TADC MEDICAL MALPRACTICE LAW NEWSLETTER

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Denise I. Gremillion
Orgain, Bell & Tucker, LLP

I. TEXAS SUPREME COURT DECISIONS

A. APPELLATE COURT MAY REMAND CONSIDERATION OF 30-DAY EXTENSION TO TRIAL COURT AFTER FINDING DEFICIENT EXPERT REPORT

In *Leland v. Brandal*, 257 S.W.3d 408, (Tex. 2008), George Brandal filed suit against Dr. John Leland, the dentist from whom Plaintiff was obtaining dentures. Plaintiff alleged that Dr. Leland negligently instructed him to stop taking his anticoagulation medicine, which Plaintiff claimed caused him to suffer a stroke shortly after having several teeth pulled. Plaintiff served Leland with timely expert reports. After Leland objected to the reports, but still within the 120-day period, Plaintiff served Leland with supplemental reports that addressed the objections lodged by Leland. Leland then objected to the adequacy of the supplemental reports, moved to have them stricken, and moved to dismiss. The trial court denied Leland's motion, finding the supplemental reports both timely and adequate.

On interlocutory appeal, the court of appeal disagreed with the trial court and found the reports deficient. Rather than ordering that the case be dismissed, however, the appellate court remanded the case, holding that it was within the discretion of the trial court, on remand, to allow a thirty-day extension to cure a deficiency in an expert report.

Leland appealed, arguing that the statutory 30-day grace period was not available when an appellate court, as opposed to the trial court, found an expert report deficient. Leland also asserted that the plaintiff's supplemental reports were not timely served, arguing that the 120-day period within which a claimant must serve an expert report began to run on the day that the statutory notice of claim was served.

The Court disagreed with both arguments. First, the Court held that the unambiguous meaning of the word "filed" in section 74.351(a), which requires an expert report to be served not later than 120 days after the date a claim was "filed," refers to the date a claim is filed with the court, not when notice is received that a claim would be filed.

The Court then examined subsection 74.351(c), the subsection under which a 30-day extension to serve expert reports may be granted. The Court explained that, under the plain language of the statute, an extension may be granted by the trial court if "elements of the report are found deficient." The Court held that nothing in that subsection's plain language required that the finding of deficiency be made by the trial court, as opposed to an appellate court, in order for the extension to be available, and that such an interpretation would actually require reading additional words into the statute. Thus, the Court held that remand to the trial court for consideration of an extension was appropriate.

B. FAILURE TO TIMELY ANSWER SUIT TOLLS EXPERT REPORT DEADLINE

In *Gardner v. U.S. Imaging, Inc*., 274 S.W.3d 669 (Tex. 2008), Craig Gardner and his wife ("Gardner") filed suit against Dr. Berney Keszler, the physician that performed a lumbar epidural procedure on Mr. Gardner, and U.S. Imaging, Inc. d/b/a SADI Pain Management ("SADI") the owner and operator of the facility at which the procedure took place. Gardner alleged that Dr. Keszler's negligence led to Gardner contracting spinal meningitis, which in turn led to hearing loss; Gardner alleged that SADI was vicariously liable for the actions of Dr. Keszler. Dr. Keszler filed a timely answer to the suit; SADI did not. Within the 120-day period, the Gardners served an expert report upon Dr. Keszler. Dr. Keszler filed objections to the report and moved to dismiss the plaintiffs' claims. Meanwhile, Gardner took a default judgment against SADI and severed that portion of the suit.

SADI, after learning of the default judgment, filed an answer in the severed suit. After the court granted a new trial in the severed suit against SADI, Gardner nonsuited the severed suit and amended the petition in the original suit to again include SADI. Gardner then served SADI with the same expert report previously served upon Dr. Keszler. SADI objected to the sufficiency of the report, and also moved to dismiss. Among other complaints, SADI

argued that the claims against it should be dismissed because the expert report was not served upon it within 120-days of the filing of the original petition in the original suit. The trial court denied the motions to dismiss of both Dr. Keszler and SADI, finding the report both timely and sufficient.

The court of appeal disagreed, finding the expert report deficient as to the element of causation, and reversed and remanded the case to the trial court for dismissal and for a determination of reasonable attorneys fees and costs. Gardner sought a rehearing, arguing that the case should have been remanded so that the trial court could consider granting plaintiff a 30-day extension to cure the report's deficiency.

The Supreme Court agreed with Gardner and reversed the appellate court opinion, remanding the case to the trial court for consideration of a 30-day extension. The Court then addressed SADI's argument that the plaintiffs were not entitled to an extension as to it because they failed to timely serve an expert report as to that entity. The Court held that, while Chapter 74 does not specifically address what effect a default judgment has on the 120-day period, the general effect of a default judgment is that all factual allegations contained in the petition are deemed admitted. The Court then reasoned that "it makes little sense to require service of an expert report on a party who by default has admitted the plaintiff's allegations." Thus, SADI's failure to timely answer the plaintiff's suit tolled the statutory period until SADI made its appearance. Finally, in response to SADI's complaint that the expert report constituted no report as to that entity because it failed to mention SADI by name or implicate its behavior, the Court pointed out that "[w]hen a party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient."

C. Interlocutory Appeal Available from Denial of Motion to Dismiss Where No Expert Report Served, Despite Granting of Extension

In *Badiga v. Lopez*, 274 S.W.3d 681 (Tex. 2009), Maricruz Lopez filed suit against S. Murthy Badiga, M.D. as a result of a perforated colon Mr. Lopez allegedly sustained during a colonoscopy performed by Dr. Badiga. Lopez failed to serve Dr. Badiga with an expert report with 120 days, and Dr. Badiga moved to dismiss Lopez's claims. More than a month after the deadline passed, Lopez filed a motion for an extension of time to serve the report. Lopez then filed a second motion for an extension one week later. The trail court refused to rule on Badiga's motion to dismiss, and nearly three months after the report was originally due, granted Lopez a 30-day extension to serve the report. Lopez finally served an expert report upon Badiga 105 days after the report was originally due. Badiga then filed a second motion to dismiss, incorporating his first motion and also challenging the adequacy of the expert report finally served. The trial court denied the motion, and Badiga appealed. The Corpus Christi court of appeal dismissed the appeal for want of jurisdiction, finding that no interlocutory appeal was available where the real substance of the complaint was the legality of the 30-day extension granted by the trial court. On review, the Supreme Court disagreed with the appellate court, holding that "[t]he exception to *section* 51.014(a)(9) prohibiting appeal from an order granting an extension under *section* 74.351 does not apply when no expert report has been served." The Court, having found that the appellate court had jurisdiction under the facts of the case, remanded the matter to the court of appeal to consider the merits of the trial court's denial of Dr. Badiga's motion to dismiss.

D. Mandamus Not Available from Denial of Motion to Dismiss Where Extension of Deadline Granted

In *In re Watkins*, 279 S.W.3d 633 (Tex. 2009), the trial court denied a motion to dismiss filed by Dr. Watkins, defendant in a health care liability claim, that argued that the expert report the plaintiff had served was nothing more than a narrative of treatment that failed to address standard of care, breach or causation. At the same time, the trial court also granted plaintiff a 30-day extension to cure the deficient report. Plaintiff subsequently served an additional expert report that was not challenged by Dr. Watkins. Dr. Watkins filed an interlocutory appeal of the denial of the motion to dismiss, and also sought mandamus relief. The court of appeal denied mandamus relief and dismissed the appeal for want of jurisdiction. Dr. Watkins then sought review from the Supreme Court, but only as to the mandamus relief. In a very brief opinion, the Court held that granting mandamus to review a trial court's grant of a 30-day extension when interlocutory appeal was prohibited "would subvert the Legislature's limit on such review." The interesting part of the opinion, however, is its reference to the "no report versus deficient report" issue. In his concurring opinion, Justice Willet notes that this case had the potential to finally address the issue expressly reserved in *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007), stating:

> Given the startling frequency of 'no report vs. deficient report' cases, I regret that Dr. Watkins' failure to appeal the court of appeals' erroneous dismissal prevents us from squarely (and finally) deciding whether this is a deficient-report case (where an extension is discretionary) or a no-report case (where dismissal is mandatory). I believe it is the latter.

Justice Willet then also expresses his opinion that plaintiffs should not be able to use "bare-bones material like this . . . devoid of the statutory elements" to avert dismissal without appellate review.

II. TEXAS APPELLATE COURT DECISIONS REGARDING CHAPTER 74 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE

A. DEFINITION OF "HEALTH CARE LIABILITY CLAIM"

In *Medical Hospital of Buna Texas, Inc. v. Wheatley*, --- S.W.3d ---, 2008 WL 5978895 (Tex. App.—Beaumont 2008, no pet. h.) Iona Wheatley filed suit against Buna Medical Center and NCM of Texas, Inc. d/b/a Edgewood Manor Nursing Home on behalf of the estate of Wheatley's elderly mother, Dorothy Helm. Helm had been a resident of Buna Medical center when Hurricane Rita hit southeast Texas in 2005. Due to a mandatory evacuation of the area, Helm was transferred to Edgewood Manor Nursing Home. Wheatley alleged in her first amended petition that during the hurricane, the Defendants breached the duty of care they owed to Helm, failed to properly attend to the needs of the nursing home residents, failed to supervise the nursing home personnel, and failed to prevent injury or death of the patients. In numerous places, the petition made specific reference to provisions of the MLA. After Wheatley failed to timely serve any expert reports, Buna Medical Center filed a motion to dismiss Wheatley's suit. Wheatley did not respond to the motion, but on the day of the hearing, filed a Second Amended Petition that removed all references to the MLA. The Second Amended Petition alleged that Defendants failed to provide adequate supervision, and deprived Helm of food and water, which resulted in Helm's death shortly thereafter. The trial court denied Buna Medical Center's motion to dismiss. The court of appeal reversed, holding that the plaintiff could not "use artful pleading to avoid the Act's requirements when the essence of the suit is a health care liability claim." The court, relying heavily on the Texas Supreme Court decision in *Diversicare Gen. Partner, Inc. v. Rubio*,185 S.W.3d 842 (Tex. 2005), held that supervision and the provision of fundamental care needs of nursing home residents are inseparable from health care services provided to residents of a nursing home. Accordingly, Wheatley's claims were health care liability claims, subject to the expert report requirements of section 74.351.

In *Scientific Image Center Management, Inc. v. Brewer*, --- S.W.3d ---_, 2009 WL 824756 (Tex. App. – Dallas 2009, no pet. h.), Rose Brewer claimed to be the victim of a "botched face lift." Brewer filed suit against the physician who performed the surgery and Lifestyle Lift, a company that provided services relating to face lift procedures. Specifically, Brewer alleged that Lifestyle Lift violated the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) by promoting a procedure without informing the public of its risks and complications and by misrepresenting the quality of the service and the benefits of the procedure. Although Brewer failed to timely serve a sufficient expert report as to Lifestyle Lift, the trial court denied the company's motion to dismiss. On appeal, Brewer argued that her claims against the company were not health care liability claims, subject to the expert report requirement. The court of appeal disagreed, finding that allegations against both the physician and the company were essentially the same: the failure to adequately disclose the risks, hazards or complications of the face lift medical procedure. The court held that Brewer could not avoid the requirements of chapter 74 by pleading health care claims as DTPA claims.

Another interesting cosmetic surgery case involved an attempt to recast health care liability claims as breach of warranty claims. In *Key v. Viera*, 2009 WL 350602 (Tex.App.-Houston [1st Dist.] 2009, no pet.), Belma Key underwent a face lift and liposuction performed by Dr. Hector Viera. Nearly four years after the procedure, Key filed suit against Dr. Viera and Cosmetic Surgery Associates ("CSA"), alleging that she suffered from facial scars and abdominal lumpiness. Key's petition asserted causes of action for breach of express warranty, fraud and misrepresentation based on representations made to her by Viera. Specifically, Key claimed that Viera represented that the liposuction procedure would result in a smooth and flat abdomen, that the facelift would not leave any visible scars, and that he would do any touch-ups needed at no charge. Defendants moved for summary judgment on various grounds, including that the claims were essentially health care

liability claims barred by the two-year statute of limitations found in chapter 74. The trial court agreed and granted the summary judgment. The court of appeal affirmed, holding that in order to prove any of her claims for breach of warranty or for fraud or misrepresentation, Plaintiff would have to prove that Viera fell below the standard of care in his performance of medical. The court pointed out that part of Plaintiff's evidence to avoid summary judgment was, in fact, the expert opinion of another cosmetic surgeon as to the results that could have been obtained from proper performance of the procedures.

In *Tesoro v. Alvarez*, --- S.W.3d ----, 2009 WL 620682 (Tex.App.-Corpus Christi 2009, no pet. h.), the court of appeal held that no expert report was required in a suit against a physician related to laser hair removal performed by the physician's nurse practitioner. The court reasoned that laser hair removal did not constitute medical "treatment" because the purpose of the procedure was not "to combat, ameliorate, or prevent a disease, disorder, or injury." The court also rejected Dr. Tesoro's argument that the location of the procedure, a medical clinic, rendered the claim a health care liability claim. The court further found the fact that a regulated medical device was used was insufficient to make the claim a health care liability claim. The court held that the underlying nature of the claim was one of common-law negligence for the nurse's alleged misuse of the laser. In so holding, the court repeatedly noted that the physician never personally rendered any care or treatment to the plaintiff, and was only being held vicariously liable for the actions of the physician's agent.

B. EXPERT REPORTS DEADLINES

1. NO TOLLING OF 120-DAY DEADLINE TO SERVE EXPERT REPORT

In *Offenbach v. Stockton*, --- S.W.3d ----, 2009 WL 606709, Tex.App.-Dallas, March 11, 2009 (NO. 05-08-01185-CV), Debbie Stockton filed suit against Howard A. Offenbach, M.D., alleging that Dr. Offenbach negligently failed to perform a caesarian section, which caused her son to suffer severe injuries to his arm. Stockton filed an expert report with her original petition, and also served a copy of the report on Offenbach's insurance carrier; however, she did not actually serve the report upon Offenbach until more than eight months later, when Offenbach was finally served with citation by publication. Offenbach moved to dismiss the claim for failure to timely serve the expert report. At the hearing on the motion to dismiss, Stockton argued that service of the report was impossible because Offenbach could not be located and her motion for substituted service was not granted until after the 120-day deadline had passed. The trial court denied the motion to dismiss, and Offenbach appealed the denial. The court of appeal reversed and remanded with instructions to render judgment for Offenbach. The court explained that section 74.351(a) did not contain a due diligence or good cause exception, and that dismissal was mandatory if an expert report was not served within 120 days of the filing of the original petition. The court further held that service of the expert report on a party's insurance carrier was insufficient and did not constitute service on the party as required by the statute. Finally, the court rejected Stockton's complaint that the statute, as applied to her, violated the "open courts" provision of the Texas constitution. The court found that Stockton failed to show that it was impossible to have served Offenbach within the 120-day deadline.

2. OTHER EXPERT REPORT DEADLINE CASES

Also rejecting an "open courts" argument was the San Antonio court of appeal in *Palosi v. Kretsinger*, 2009 WL 331894 (Tex. App.—San Antonio 2008, no pet. h.). In that case, two brothers filed wrongful death and survival claims after their father died under the care of Dr. Kretsinger. Less than three weeks after the original petition was filed, the attorney representing the plaintiffs unexpectedly died. After more than 120 days passed without service of an expert report, Dr. Kretsinger filed a motion to dismiss, which was granted by the trial court. The brothers appealed, arguing that sections 74.351(a) and (b) violated their rights under the Texas open courts provision because they required mandatory dismissal of their suit despite the fact that the Plaintiffs' failure to comply with the expert report requirement was a result of their attorney's unexpected death, not because their suit was frivolous. The court of appeal rejected the argument. The court reasoned that the open courts provision applied only to "a well-established common law cause of action," whereas the wrongful death and survival causes of action asserted by the brothers were both statutory remedies.

In *Suleman v. Brewster*, 269 S.W.3d 297 (Tex. App. -- Dallas, 2008, no pet.), Roger and Annetta Brewster filed suit against Amer Suleman, MD and a hospital as a result of pressure sores and other skin problems Roger Brewster sustained while receiving

cardiac care in the hospital's intensive care unit. Plaintiffs timely served an expert report in support of their claims regarding the skin problems. More than a year after filing their original suit, plaintiffs amended their petition to include allegations of negligence related the treatment of Mr. Brewster's heart problems in the ICU. They then served upon Defendants an expert report addressing those cardiac claims. Dr. Suleman filed a motion to dismiss the plaintiffs' cardiac claims, arguing that the expert report addressing those claims was served more than 120 days after the lawsuit was originally filed. The trial court denied Dr. Suleman's motion to dismiss. The Dallas court of appeals affirmed, holding that the 120 day deadline to serve and expert report concerning allegations raised for the first time in an amended petition ran from the date of the amended petition, rather than the date of the original filing. The court explained that section 74.351(a) required service of an expert report within 120 days of the filing of a "healthcare liability claim" and that under the plain language of the applicable version of section 74.351(a), a claim is defined as a "cause of action," not a "lawsuit."

3. SERVICE ISSUES

In two related cases, *Poland v. Ott*, 278 S.W.3d 39 (Tex. App.--Houston [1st Dist.] 2008, pet. filed) and *St. Luke's Episcopal Hospital v. Poland*, --- S.W.3d ----, 2009 WL 350509 (Tex. App. – Houston [1st Dist.] 2007, pet. filed), the surviving family of Jessie Poland brought suit against various health care providers after Poland died during elective heart surgery. Prior to filing suit, plaintiffs sent an expert report to counsel for St. Luke's Episcopal Hospital ("St. Luke's") and the Texas Heart Institute ("THI"), as well as to counsel for the insurance carrier for Dr. Ott. Defendants each later filed a motion to dismiss, claiming that plaintiffs' expert report was not "served" upon them until 123 days after the date of the filing of the original petition. The trial court denied the motion by St. Luke's and THI, but granted the motion by Dr. Ott. In two separate opinions, the court of appeal held that "the provision of an expert report to a physician or health-care provider before a claim is filed against that individual or entity in court does not comply with former section 74.351(a)'s service requirement because the plain language of the statute "simply does not contemplate 'service' of the expert's report and CV on a physician or health-care provider until after a claim has been filed in court against that person or entity."

In *Moreno v. Palomino*, 269 S.W.3d 236 (Tex. App.-El Paso 2008, pet. filed) the plaintiffs filed a medical malpractice suit under former Tex. Rev. Civ. Stat. Ann. Art. 4590i against various defendants, including Dr. Adolpho Palomino-Hernandez ("Palomino"). Plaintiffs timely served expert reports that were deemed sufficient by the trial court. Plaintiffs later non-suited their claims, then re-filed under Chapter 74. Dr. Palomino was initially named as a defendant in the re-filed action, but then the plaintiffs amended their petition and omitted Dr. Palomino as a defendant. Several months later, after another defendant designated Dr. Palomino as a responsible third party, the plaintiffs amended their petition again to include Dr. Palomino as a defendant. Plaintiffs then re-served the expert report that had originally been served in the 4590i lawsuit. Dr. Palomino moved to dismiss on the basis that he had not been timely joined and that the expert report was not timely served. The trial court granted the motion and awarded Dr. Palomino attorneys fees. The court of appeal reversed, finding that timely service of the expert report in the prior suit was sufficient to satisfy "the technical requirements" of Section 74.351.

C. JURISDICTIONAL ISSUES

In *Scoresby v. Santillan*, --- S.W.3d ----, 2009 WL 1176448 (Tex. App.-Fort Worth 2009, no pet. h.), plaintiffs filed suit against two physician defendants alleging that the physicians' negligence during a surgical procedure left the minor plaintiff with significant brain damage. Plaintiffs timely served defendants with a purported expert report, but with no curriculum vitae of the proffered expert. Defendants objected to the report and moved to dismiss the plaintiffs' claims, alleging that the report was so deficient as to constitute no report at all. The trial court denied the motion, and granted plaintiffs an extension to cure any deficiencies in the report, including the failure to serve a curriculum vitae. The appellate court dismissed the physician defendants' appeal, holding that it had no jurisdiction to review the trial court's grant of a 30-day extension. Importantly, the court of appeal addressed what it called the "'recurring and elusive' 'no report v. deficient report' issue." As to this issue, the appellate court noted that the Supreme Court had not yet had an opportunity to squarely address the issue. However, it interpreted the Supreme Court decision in *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007), as essentially "limit[ing] the universe of possible reports to (1) absent reports, which have not been filed at all and required dismissal of the case, and (2) deficient reports, which have been timely filed and may receive an extension." The appellate court acknowledged that there was a split in appellate

authority on the issue and held that, absent direct precedent from the Supreme Court, an opinion that a timely filed but deficient report could constitute "no report" would "necessarily constitute a modification to *Ogletree*." Therefore, the court found that it had no jurisdiction to consider the appeal because a report had been served, regardless of how deficient such report may have been deemed.

D. ADEQUACY OF EXPERT REPORTS

1. REPORTS DEEMED SUFFICIENT

In *Obstetrical & Gynecological Associates, P.A. v. McCoy*, --- S.W. 3d ----, 2009 WL 943893 (Tex. App. -- Houston [14th Dist.] 2009, no pet. h.) plaintiff filed suit against two obstetricians that rendered care to her during the birth of her child. Plaintiff also brought suit against Obstetrical & Gynecological Associates, P.A. ("OGA"), the employer of the two obstetricians, claiming that OGA was vicariously liable for the conduct of the two obstetricians. Plaintiff timely served expert reports on the defendants; however, none of the expert reports identified OGA by name, nor did they specifically address any action or conduct of OGA. OGA filed a motion to dismiss on the basis that plaintiff had failed to timely serve an expert report that addressed allegations against that entity. The trial court initially granted, then reconsidered and denied the motion to dismiss, and OGA appealed. The appellate court affirmed, holding that the recent Texas Supreme Court opinion in *Gardner v. U.S. Imagining, Inc.*, 274 S.W.3d 669 (Tex. 2008) was equally applicable to the facts of this case. The court held that, in accordance with *Gardner*, no expert report was required as to OGA because all claims against OGA were based on its vicarious or direct liability for the actions of the two employee obstetricians. Thus, the expert reports that sufficiently addressed the conduct of the two obstetricians were sufficient to implicate OGA.

In *Benish v. Grottie*, 281 S.W.3d 184 (Tex. App.—Fort Worth 2009, pet. filed), the parents of a 22-month old baby that died twelve hours after being discharged from a hospital emergency room filed suit against the emergency room physician and two nurses that had rendered care to the baby. Plaintiffs served upon the defendants an expert report by a physician and one by a nurse. Defendants filed various objections to the reports, including an argument that the reports failed to opine that any of the defendants acted "with willful or wanton negligence," as the standard of proof set forth in section 74.153 requires. The trial court denied the defendants' motions to dismiss, and the defendants appealed the denial. The court of appeal held that an expert report must opine only as to the applicable standard of care, which is different from the standard of proof that would ultimately be required at trial. The court declined to "superimpose section 74.153's standard of proof requirements onto the expert report requirements codified in section 74.351(r)(6)," holding that the statute's plain language prohibited such a reading. The court then, after finding the expert reports sufficient as to all defendants, affirmed the trial court's denial of the defendants' motions to dismiss.

The Dallas court of appeal reached the same conclusion when it addressed the "willful and wanton" argument in Baylor Medical Center at *Waxahachie v. Wallace*, 278 S.W.3d 552 (Tex. App.—Dallas 2009, no pet.). In that case, the plaintiff suffered brain damage after being discharged from a hospital emergency room despite symptoms of a cerebral bleed. After plaintiff timely served an expert report, the hospital objected to the report and filed a motion to dismiss. The hospital argued that the report failed to address the standard of care provided in section 74.153, i.e., willful and wanton negligence. The trial court denied the motion, and the court of appeal affirmed. The appellate court explained that "[t]he phrases 'standard of care' and 'standard of proof' are not synonymous in the context of medical malpractice actions." The court held that section 74.153 "does not constitute a standard of care as contemplated by section 74.351(r)(6)." Accordingly, an expert report served pursuant to section 74.351 need not allege that a defendant's negligence was willful or wanton.

2. REPORT DEEMED INSUFFICIENT

In *Fulp v. Miller*, 2009 WL 1822758 (Tex. App.—Corpus Christi 2009, no pet. h.), Robert Fulp filed suit against Dr. Fulp and Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital ("Hospital") following an elective hip revision surgery performed by Dr. Fulp at Rio Grande Regional Hospital. Within the statutory 120-day period, Miller served an expert report on the attorney that filed an answer on behalf of Dr. Fulp, and also on an attorney that represented the Hospital on an unrelated matter, but not on the attorney that filed an answer on behalf of the Hospital in Miller's case. Dr. Fulp filed objections to the report and a motion to dismiss based on the inadequacy of the report. The Hospital filed a motion to dismiss based on Miller's failure to timely serve a report upon its attorney in charge within the statutory period. The trial court

denied both motions and while the case was pending on appeal, Miller moved to non-suit his action against both Defendants. The trial court granted Miller's motion and dismissed the case without prejudice, ordering that all parties bear their own costs. The appellate court found that the expert reports as to Dr. Fulp were adequate as to standard of care and breach of standard of care, but conclusory and insufficient as to causation. The court then held that Miller's non-suit could not extinguish Miller's motion for affirmative relief. The court remanded the matter to the trial court to dismiss Miller's claims with prejudice and to award Miller costs and attorney's fees. As to the Hospital's motion, the court held that rule 8 of the Texas Rules of Civil Procedure applies to health care liability claims and that rule 8, along with rule 21a, requires all communications be sent to the attorney representing the party. The court found that Miller was required to serve his expert report on the attorney that made an appearance on behalf of the Hospital in Miller's suit, and that the Hospital was entitled to dismissal with prejudice and costs and attorney's fees.

E. STATUTES OF LIMITATIONS / REPOSE

In *Brewster v. Columbia Medical Center of McKinney Subsidiary, LP*, 269 S.W.3d 314 (Tex. App.-Dallas 2008, no pet.), Roger and Annetta Brewster filed suit against the Medical Center of McKinney Subsidiary, LP d/b/a Medical Center of McKinney ("Hospital") and Amer Suleman, MD ("Doctor") as a result of pressure sores and other skin problems Roger Brewster sustained while receiving cardiac care at the Hospital's intensive care unit. Plaintiffs' original petition was filed on the eve of the expiration of limitations. More than a year later, plaintiffs amended their petition to include allegations of negligence related to the treatment of the patient's heart problems in the ICU. Defendants moved for summary judgment as to the cardiac claims, arguing that the two year statute of limitations had run on the cardiac issues. The plaintiffs responded, arguing that the claims were not barred because they arose out of the same transaction or occurrence as the skin allegations, and thus the cardiac claims "related back" to the timely filed original petition. The trial court granted summary judgment, and the court of appeal affirmed. The appellate court held that while close in time, the conduct which resulted in skin ulcers differs from the conduct which resulted in the cardiac claims. The court pointed out that the allegations in the original petition referenced specific acts and omissions relating to nutrition or acts necessary to maintain skin integrity, whereas the complaints in the amended petition contained different allegations relating directly to the cardiac claims. The court noted that "the skin care claims and the cardiac claims relate to actions and omissions that took place at different times, in different locations in the hospital, and in some cases, involve different health care providers."

In *Kimbrell v. Molinet*, --- S.W. 3d ----, 2008 WL 5423131 (Tex. App. -- San Antonio 2008, no pet.), Jeremy Molinet filed suit against several individuals as a result of a tendon injury he suffered. Among those sued was Marque Allen, D.P.M., a podiatrist that Molinet alleged provided negligent treatment for the tendon injury. Dr. Allen, in turn, designated Patrick Kimbrell, M.D. and John Horan, M.D. as responsible third parties. After Dr. Allen designated Kimbrell and Horan as responsible third parties, Molinet amended his petition to join those physicians as additional defendants pursuant to Civil Practices & Remedies Code section 33.004(e). The physicians moved for summary judgment on the basis of limitations. The trial court denied the motions, but the San Antonio court of appeal reversed and rendered. The court held that section 33.004(e) could not be used "to circumvent the two-year limitations bar contained in section 74.251." The court explained that the two-year statute of limitation on healthcare liability actions was absolute, and that the provision prevailed over any other statute or rule purporting to commence, toll or extend such limitation period. The court found that, because section 33.004(e) is a tolling provision, section 74.251 expressly made that statute inapplicable to healthcare liability claims.

In three related cases, the El Paso court of appeal addressed the sufficiency of the claim notice required to toll the two-year limitations period found in Chapter 74. *Rabatin v. Chavez*, --- S.W. 3d ----, 2008 WL 4684369 (Tex. App. -- El Paso, no pet.); *Rabatin v. Vazquez*, --- S.W. 3d ----, 2008 WL 4684366 (Tex. App. -- El Paso 2008, no pet.) and *Rabatin v. Kidd*, --- S.W. 3d ----, 2008 WL 4684363 (Tex. App. -- El Paso 2008, no pet.), each involve the same factual basis, procedural history and same plaintiffs, but different defendants. Maria Rabatin died after she suffered from a perforated blood vessel during the insertion of a central line at a hospital. Almost twenty-one months after the death, Rabatin's family (collectively, "Rabatin") sent a claim notice letter, along with a medical authorization form, to one of the physicians that had treated Maria Rabatin. Two months later, Rabatin sent a second notice letter to all potential defendants, and again included an authorization form. Finally, two years and sixty-eight days after Maria Rabatin's death, the plaintiffs

filed suit against several of the defendants that had received the claim notices. The defendants moved for summary judgment, arguing that the medical authorization forms provided by plaintiff were defective in that they excluded all physicians' records that were listed as having treated Mrs. Rabatin within a five year period before the treatment that was the basis of the claim and did not give the dates of treatment. Defendants argued that the medical authorization forms were therefore insufficient to toll the statute of limitations period under section 74.051(a), (c). The trial court found that the authorization forms were deficient, and granted summary judgment in favor of the healthcare providers. The court of appeal reversed, finding that the first notice letter sent to a single physician was sufficient to toll the statute of limitations as to all defendants through constructive notice. The court further held that the second letter and authorization form provided actual notice to all parties. Additionally, although it did not appear relevant to the holding, the court did point out that one of the defendants was able to obtain records from a treating hospital using the deficient authorization form. The court concluded that "tolling the statute the limitations when a notice letter and medical authorization form, albeit a[n] improperly filled out form, gives fair warning of a claim and the opportunity to abate the proceedings for negotiations and evaluation of the claim, which carries out the Legislature's intent in enacting the statute."

In *Montes v. Villarreal*, --- S.W. 3d ----, 2008 WL 4684359 (Tex. App. -- El Paso 2008, pet. filed). Veronica Montes alleged that she suffered from sepsis due to the negligence of Jorge Villarreal, M.D. during a surgical procedure. On the eve of the expiration of the 2-year statute of limitations, Montes sent Dr. Villarreal a claim notice letter and medical authorization pursuant to sections 74.051 and 74.052, thereby tolling the statute of limitations for 75 days. Just before the expiration of the 75 day tolling period, Montes filed her original petition. Dr. Villarreal was not served, however, until more than four months later. After being served, Dr. Villarreal moved for summary judgment, arguing that, although the original petition was filed within the statute of limitations, plaintiff failed to use due diligence in obtaining service of citation. In response to the motion, plaintiff's counsel responded that he did not want to serve Dr. Villarreal and cause him to incur attorney's fees and costs until the attorney had received an expert report that satisfied the statutory requirements. Plaintiff's counsel also argued that he did not want his client to risk incurring liability for attorney's fees and costs. The trial court rejected the arguments of plaintiff's counsel and granted summary judgment in favor of Dr. Villarreal. The El Paso court of appeal affirmed, noting that as a general rule, the date of service only relates back to the date of filing if service is diligently affected after limitations has expired. The court explained that the tactical decisions of plaintiff's counsel, while reasonable, could not negate the requirement of diligence in attempting service upon the defendant once the limitation period expired.

III. OTHER TEXAS APPELLATE COURT DECISIONS

A. INSUFFICIENT EVIDENCE OF ATTORNEY'S FEES

In *Garcia v. Gomez*, --- S.W.3d ----, 2008 WL 5083707 (Tex. App.—Corpus Christi 2008, pet. filed), the family of Ofelia Marroquin ("Gomez") filed suit against Samuel Garcia, Jr., M.D. as a result of Marroquin's death from a pulmonary embolism following abdominal surgery. Specifically, Plaintiff alleged that Dr. Garcia was negligent in failing to prevent the pulmonary embolism by placing a filter in Marroquin's chest. After the hospital produced records showing that Garcia had, in fact, used such a filter, Garcia filed a motion to dismiss and for attorneys' fees in excess of $12,000.00. Plaintiffs consented to the dismissal, but argued that attorneys' fees were unwarranted because the suit was filed in good faith and without the knowledge that the filter had been used. The trial court dismissed the case, but denied the request for attorney's fees. The court of appeal affirmed, finding that although an award of attorney's is mandatory under section 74.351(b), Garcia was still required to present sufficient evidence to support such an award. The court pointed out that the only evidence offered by Garcia in support of his request for attorney's fees was the conclusory statement by Garcia's counsel that $12,200.00 was a "reasonable and necessary" fee. The court further pointed out that there was no evidence that Garcia actually incurred that amount of fees, as required by the statute. Thus, the court held that there was legally insufficient evidence to award attorneys fees under the facts of this case.

B. EVIDENCE SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

In *Chau v. Riddle*, 2008 WL 4836500 (Tex.App.—Houston [1st Dist.] 2008, no pet.), 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 had gone into 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 filed a no-evidence motion for summary judgment and also a traditional motion for summary judgment based on the affirmative Good Samaritan defense. The trial court granted summary judgment without specifying grounds, and the ruling was upheld by the court of appeal as to the traditional summary judgment. The Texas Supreme Court reversed, finding that a question of fact precluded summary judgment on the Good Samaritan defense. The Court remanded the case to the appellate court for consideration of whether the summary judgment could be affirmed on other grounds. On remand, the appellate court considered the testimony of Plaintiffs' expert anesthesiologist and concluded that it raised more than a scintilla of evidence that Dr. Riddle breached the standard of care by failing to personally secure the infant's tube and confirm proper placement. The court also found that while the expert's testimony did not quantify the amount of damage caused by the breach as opposed to the infant's already-existing medical condition, it was sufficient to establish that Dr. Riddle's negligence caused "some degree of additional damage," which was sufficient to defeat summary judgment.