Tex. App.—Corps Christi 2009, pet. filed), plaintiffs contacted the defendant pharmacy to request an oxygen tank and two batteries for the ventilator used by their minor daughter, who suffered from multiple sclerosis. Defendant provided only one of the two batteries requested, and it was ultimately discovered that the battery was not fully charged. The battery did not last long, and the machine gave no warning that the battery was running low. The ventilator eventually failed, leading to the death of the plaintiffs' daughter. Plaintiffs sued the defendant pharmacy for negligence and under the doctrine of *res ipsa loquitur*. Specifically, Plaintiffs claimed that defendant was negligent in failing to provide a properly charged battery. They also made various allegations related to the provision and maintenance of the ventilator itself. After Plaintiffs failed to file an expert report, Defendant moved to dismiss all claims. The trial court denied the motion, specifically holding in its order that the claims were not health care liability claims. In its review, the court of appeal distinguished the claims related to the uncharged battery from the claims related to the ventilator itself. As to the battery claims, the court found that "it is most certainly within the common knowledge of the general public that electronic equipment requires functioning, properly charged batteries in order to operate" and that expert medical testimony would not assist a jury in deciding that issue. Accordingly, claims relating to the uncharged battery were not health care liability claims for which an expert report was necessary. The other claims, however, relating to the Defendant's alleged failure to provide warnings or properly maintain the ventilator "clearly involve acts or omissions that are inseparable from the rendition of medical services." As such, all of those claims were health care liability claims for which dismissal was mandated after plaintiffs failed to file an expert report. Further, the court of appeal found that the Defendant had not waived its right to dismissal by filing the motion eighteen months after plaintiffs filed their original petition. The court held that, despite the delay, the plaintiffs failed to show any action taken by defendant that could be deemed inconsistent with the right to mandatory dismissal.

Finally, in *Dual D Healthcare Operations, Inc. v. Kenyon*, ___ S.W.3d ___ (Tex. App.—Dallas 2009, no pet. h.), a nursing home resident fell after stepping in a "slippery substance" in a hallway being stripped and rewaxed by hospital workers. The Dallas court of appeal held that the patient's negligence claim resulting from the fall did not constitute a healthcare liability claim because there was no allegation of a failure of any safety standard related to medical care.

This is the same result as the one reached by the Fort Worth court of appeal in *Harris Methodist Fort Worth v. Ollie*, 270 S.W.3d 720 (Tex. App.—Fort Worth 2008, pet. filed), which involved a patient that slipped and fell on a wet floor while getting out of a bathtub. The appellate court in that case concluded that a fall from the bathtub was not inseparable from the rendition of medical services and that expert

medical testimony would not be necessary for a jury to understand the patient's claims.

B. NO EQUITABLE TOLLING OF THE 120-DAY DEADLINE TO SERVE EXPERT REPORT

In *Lone Star HMA, L.P. v. Wheeler*, 2009 Tex. App. LEXIS 5761 (Tex. App.—Dallas 2009, no pet.), plaintiffs filed suit against Mesquite Community Hospital, a physician and two nurses. Due to errors in properly identifying the Hospital in its first two petitions, plaintiffs were unable to have the Hospital served with process until their second amended petition was filed, nearly three months after the original petition was filed. Plaintiffs did not serve the Hospital with an expert report as to that entity until nearly six months after the original petition was filed. The Hospital moved to dismiss plaintiffs' claims for failure to timely file an expert report, and the trial court denied the motion. On appeal, plaintiffs argued that, due to the difficulties they had in serving the hospital, the deadline for filing an expert report as to the Hospital was not triggered until the filing of the second amended petition. The appellate court disagreed, holding that "the statute makes no exception for the time it takes to effectuate service of the lawsuit, nor does it address failed attempts to serve a lawsuit." It noted that plaintiffs' argument that their misidentification of the Hospital delayed the running of the deadline amounted to a request for the court to "engraft a judicial exception to an unambiguous state," a request which the court declined.

C. CLOCK ON 120-DAY DEADLINE TO SERVE EXPERT REPORT CONTINUES TO RUN DESPITE NON-SUIT

In *White v. Baylor All Saints Medical Center*, 2009 Tex. App. LEXIS 3372 (Tex. App.—Amarillo 2009, pet. filed), the Amarillo court of appeal addressed an issue that has faced numerous other Texas appellate courts. In that case, plaintiff filed suit against Baylor, then nonsuited her claims prior to tendering an expert report. Within days of plaintiff re-filing her claim against Baylor several months later, she served Baylor with an expert report. The court noted at the outset that every court that had considered that issue had held that non-suiting then re-filing does not restart the expert report deadline; rather, the clock "begins when a claim is first filed and continues to run even if a non-suit is taken," and the court saw "no reason to deviate from the unanimous stance taken" by other courts. The court also rejected plaintiff's equitable tolling request as contrary to the statute. Finally, the court held that the plaintiff's addition of "new" claims in the re-filed suit failed to restart the clock because the new claims encompassed the same actors and the same purported underlying cause of harm. Thus, the court found that the "new" claims were nothing more than "the same old wine being poured into new skin."

D. DEADLINE TO OBJECT TO THE SUFFICIENCY OF EXPERT REPORT BEGINS TO RUN ON DATE OF HAND-DELIVERY, EVEN IF ALSO FAXED

In *Amaya v. Enriquez*, 2009 Tex. App. LEXIS 5902 (Tex. App.—El Paso 2009, no pet. h.), Plaintiff timely served Dr. Enriquez with an expert report on May 3, 2006 by faxing the report to Dr. Enriquez's attorneys' office, and then hand-delivering a copy to the same office approximately one half-hour later. On May 30, 2006, Dr. Enriquez filed objections to the report and a motion to dismiss. The trial court granted the motion and plaintiff appealed, arguing that Dr. Enriquez's objections and motion had not been timely filed. Dr. Enriquez countered that, because the report had been first served by facsimile, his deadline to respond was extended by three days pursuant to Rule 21(a) of the Texas Rules of Civil Procedure. The court of appeal acknowledged that the rule provides that a recipient of a faxed expert report may to add three days to section 74.351(a)'s 21-day deadline to file objections to the sufficiency of an expert report. The court noted that the recipient of a hand-delivered expert report, on the other hand, is not entitled to any additional time to respond. The court then explained that, in its view, the purpose of these provisions is to ensure that the recipient of a faxed or mailed report has "roughly the same time to respond as if the report had been hand-delivered." The court then reasoned that, when a report has been both faxed and hand-delivered, "there is no logical reason to give the party an additional three days" to respond. Accordingly, the court held that Dr. Enriquez's objections were not filed timely, and the trial court's dismissal of plaintiff's claims had to be reversed.

E. SERVICE OF EXPERT REPORT ON NAMED DEFENDANT NOT PERMISSIBLE UNTIL NAMED DEFENDANT IS A "PARTY"

In *Carreras v. Zamora*, 2009 Tex. App. LEXIS 6344 (Tex. App.—Corpus Christi 2009, no pet. h.), plaintiff filed suit against Dr. Carreras as a result of knee replacement performed by Dr. Carreras. The original petition was filed on August 28, 2007, but Dr. Carreras was not served with process until January 8, 2008. In late February, Dr. Carreras

moved to dismiss Plaintiff's claims for failure to serve upon him a timely expert report. Plaintiff responded that she had served Dr. Carreras with the expert report at the end of December, 2007, within the 120-day deadline. The trial court denied Dr. Carreras's motion to dismiss. The court of appeal reversed, holding that the plaintiff's expert report had not been timely served in conformance with the statute. Specifically, the court noted that the statute required an expert report to be served "on each *party* or the *party's* attorney" and that, because Dr. Carreras had not yet been served at the time that Plaintiff claimed to have sent the expert report, under Texas law he was not a "party' to the lawsuit at that time. The court pointed out "[i]mportant policy considerations" in support of its decision, noting that requiring a potential party to respond to an expert report before he has actually been served would force such a defendant to submit to the trial court's jurisdiction and waive issues regarding jurisdiction and service of process.

The concurring opinion by Justice Garza in *Carreras* raised an interesting point and a suggestion for amendment to the statute. Justice Garza pointed out that, while the result reached in the case was mandated by the clear language of the statute, the practical result provides a perverse incentive for healthcare defendants to avoid potential liability by simply dodging service of process for four months, effectively leaving a potential claimant no way to timely serve the required expert report. Justice Garza suggested that this incentive, and the inequitable treatment of plaintiffs and defendants under the rule, could be remedied by amending the statute to provide that an expert report may be served "at the same time as service of process for any named Defendant that becomes a 'party' to the suit more than 120 days after the petition is filed."

F. DISCOVERY MAY NOT PROCEED UNTIL EXPERT REPORT SERVED AS TO ALL DEFENDANTS

In *In re Knapp Medical Center Hospital*, 2009 Tex. App. LEXIS 5995 (Tex. App.—Corpus Christi 2009, orig. proceeding), Juan Ramos suffered cardiac arrest and brain damage during surgery performed at Knapp Medical Center (the "Hospital"). Plaintiffs filed suit against the Hospital and Dr. Vu, the anesthesiologist involved in the surgery. Plaintiffs served upon all parties an expert report regarding the conduct of Dr. Vu, but did not serve an expert report that addressed the plaintiffs' direct liability claims against the Hospital. Nonetheless, Plaintiffs sought to depose a corporate representative of the Hospital, and the trial court ordered the Hospital to produce the representative for deposition. The Hospital sought mandamus relief, arguing that Plaintiffs were not permitted to proceed with discovery until a proper expert report had been tendered addressing the claims against it. Without lengthy discussion, the court of appeal agreed and granted the petition for writ of mandamus. The court held that to the extent that Plaintiffs' claims against the Hospital were based on vicarious liability, they were not required to file a separate expert report; however, to the extent that direct liability was alleged, a separate report addressing those claims directly was required before discovery would be permitted. In reaching its decision, the court of appeal also rejected Plaintiffs' argument that the deposition should be allowed because it was "vital" and because the Hospital had refused to provide written discovery in a timely fashion, holding that "the statute contains no exception to the report requirement of stay of discovery because of inadequate or incomplete medical records."

G. NO RIGHT TO FREE MEDICAL RECORDS UNDER CHAPTER 74

In *Valley Baptist Medical Center v. Morales*, 2009 Tex. App. LEXIS 6900 (Tex. App.—Corpus Christi 2009, orig. proceeding), the court considered the relationship between sections 241.154 of the Health and Safety Code and 74.051(d) of the Civil Practices and Remedies Code, and found that the two provisions were easily harmonized. In this case, the administrator of a decedent's estate sought medical records of the decedent from Valley Baptist Medical Center ("VBMC"). After the request was made, VBMC notified the administrator that the cost for the records would be $1,143.00. The trial court ordered VBMC to produce the records to the administrator at no charge, and VBMC sought mandamus relief. The court of appeal agreed with the administrator that section 74.051(d) permits all parties to obtain complete medical records from any other party within 45 days of a written request for same. The court pointed out, however, that the statute is silent regarding the expense of obtaining such records. Meanwhile, section 241.154 expressly allows a hospital such as VBMC to "charge a reasonable fee for providing the health care information and is not required to permit the examination, copying, or release of the information requested until the fee is paid unless there is a medical emergency." The court held that, while 74.051(d) provided that the administrator had a right to request and receive the medical records at issue, nothing in the statute said that he was entitled to such records at no charge. It

pointed out that, [h]ad the Legislature intended to require health care defendants to provide a copy of a patient's medical records free of charge, it could have done so." Thus, the court concluded, because the two statutory provisions were not in conflict, they could be harmonized and must be read together to provide that a patient has a right to obtain medical records, but that a hospital retains the right to charge for such records.

H. DISCOVERY STAYED PENDING INTERLOCUTORY APPEAL OF SUFFICIENCY OF EXPERT REPORT

In *In re Lumsden*, 2009 Tex. App. LEXIS 3721 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding), plaintiff filed suit against various health care defendants, including The Methodist Hospital (the "Hospital") and three physicians, and timely served an expert report as to all defendants. Defendants objected to the sufficiency of the report, and the trial court granted a 30-day extension to file a supplement. After plaintiff filed a supplemental report, the defendants again objected and sought dismissal of the claims. The trial court overruled the objections and denied the motions to dismiss, and the Hospital filed an interlocutory appeal of the denial. While the appeal was pending, Plaintiffs noticed the depositions of two of the physician defendants and five individuals from the Hospital. The Hospital moved to have the trial court stay the entire case, including discovery, pending its interlocutory appeal. The trial court stayed commencement of the trial, but denied the request to stay discovery. One of the physician defendants, Dr. Alan Lumsden, sought a writ of mandamus from the trial court's denial of that request. On review, the court of appeal held that "when a health care defendant challenges the adequacy of an expert report in the appellate court, the report is not adequate and, therefore, not served, until the court of appeals determines that it is adequate." Thus, pending the outcome of the Hospital's interlocutory appeal, no report was "served" on that defendant. The court further noted that section 74.351(s)'s discovery limitations apply to all health care defendants, even if only one of those defendants challenges the adequacy of the proffered expert report. Therefore, the discovery limitations prohibited the depositions of any of the defendant physicians and Hospital employees in this case. Finally, the court held that the defendants had no adequate remedy by appeal because the undue expense and duplication of discovery would result to all health care defendants if oral depositions were not stayed during the pendency of the Hospital's interlocutory appeal.

I. FAILURE TO INCLUDE MEDICAL AUTHORIZATION WITH STATUTORY NOTICE DOES NOT BAR TOLLING OF STATUTE OF LIMITATIONS

In *Carreras v. Marroquin*, 2009 Tex. App. LEXIS 6645 (Tex. App.—Corpus Christi 2009, no pet. h.), the court examined an issue faced by two of its sister courts: "whether the failure of a plaintiff to include a medical authorization with its notice of a health care liability claim to a health care provider bars the tolling of the statute of limitations permitted in section 74.051." The appellate court acknowledged that in *Rabatin v. Kidd*, 281 S.W. 3d 558 (Tex. App. -- El Paso 2008, no pet.), the El Paso court of appeal held that the limitations period was not tolled unless a medical authorization was provided as required by the statute. The Corpus Christi court in this case, however, disagreed and found the reasoning of the Austin court of appeal in *Hill v. Russell*, 247 S.W.3d 356 (Tex. App.—Austin 2008, no pet.) more persuasive. The court held that "[t]he plain language of the statute makes the notice requirement independent from the medical authorization requirement." Thus, the court held that a statutory notice was effective to toll the statute of limitations even if the required authorization was omitted.