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NOTE: *This newsletter is intended to summarize significant cases and issues impacting the Texas Health Care Liability practice area in the past six (6) months. It is not a comprehensive digest of every case involving Texas Health Care Liability litigation issues during that time period or a recitation of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.*

A. "LIFE IS ABOUT TIMING"[1]: Appeal from Motion to Dismiss under § 74.351 had to have been made within 20 days from the date the order was signed.

***Azul v. Slaughter*, 2017 Tex. App. LEXIS 237, 2017 WL 124526 (Tex. App. Houston 14th Dist. Jan. 12, 2017)**. This case is an attempted appeal from an order denying appellant's motion to dismiss appellee's claim as a health care liability claim under Chapter 74 of the Texas Civil Practice and Remedies Code. The applicable order was signed June 1, 2016, and the Appellant's notice of appeal was filed December 16, 2016. § 51.014 of the Texas Civil Practice and Remedies Code expressly authorizes an appeal from certain interlocutory orders of the trial court, including orders denying a motion to dismiss under § 74.351. An interlocutory appeal must be filed within 20 days after the judgment or order is signed. Tex. R. App. P. 26.1(b) and Tex. R. App. P. 28.1. Appellant's notice of appeal was not filed timely. A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by Rule 26.1, but within the 15-day grace period provided by Rule 26.3 for filing a motion for extension of time.

On January 4, 2017, notification was transmitted to all parties of the court's intention to dismiss the appeal for want of jurisdiction. On January 6th, Appellant filed a response to the court's notice in which he alleged he could appeal the trial court's order "at any time." Appellant, claiming that the case was a plastic surgery case, asserted that the Appellee did not file the required Chapter 74 expert report and tried to circumvent the requirements of Chapter 74 by pleading the cause of action as a breach of contract, fraud, and deceptive acts case.

The record in this appeal did not contain a final judgment. An appeal from a motion to dismiss has never been held to be able to be brought "at any time." The Appellate Court agreed that the Appellant had not forfeited his right to complaint of the trial court's motion to dismiss upon final judgment. The Appellate Court found that the Appellant's response did not demonstrate jurisdiction over the appeal. The appeal was ordered dismissed.

[1] Carl Lewis.

B. "JUDGMENT IS NOT UPON ALL OCCASIONS REQUIRED, BUT DISCRETION ALWAYS IS."[2]:

It was not an abuse of discretion to hold no hearing on the adequacy of a § 74.351 expert report because the statute required no oral hearing, and any oral argument or testimony would exceed the report's four corners.

***Blevins v. Emad Mikhail Bishai*, 2017 Tex. App. LEXIS 3524, 2017 WL 1425590 (Tex. App. Beaumont Apr. 20, 2017).** This case involves an appellate court review of a trial court's decision regarding the adequacy of an expert report and on a motion to dismiss under Chapter 74 for abuse of discretion. The Plaintiff or Appellant (Blevins) appealed the trial court's orders sustaining defendants' objections to Blevins' expert reports and granting their motions to dismiss Blevins' health care liability claims. Blevins raises five issues on appeal: (1) that the trial court erred by granting Appellees' motions to dismiss without first holding a hearing on the sufficiency of Blevins' expert report; (2) that the trial court erred by determining that the expert report was served without leave of court; (3) that the trial court erred by dismissing Ngu and Premier Spine Institute, PLLC because they failed to challenge the final expert report and thereby waived their objections; (4) that the trial court abused its discretion in finding that Dr. Mallory was not qualified to render an opinion under the statute; and (5) that the trial court abused its discretion in determining that the expert report was insufficient. The Appellees raised cross-issues concerning the trial court's order granting an extension of time and the statute of limitations. The Appellate Court affirmed.

Dr. Bishai administered epidural steroid injections to Blevins and sometime thereafter Dr. Ngu performed certain procedures on Blevins. On January 15, 2013, Dr. Bishai ordered Blevins undergo a MRI to his lumbar spine, without contrast. Blevins claims that Dr. Bishai told Blevins he could no longer treat Blevins and he should find another spine specialist. Another person performed another MRI on Blevins. Thereafter, he was referred to Dr. Ngu. Dr. Ngu performed lower back surgery on Blevins that included several procedures and installation of "pedicle screws and instrumentation."

After, Blevins' surgical wound was not healing. Another MRI was performed and Dr. Ngu recommended hardware removal.

September 4, 2013, Dr. Ngu attempted corrective surgical procedures to revise defective hardware. Blevins complained of continued pain post procedure. Dr. Ngu performed revisionary surgery again on January 24, 2014. Blevins again complained of continued pain. On July 9, 2014, Dr. Ngu allegedly informed Blevins that he refused to treat Plaintiff any further. Blevins alleged that Bishai and Ngu breached their duties of care and caused Blevins' injuries.

The Bishai Defendants filed an answer on May 1, 2015. On May 12, 2015, the Ngu defendants filed an answer. On August 28, 2015, Plaintiff filed the report and curriculum vitae of Raymond M. Baule, MD. There was no mention of Dr. Ngu in the Baule report. On August 31, 2015, Plaintiff filed a motion for an extension of time to cure what Plaintiff described as a deficient expert report. Plaintiff also filed a

[2] Philip Stanhope, 4th Earl of Chesterfield.

motion to compel production of medical notes and records from Dr. Bishai. Plaintiff filed an amended motion for an extension to cure deficiencies in his expert report, claiming "non-cooperation in the discovery proceedings and the intentional spoliation of evidence" by the Bishai Defendants. On September 8, 2015, Plaintiff filed the first expert report and CV from G. Edward Mallory, D.O. Plaintiff filed the second Mallory Report on September 10, 2015. A Third report was filed September 15, 2015. The last Mallory report was filed October 23, 2015. The defendants filed various objections to the reports and Motions to Compel filed by Plaintiff.

On January 29, 2016, the trial court signed an order granting the Ngu Defendants' motion to dismiss. The order dismissed Plaintiff's claims against the Ngu Defendants with prejudice and granted attorney's fees and costs. Also on January 29, the trial court singed an order sustaining the Bashai Defendants' objections to Dr. Mallory's reports and objections, finding it was "untimely and served without leave of the Court." The Bishai Defendants' motion to dismiss was granted and awarded attorney's fees and costs. The claims were also dismissed with prejudice.

When a plaintiff sues more than one defendant, the expert report must set forth the standard of care applicable to each defendant and explain the causal relationship between each defendant's individual acts and the injury.

§ 74.351(l) provides that "[a] court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (f)(6)." The Appellate Court concluded that the statute's use of the word "hearing" does not require a trial court to hold an oral hearing; rather the trial court may decide the matter on written submission.

In reviewing the Appellees' cross issues, the trial court held that the order granting an extension of time granted an extension as to the Baule Report. That report did not implicate Dr. Bishai because it wholly failed to address any manner in which Dr. Bishai breached the applicable standard of care or caused Blevins' alleged injuries. A plaintiff is not entitled to a 30-day extension to cure when "no report" is timely served. Therefore, Blevins was not entitled to a 30-day extension to cure deficiencies, and the trial court abused its discretion in granting the motion for an extension. The Appellate Court did not address Dr. Bishai's remaining cross-issues.

The Baule Report did not even mention Dr. Ngu or his conduct. Therefore, there was no report as to Dr. Ngu. However, before the 120-day period to serve an expert report expired, Blevins served the First and Second Mallory Reports. Blevins did not file a motion for an extension to cure deficiencies as to any of the Mallory Reports. Accordingly, the trial court's order did not grant a motion for an extension of time to cure deficiencies in the Mallory Reports. An amended expert report supersedes a previously-served report. Accordingly, the Appellate Court only considered the second Mallory Report. The Second Mallory Report was conclusory and did not explain the basis of Dr. Mallory's opinions nor link his conclusions to the facts. The trial court could have reasonably concluded the Second Mallory Report was deficient regarding causation as to the Ngu

Defendants. Accordingly, the Appellate Court overruled Appellant's second and fifth issues as to the Ngu Defendants. The remaining arguments were not reached as they were no longer necessary.

The trial court's decision was affirmed.

This opinion was written by Justice Leanne Johnson.

C. "THE SECRET OF STAYING YOUNG IS TO LIVE HONESTLY, EAT SLOWLY, AND LIE ABOUT YOUR AGE"[3]:

Does a Chapter 74 stay trump a DCO? Yes, it does.

***Harvey v. Kindred Healthcare Operating, Inc*., 2017 Tex. App. LEXIS 2488 (Tex. App. Houston 14th Dist. Mar. 23, 2017).** This opinion deals with a very rare issue whether a stay of discovery under Ch. 74 of the Texas Civil Practice and Remedies Code involving a health care liability claim supersedes a trial court's docket governing discovery and precludes a trial court from granting a no-evidence motion for summary judgment based on the claimant's failure to designate expert witnesses while the stay was in effect. The 14th Court of Appeals held that the stay of discovery under Chapter 74 supersedes the deadline contained in the docket control order for designating experts.

In Chapter 74 cases, a discovery stay applies when an adequate expert report has not been served. A report can be considered not served in two respects: 1) not served at all or 2) served but deficient. When the report is found to be deficient, the court may grant one thirty-day extension to cure the deficiency. Discovery is stayed until there is a final judicial determination that an expert report is adequate.

It was during this thirty-day grace period that the expert designation deadline in this matter, according to the docket control order, passed. The court concluded that discovery was stayed under Chapter 74 when the expert designation in the docket control order had passed because claimants had not served an amended report by the deadline and there had not yet been a final judicial determination that the amended expert report was adequate. Appellant contended that they did not have to designate experts in compliance with the docket control order issued by the court because discovery was stayed when the deadline passed. The Appellate Court noted that Chapter 74 controls over a conflict between Chapter 74 and "another law, including a rule of procedure or evidence or court rule," other than certain exceptions not applicable to that case.

Appellee argued that designating experts was not a discovery request and therefore Chapter 74 did not bar appellants from designating expert witnesses. The court noted that "docket control orders" are also referred to as "discovery control plans" that govern the way discovery is to be conducted including setting deadlines for designating expert witnesses. The court found that the deadline for designating expert witness under the docket control order conflicted with the Chapter 74 discovery stay. When in conflict, Chapter 74 discovery stay supersedes an

[3] Lucille Ball.

expert designation deadline in a docket control order.

D. "IF YOU DISPUTE WITH ME YOU WILL ONLY QUARREL WITH YOUR BREAD AND BUTTER."[4]: Dispute over sufficiency of expert reports.

***Matagorda Nursing & Rehab. Ctr., L.L.C. v. Brooks*, 2017 Tex. App. LEXIS 210, 2017 WL 127867 (Tex. App. Corpus Christi Jan. 12, 2017).** This opinion involves a dispute over the sufficiency of expert reports. In this case, a registered nurse licensed to practice in Texas with over fifteen years experience was not qualified to give opinions as to causation in her report and the report and curriculum vitae of a pathologist did not establish that he was qualified to opine whether the alleged failure to abide by nursing safety standards proximately caused a patient to fall while getting out of bed breaking his neck.

Appellee served the reports from two experts – a nurse and a pathologist with both containing statements regarding causation. The court examined whether either of Appellee's expert witnesses were qualified to opine on proximate cause. The Texas Medical Liability Act contained in Chapter 74 of the Texas Civil Practice and Remedies Code provides the qualifications necessary for an expert in a health care liability claim to opine as to causation. The TMLA states that an "expert" with respect to proximate cause must be a physician. The court noted that the Texas Rule of Evidence 702 which provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact issue. The court further noted that section 74.351(r)(5)(c) incorporates the rules of evidence in the context of expert's qualifications.

Appellees conceded on appeal that their nurse expert was not a physician and therefore not qualified to opine as to causation.

The court then analyzed the qualifications of the anatomic pathologist. The pathologist was board certified with fifty years experience including a teaching fellowship, chief of laboratory service, chief deputy medical examiner, assistant professor of pathology, chief of pathology at a hospital, and various staff pathologist positions at various hospitals. He had also been a licensed attorney since 1969 and an adjunct professor at a law school. Despite his numerous qualifications, appellants argued that his report and CV were completely silent as to any qualifications to opine on the proximate cause of injuries allegedly sustained by a nursing home resident. Appellants cited *Broders v. Heise* and *Tent Hosps. Ltd. v. De La Riva* as authority for determining that some expert witness though physicians were not qualified under Rule 702 to opine as to causation. The Appellate Court found that these causes were analogous to the instant

[4] Francis Bond Head.

case and stated that the appellee had the burden to establish that their expert had some knowledge, skill, experience, training, or education regarding whether those alleged failures caused Brooke's injuries. The Appellate Court noted that the pathologist was undoubtedly an experienced pathologist, but there was nothing in the report or CV explicitly addressing whether or how, his vast experience as a pathologist qualified him to opine on whether appellants' negligence caused Brooke's injuries. More specifically, there was nothing in this report or CV that said that he had any knowledge, skill, training, or education relevant to determining whether the failure to abide by nursing safety standards, as alleged in appellee's live petition, could or would proximately cause a patient to fall while trying to get out of his bed and thereby break his neck. As such, the Appellate Court ultimately held that the pathologist was not qualified to opine as to causation under the facts of the case.

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