HEALTH CARE LIABILITY UPDATE, 2017

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MEDICAL MALPRACTICE UPDATE

I. SCOPE OF THE ARTICLE

There is probably no area of personal injury law that has seen greater change and evolution in the past twenty years than medical malpractice. When the Legislature passed the first significant legislation in this area in 1975, the common law of malpractice had just begun to develop. In the past decades, more appellate court and Supreme Court decisions have been handed down in this area than in the previous two hundred years.

In the 2003 Legislative Session, Texas malpractice law was radically changed. The Legislature repealed Article 4590i, the governing statute for health care liability claims since 1977, and replaced it with Chapter 74 of the Civil Practices & Remedies Code. In doing so, much of the language of Article 4590i was incorporated verbatim, leading to the intended result that case law interpreting Article 4590i would carry forward into the interpretation of those sections which were brought forward verbatim into Chapter 74. The reader will thus note continued reliance on Article 4590i authorities in those areas undamaged by the enactment of Chapter 74. The 2003 changes, with no exceptions, reduce the rights of plaintiffs and correspondingly increase the protections, defenses and immunities available to defendants.

II. THE GOVERNING STATUTE: CHAPTER 74, CPRC

This section outlines the basic requirements of CPRC Chapter 74 and, where applicable, how the case law has interpreted those requirements.

A. Chapter 74

1. Definitions

The class of individuals and entities covered by Chapter 74 is extremely broad.

2. Application

Indisputably, the language of Chapter 74 and its case law interpretation take a very broad view of “who is a health care provider.” This is true both in the definition of “health care provider” under § 74.001(a)(12)(A) and by the broad definition of “affiliate” at § 74.001(a)(1). Note that older case law (pre-dating 2003) interpreting the definition of ‘health care provider’ under Article 4590i, is frequently obsolete in the Chapter 74 universe. By way of example of the breadth of the statute, a psychologist (not a listed protected provider) who provided care at the request of a gastroenterologist was covered because he was an “employee or agent” of a health care provider. The psychologist worked for a hospital that was dismissed after plaintiffs failed to file an expert report as to the hospital. The hospital was clearly a “health care institution” under § 74.001(a)(11). Since the psychologist was a contractor to the hospital, he was covered under the Act as an “employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.” TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(B)(ii). Additionally, the psychological treatment provided constituted “health care” under 74.001(a)(10). MacPete v. Bolomey, 185 S.W.3d 580 (Tex. App.—Dallas 2006, no pet.).

Further, even though individuals may not themselves constitute health care providers, the claim may still be insulated if the care is an indispensable part of health care. See § 74.001(a)(13) (defining “health care liability claim” under Chapter 74).

§ 74.001. Definitions

a) In this chapter:

(1) "Affiliate" means a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect parent or subsidiary.
(2) "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Disclosure panel" means the Texas Medical Disclosure Panel.

(6) "Economic damages" has the meaning assigned by Section 41.001.

(7) "Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

(8) "Emergency medical services provider" means a licensed public or private provider to which Chapter 773, Health and Safety Code, applies.

(9) "Gross negligence" has the meaning assigned by Section 41.001.

(10) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "Health care institution" includes:
(A) an ambulatory surgical center;
(B) an assisted living facility licensed under Chapter 247, Health and Safety Code;
(C) an emergency medical services provider;
(D) a health services district created under Chapter 287, Health and Safety Code;
(E) a home and community support services agency;
(F) a hospice;
(G) a hospital;
(H) a hospital system;
(I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;
(J) a nursing home; or
(K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.

(12) (A) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:
(i) a registered nurse;
(ii) a dentist;
(iii) a podiatrist;
(iv) a pharmacist;
(v) a chiropractor;
(vi) an optometrist; or
(vii) a health care institution.

b) The term includes:
(i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and

(ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(13) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

The 2015 Legislature added the following sentence to Section (13) to eliminate the inclusion of claims by health care provider employees against their employers as health care liability claims. This problem arose as a result of the Supreme Court's ruling in Tex. W. Oaks Hosp., LP v. Williams, as it relates to the TMLA's safety prong. Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012).

"The term does not include a cause of action describe by Sec. 406.033A or 408.001B of the Labor Code against an employer by an employee or the employee’s surviving spouse or family”.

(14) "Home and community support services agency" means a licensed public or provider agency to which Chapter 142, Health and Safety Code, applies.

(15) "Hospice" means a hospice facility or activity to which Chapter 142, Health and Safety Code, applies.

(16) "Hospital" means a licensed public or private institution as defined in Chapter 241, Health and Safety Code, or licensed under Chapter 577, Health and Safety Code.

(17) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(18) "Intermediate care facility for the mentally retarded" means a licensed public or private institution to which Chapter 252, Health and Safety Code, applies.

(19) "Medical care" means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

(20) "Noneconomic damages" has the meaning assigned by Section 41.001.

(21) "Nursing home" means a licensed public or private institution to which Chapter 242, Health and Safety Code, applies.

(22) "Pharmacist" means one licensed under Chapter 551, Occupations Code, who, for the purposes of this chapter, performs those activities limited to the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.

(23) "Physician" means:

(A) an individual licensed to practice medicine in this state;

(B) a professional association organized under the Texas Professional Association Act (Article 1528f, West's Texas Civil Statutes) by an individual physician or group of physicians;

(C) a partnership or limited liability partnership formed by a group of physicians;

(D) a nonprofit health corporation certified under Section 162.001, Occupations Code; or
(E) a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, West's Texas Civil Statutes).

(24) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.

(25) "Representative" means the spouse, parent, guardian, trustee, authorized attorney, or other authorized legal agent of the patient or claimant.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

B. Article 4590i

1. Definition of “Health Care Provider”

Note the much narrower definition of a health care provider under Article 4590i:

Any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(3) (West Supp. 1996). This seemingly straightforward definition led to debate as to exactly what types of individuals or entities were covered. Much of this case law continues to inform the interpretation of who is a health care provider under Chapter 74, though Chapter 74 is much more inclusive. It is safe to say that any case law finding a potential defendant was a health care provider under ARTICLE 4590i is still good law. Cases finding to the contrary are suspect, at best, and quite likely to be completely obsolete.

The point is critical, obviously, since whether or not the definition of health care provider applies to a given defendant can affect a case in a variety of ways: permissible scope of discovery, the statute of limitations, damages caps, the 120-day deadline, and so on.

The burden of proof for establishing that a defendant is a health care entity is on the defendant. For example, because the defendant did not establish that it was “duly licensed, certified, or registered or chartered by the State of Texas to provide health care,” it was not entitled to dismissal based on the plaintiff’s failure to file expert reports. Brown v. Villegas, 202 S.W.3d 803 (Tex. App.—San Antonio 2006, no pet.). A school for young people with mental disabilities is not a healthcare provider. Shiloh v. Ward, __S.W.3d___, 2015 WL 1825757 (Tex. App. —Houston [1st Dist.], 2015 n.p.h.).

2. Definition of “Health Care Liability Claim”

a. Under Chapter 74

1) Almost Anything is Health Care

Apparently, under Chapter 74, almost anything is health care. In 2012, the Texas Supreme Court reversed a court of appeals decision that where a defendant physician was alleged to have “palmed” plaintiff’s breasts throughout a stethoscope examination of her heart, the claim was not a health care liability claim (HCLC). The Supreme Court held that the Texas Medical Liability Act (TMLA) “creates a rebuttable presumption that a patient’s claims against a physician or health care provider based on facts implicating the defendant’s conduct

However, the court also provided a guideline for getting a claim out of chapter 74 territory: “a claim against a medical or health care provider for assault is not an HCLC if the record conclusively shows that (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place.” *Id.* at 257. It concluded: “the record does not contain sufficient information to conclusively show that Dr. Loaisiga’s conduct could not have been part of the examination he was performing.” *Id.* at 259–60.

A practice tip may be gleaned from Justice Hecht’s concurrence/dissent: “it seems unlikely that a chart notation, ‘groped patient unnecessarily’, will be found, and the expert may need to base his opinion on an interview with the claimants.” *Id.* at 265 (Hecht, J., concurring in part and dissenting in part). Plaintiffs are not required to confine their experts to reliance solely on the pleadings, and defendants should be aware that this seemingly opens the field as to what experts may rely upon.

In an attempt to reduce the endless litigation over whether a claim does or does not constitute a health care liability claim, the Supreme Court delineated a list of “non-exclusive” factors to be considered by the Trial Court in determining whether or not a claim falls under the ambit of Chapter 74. Those factors are:

1. Did the alleged negligence of the defendant occur in the course of the defendant’s performing tasks with the purpose of protecting patients from harm.

2. Did the injuries occur in a place where the patient might be during the time they were receiving care, so that the special obligation to protect persons undergoing medical care were implicated.

3. Was the Claimant in the process of seeking or receiving healthcare.

4. Was the Claimant providing or assisting in the provision of healthcare.

5. Are the allegations based on safety standards arising from the professional duties owed by healthcare providers.

6. If some sort of mechanical instrumentality was involved was it an instrument used in the provision of healthcare.

7. Did the injury occur as a result of compliance with safety related government or accrediting regulations?

With luck, perhaps this enumeration will reduce the friction cost of the endless attempts to characterize any injury even tangentially related to healthcare as a healthcare liability claim. *Ross v. St. Luke’s Episcopal Hospital*, 462 S.W. 3d 496 (Tex. 2015).

The Supreme Court reinforced its holding in Ross in a slip in fall case, in which injury to a visitor at a hospital is not a healthcare liability claim because it does not demonstrate a substantive relationship between safety standards the visitor alleges the hospital breached and healthcare.

Since Diversicare v. Rubio, 185 S.W.3d 842 (Tex. 2005), wherein the Supreme Court held that the multiple rapes and assaults of a nursing home patient constituted health care, the court has taken the uber-inclusiveness of the term “health care” to its maximum reach.

Perhaps the high-water mark for such claims has been reached. In the now infamous “cow in the road” case, a physician whose cows got loose on a road and caused injury to a motorist sought to avail himself of the protections of Chapter 74. Ultimately, the trial court rejected the argument, and was sustained by the Court of Appeals which additionally sanctioned the physician for frivolous pleading. Archer v. Tunnell, 2016 WL 519632 (Tex. App.—Dallas 2016 no pet.) (not designated for publication).


Masturbating employees are a healthcare liability claim. Where a patient was subjected to a hospital employee masturbatıng in front of her, she was required to file a report because such conduct was part of healthcare. In re Seton Northwest, 2015 WL 4196546 (Tex. App.—Austin 2015, n.p.h.) (Not designated for publication).

However, the expansive decisions in Loaisiga and Omaha were far from unanimous. Both cases show a fractured court with multiple concurrences and dissents, which show developing fault lines in the court’s decision-making in this area: “[T]he Court radically departs from our clear assurances that there can be ‘premises liability claims in a healthcare setting that may not be properly classified as health care liability claims.’” Omaha Healthcare Ctr., 344 S.W.3d at 396–97 (Lehrmann, J. dissenting). In Loaisiga, the majority consisted of Justice Johnson and Chief Justice Jefferson, with Justices Wainwright, Green, and Guzman concurring in parts only. Justices Hecht and Medina concurred in part and dissented in part. Justices Willet and Lehrmann each wrote separately to address their partial concurrence and partial dissent. Loaisiga, 379 S.W.3d at 248.


Other appellate courts have held that these types of cases do not fall under the definition of a health care liability claim, see, for example, Wasserman v. Gugel, 2010 WL 1992622 (Tex. App.—Houston 14th), 2010, writ granted then withdrawn as improvidently granted), (not designated for publication), in which an orthopedic surgeon sexually assaulted a Plaintiff allegedly during an examination of her low back, where the Court held “Under no reasonable view of the allegations we are presented with here could it be argued that a surgical consult for back surgery would require Wasserman, an orthopedic surgeon, to insert his finger into Gugel’s vagina and ask if she had feelings in that location.” Thus, the claim was not covered under Chapter 74.

A whole subset of cases now involves claims by employees of health care entities. Much of this dispute has arisen over how to interpret the Texas Supreme Court’s decision Tex. W. Oaks Hosp., LP v. Williams, as it relates to the TMLA’s safety prong. Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012). In Tex. W. Oaks Hosp., LP v. Williams, the court displayed a disagreement about the contours of the statutory definition of “healthcare liability claim.” The court held that a hospital employee’s suit against his employer for negligence was a HCLC. Williams, 371 S.W.3d at 183–86 (to qualify as a HCLC, a claim that is based on departures from accepted standards of safety need not be directly related to health care, abrogating St. David’s Healthcare P’ship, L.P. v. Esparza, 315 S.W.3d 601; Appell v. Muguerza, 329 S.W.3d 104 (Tex. App.—Houston [14th] 2010 pet. ref’d).) Justice Lehrmann was joined by Justices Medina and Willett in her dissent:

The court’s strained reading of the statute runs counter to express statutory language, the Legislature’s stated purposes in enacting the current version of chapter 74, and common sense. Further, the court’s decision undermines the balance struck by the Legislature to encourage employers to become subscribers under the Workers Compensation Act.

Id. at 193. The dissent also pointed out that the majority’s decision undermined the stated legislative purpose of reducing HCLCs:

[1]In the future, employees in [Plaintiff]’s position will be forewarned that they must provide an expert report and undoubtedly will do so. The upshot of the court’s decision is that medical professional liability insurers will be responsible for claims that normally would have fallen under a health care employer’s workers compensation or comprehensive liability coverage.

Id. at 199-200.

Most recently, in Psychiatric Solutions, Inc. v. Palit, the supreme court declared that a mental health professional’s negligence claim against his employer for injuries sustained while restraining a patient during an emergency was a health care liability claim. Psychiatric Solutions, Inc. v. Palit, 414 S.W.3d 724, 724 (Tex. 2013).
In contrast, the Texarkana court recently distinguished Williams. Twilley, the plaintiff, was a worker who fell from a ladder in an on-the-job injury and sued the hospital for OSHA violations. Twilley’s claim did not meet the TMLA requirement that a claim have at least an indirect relationship to health care. *Good Shepherd Med. Ctr.-Linden, Inc. v. Twilley*, 422 S.W.3d 782 (Tex. App.—Texarkana 2013, pet. denied). The court noted, “the claim in Williams had an indirect relationship to health care; Twilley’s claim d[id] not.” *Id.* Analogously, the Dallas court recently ruled that injuries sustained from irritants in sewage fumes and chemicals at a nurse’s workplace did not constitute a health care liability claim. *Baylor Univ. Med. Ctr. v. Lawton*, 442 S.W.3d 483 (Tex. App.—Dallas 2013 pet. ref’d). Additionally, in construing a fact pattern involving a slip and fall of a hospital employee at work, the Dallas Court rules that injury to an employee must “have some indirect, reasonable relationship to healthcare in order to constitute a healthcare liability claim”. *McKelvy v. Columbia Medical Center __S.W.3d__, 2015 WL 169656 (Tex. App.—Dallas 2015, pet. denied)*.

Citing *Twilley*, the Court emphasized that the plaintiff was not a “recipient of healthcare, and the gravamen of [her] claim—workplace injuries—was unrelated to the provision of health care to the patient population or anyone else.” *Id.* at *2.* This emphasis has been noted by other courts as well. See *Williams v. Riverside Gen. Hosp., Inc.*, No. 01-13-00335-CV, 2014 WL 4259889, at *6 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet. h.) (mem. op.) (declining to extend *Loaisiga*, stating, “the gravamen of [the employee’s] claim that she tripped over an extension cord is a garden-variety slip-and-fall claim that is completely untethered from the provision of health care”) (citations omitted). An ambulance driver’s claim for carbon monoxide poisoning was not a healthcare liability claim. *Good Shepherd Hospital v. Masten*, 2014 WL 6792683 (Tex. App.—Tyler 2014, pet. denied) (not designated for publication).

Notwithstanding these distinctions, an indirect relationship to health care may be found in health care employees’ claims despite direct patient involvement. See *Morrison v. Whispering Pines Lodge I, L.L.P.*, 428 S.W.3d 327 (Tex. App.—Texarkana 2014, pet. ref’d). In *Morrison*, the Texarkana appellate court distinguished Twilley, finding that a nursing home employee’s slip and fall in a resident’s shower, post-mopping by another employee, was a health care liability claim because it “occurred as a result of the [nursing home]’s actions in attempting to carry out its legal duty to provide a sanitary environment for its residents.” *Id.* at *5* (citing *Johnson* for “nursing home’s broad duty to provide health care for its residents”).

Most notably for this discussion see p.3, citing the new statutory language added in the 2015 Legislative session desired to obviate much of this issue.

Most recently, the Court has found that pharmacists, including compounding pharmacists, are health care providers engaged in the rendition of health care. *Randoll Mill Pharmacy v. Miller*, 465 S.W.3d 612 (Tex. 2015).

**Transportation services are health care.** The Dallas Court of Appeals relied on *Williams* to hold that a patient’s claim for injury sustained during the van ride home from the hospital was a health care liability claim. *Sherman v. HealthSouth Specialty Hosp., Inc.*, 397 S.W.3d 869 (Tex. App.—Dallas 2013, pet denied). The court determined that Sherman’s claim was a claim against a health care provider based on a departure from accepted standards of safety, and that this constituted a health care liability claim under 74.001(a)(13). *Id.* It specifically relied on Williams for its definition of the “precise boundaries of the safety prong” of healthcare liability claims, noting that “the court expanded the scope of health care liability claims beyond claims
for medical and health care.” *Id.* at 871-72 (citing *Williams*, 371 S.W.3d at 184–186).

Laser hair removal is “health care.” The Supreme Court has ruled that, at least on the facts presented in the case before it, laser hair removal operated under the auspices of a physician’s office, using equipment that required a physician’s license to purchase, laser hair removal is health care. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014). Multiple appellate opinions diverged on this issue, and the Supreme Court resolved the disparity under the facts before it, in favor of inclusion under Ch. 74. Note, however, that the opinion is factually specific.

The First Court of Appeals recently concluded that a claim of negligence for the failure to deliver the products of a miscarriage to a funeral home is a health care liability claim because it involves a “professional or administrative service” directly related to health care. *CHCA Bayshore, L.P. v. Ramos*, 388 S.W.3d 741 (Tex. App.—Houston [1st Dist.] July 19, 2012, no pet. (citing *TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001(a)(13), (24)). The crux of the plaintiffs’ allegations was that the hospital failed to properly handle, identify, monitor, and dispose of a specimen resulting from a miscarriage. *Id.* at 743. The hospital erroneously delivered the amputated toe of another patient to the funeral home for burial. *Id.* The plaintiffs’ claims were deemed by the court to be health care liability claims because “the identification, handling, and ultimate disposal of specimens are services that a health care provider is required to provide as a condition of maintaining its license.” *Id.* at 745–46 (citing *TEX. ADMIN. CODE ANN. § 1.33(a)(2)(F) (2012) and §§ 1.131–1.32(40)). Additionally, the court held that:

…[I]t is not necessary that the professional or administrative services occur during the patient’s medical care, treatment, or confinement. Instead, those services only need be “directly related” to “health care,” including treatment that was or should have been performed during the patient’s medical care, treatment, or confinement. *Id.* at 746 (citing *TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13)(definition of “health care liability claim”)).

Midwives are probably health care providers. *House of Yahweh v. Johnson*, 289 S.W.3d 345 (Tex. App.—Eastland 2009, no pet.).

Recasting or Refashioning Claims.

As noted in *Yamada v. Friend*, “[w]hether a claim is a health care liability claim depends on the underlying nature of the claim being made.” *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010). “Artful pleading does not alter that nature.” *Id.* at 196 (citing *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, at 854 (Tex. 2005); *Garland Cnty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004)). In fact, “[w]hen the underlying facts are encompassed by provisions of the TMLA in regard to a defendant, then all claims against that defendant based on those facts must be brought as health care liability claims.” *Id.* at 193-94. Thus, when a plaintiff brought an action against a doctor for negligently advising a water park about safety procedures and defibrillators both as a health care liability claim and an ordinary negligence claim, but failed to file an expert report, the plaintiff’s action was dismissed. *Id.* at 193. Because the ordinary negligence claim was based on the same underlying facts as the health care liability claim, the court held it too was a health care liability claim, incapable of splitting, and needed to be treated as such. *Id.* at 194.

Similarly, in *PM Management-Trinity–NC v. Kumets*, the supreme court held that “retaliatory discharge” was a healthcare liability claim. *PM Mgmt.-Trinity–NC v. Kumets*, 404 S.W.3d 550, 552 (Tex. 2013) (per curiam). It is important to
note that this particular form of retaliatory discharge was not the firing of an employee but was the retaliatory discharge of a patient, allegedly because of complaints by the patient or patient’s family about the patient’s quality of care. *Id.* at 551. Following the reasoning in *Yamada*, the *Kumets* court held that plaintiff’s claim was a health liability claim because it was based on the same underlying facts as the claim for a breach of fiduciary duty, already established as an HCLC. *Id.* at 552.


**Post-Mortem Fraud designed to conceal malpractice is health care.** In a closely watched case, the Supreme Court held in May 2016 that a hospital’s deliberately fraudulent or obfuscatory conduct allegedly designed to conceal the evidence of its malpractice by fraudulently inducing the widow of a decedent to consent to an autopsy was in fact a health care liability claim.

“Given the foregoing, we conclude that the Carswells’ post-mortem claims alleged departures from accepted standards of “professional or administrative services” the hospital had the duty to comply with or provide in order to maintain its license. But to be characterized as an HCLC, the “professional or administrative services” must have been directly related to health care…..

“Here, the question is whether the post-mortem claims by the Carswells were directly related to health care—that is, directly related to an act or treatment that was or should have been performed or furnished by the hospital for, to, or on behalf of Jerry Carswell during his treatment or confinement…..

“The Carswells’ post-mortem fraud claim was essentially that immediately following Jerry’s death, the hospital began covering up for the deficient health care provided to him. That was done, they claimed, by the hospital’s failing to notify the Harris County Medical Examiner’s Office of Jerry’s death and the circumstances surrounding it, but rather by the hospital immediately obtaining Linda’s consent for an autopsy at an affiliated hospital by an associated pathology practice group. Even though the jury refused to find that CHRISTUS negligently caused Jerry’s death, it remains that the Carswells’ post-mortem fraud claim was that the hospital’s obtaining Linda’s consent for the autopsy was based on and for the purpose of concealing the hospital’s malpractice that caused Jerry’s death. Given these circumstances, the claim was directly related to acts or treatments the Carswells
alleged were improperly performed or furnished, or that should have been performed or furnished, to Jerry during his treatment and confinement. See TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). As such, the fraud claim was an HCLC. Christus v. Carswell, ___ S. W. 3d ___, 2016 WL 2979718, (Tex. 2016).

This somewhat stunning opinion yields one helpful thread for practitioners trying to evaluate whether a claim constitutes a HCLC or not: the question to ask is “is the claim directly related to the acts of treatment of the patient.”

Recasting as Contract Also Impermissible. Plaintiff sought to obtain reimbursement from a nursing home for inadequate services provided by the nursing home to her mother. She did not file an expert report because she was seeking contractual damages for costs of the services not provided only. The Dallas court of appeals dismissed, saying “[plaintiff’s] argument that she could avoid triggering Chapter 74 by omitting any allegation of injury or death and by praying only for contract damages was merely another variation of the artful-pleading tactic that Texas courts have frequently condemned. The legislature did not intend for plaintiffs to be able to avoid the requirements of Chapter 74 so easily.” Victoria Gardens of Frisco v. Walrath, 257 S.W.3d 284, 289 (Tex. App.—Dallas 2008, pet. denied).

In another example of a plaintiff attempting to bring suit against a health care provider on a breach of contract claim rather than as a negligence claim governed by Chapter 74, the plaintiff in Ramchandani v. Jimenez, 314 S.W.3d 148 (Tex. App.—Houston [14th Dist.] 2010, no pet.) was dismissed for failing to meet the requirements of Chapter 74. The plaintiff complained that the defendant Ramchandani agreed to perform surgery, but instead permitted another surgeon who was incompetent to perform the surgery, with bad results. The plaintiff sued defendant Ramchandani for breach of contract alleging that, since Dr. Ramchandani had agreed to perform the surgery, he was contractually bound to do so, and his failure to perform the surgery himself was a breach of contract. The court of appeals held that “Doctor Ramchandani’s alleged failure to perform the surgery as agreed and his alleged designation of another doctor to perform the surgery are necessarily part of the rendition of health care services.” Ramchandani, 314 S.W.3d at 152. Accordingly, Chapter 74’s requirements applied.

A Few Exceptions. A few recent exceptions to the foregoing trend are noteworthy: use of a treadmill at a hospital-owned facility is not health care since it is not “directly related to health care” or “an inseparable part of the rendition of health care services.” Valley Baptist Med. Ctr. v. Stradley, 210 S.W.3d 770, 772 (Tex. App.—Corpus Christi 2006, pet. denied).

In a situation in which consent to perform an autopsy was not obtained, the defendant alleged that the plaintiff’s case must be dismissed because plaintiff failed to file a Chapter 74 expert report. The plaintiff claimed that the allegations did not constitute a health care liability claim. The Fort Worth court of appeals said that, in order for Chapter 74 to apply, a “patient” must be involved. Hare v. Graham, 2007 WL 3037708, at *3 (Tex. App.—Fort Worth 2007, pet. denied) (mem. op.). “This clearly implies that a person must be alive in order to be a ‘patient’. This court has previously held that a body was not a patient, nor was an autopsy a form of medical treatment.” Id. at *3 (citing Putthoff v. Ancrum, 934 S.W.2d 164, 171 (Tex. App.—Fort Worth 1996, writ denied)). “We agree with such a holding as the idea that a cadaver can be ‘patient’ is, on its face, illogical. As such, we hold that a dead body is not a patient and conclude that a body does not receive ‘medical care,
treatment or confinement’ after death. Therefore, we hold that the claim brought by Graham is not a health care liability claim. As such, no expert opinion was required to be filed.” Id.


Tripping Over Wires. Suit over injury caused by tripping over wires in a hospital room is not a health care liability claim. The test is whether the injury results from actions that are in some way “an inseparable part of the rendition of medical services and the standards of safety within the health care industry.” *Dallas Homes for Jewish Aged v. Leeds*, 2010 WL 1463439 (Tex. App.—Dallas 2010, no pet.) (mem. op.). Warning about the presence of wires on the floor cannot, as a matter of law, be held to be an inseparable part of the medical standards of care or health care services, neither is medical testimony required to determine whether such wires should run across the floor. Id.


Improper Sexual Relationship. A claim against a therapist for initiating an improper sexual relationship with a patient after the termination of the patient’s hospital stay is not health care. There is no “substantial and direct relationship” between the defendant’s actions and the patient’s care and treatment. *Nexus Recovery Cir., Inc. v. Mathis*, 336 S.W.3d 360, 370 (Tex. App.—Dallas 2011, no pet.). Further, the sexual relationship “certainly did not constitute an inseparable or integral part” of the patient’s health care. Id. As to the entity that retained the therapist, the plaintiff complained that the entity, Nexus, that retained the therapist, failed to properly inquire about her background. The Dallas court of appeals held that this was not health care because it did not concern any “act or treatment performed or furnished or that should have been performed or furnished by [Nexus] for, to, or on behalf of [plaintiff] during [plaintiff’s] medical care, treatment, or confinement.” Id. Although the failure to inquire may be “related” to plaintiff’s care and treatment, it did not constitute or implicate an “inseparable or integral part” of that care and treatment, as required in the Supreme Court’s ruling in *Marks v. St. Luke’s*, 319 S.W.3d 658, 664 (Tex. 2010). Id. Importantly, the court of appeals held that part of the basis for its opinion is that no expert testimony is required in order to determine that the therapist defendant violated statutory prohibitions against sexual relationships with patients. A lay individual can determine that the statute was violated. Id. at 371. The court of appeals also permitted the plaintiff’s claim against Nexus for failing to act to stop the abuse once it knew or had reason to know that the exploitation was in progress. Rejecting the proposition that such a claim constituted a health care claim under the Act, the court of appeals carefully differentiated sexual abuse that takes place on a health care defendant’s premises and during a hospitalization versus an improper sexual relationship that takes place after the patient’s discharge from the health care facility. Id. at 373.

Similarly, a health care provider who induced a plaintiff into a “counseling” session in order to obtain information for her husband to use against her in a divorce was not practicing health care, but fraud. Thus, the plaintiff was not required to have a Chapter 74 report to the effect that his fraudulent inducement to the counseling session was wrongful. *Cardwell v.*
McDonald, 356 S.W.3d 646, 656 (Tex. App.—Austin 2011, no pet.). This was true even though the plaintiff’s claims overlapped with her underlying health care liability claim. *Id.*

**Assault with Nail Polish.** A plaintiff, an employee of the defendant hospital, was admitted for a tonsillectomy. While he was anesthetized, two nurses painted his fingernails and toenails with pink nail polish, wrapped his thumb with tape and wrote "Barb was here" and "Kris was here" on the bottoms of his feet. He sued but did not file reports, arguing the claims were not for health care liability. The trial court dismissed and the Austin court of appeals reversed, ruling in favor of the plaintiff that such conduct is, indeed, not health care. *Drewery v. Adventist Health Sys./Tex., Inc.*, 344 S.W.3d 498 (Tex. App.—Austin 2011, pet. denied).

**Claims for Restriction of Privileges.** A claim by podiatrists against a hospital for restricting its privileges is not a healthcare liability claim. “Appellees’ claims do not involve care or treatment that was rendered to any patient. Instead, their claims relate to a dispute between Hendrick and them as to the scope of the practice of podiatry...Therefore, Hendrick’s act of eliminating privileges was not ‘directly related to healthcare.’” *Hendrick Med. Ctr. v. Tex. Podiatric Med. Assoc.*, 392 S.W.3d 294 (Tex. App.—Eastland 2012, no pet.).

Note that in other states, courts have taken a more real-world approach. The Louisiana Supreme Court has held that accusations that hospitals lacked evacuation plans, resulting in tragedy as a result of Hurricane Katrina, were not medical malpractice claims. Therefore, special provisions for medical malpractice suits did not apply nor did damage caps on medical malpractice claims. *LaCoste v. Pendleton Methodist Hosp.*, 966 So.2d 519 (La. 2007). Claims that the hospital failed to design, construct, and/or maintain its facility to provide emergency power to sustain life support systems during and in the aftermath of a major hurricane, to implement adequate evacuation plans, and to have facilities available for transfer of patients in the event of an emergency or mandatory evacuation, sounded in general negligence and not in medical malpractice within the scope of the Louisiana Medical Malpractice Act. *Id.* at 523. Thus, the representative of the patient’s estate and patient’s survivors did not have to present their claims to the medical review panel as a prerequisite to initiating suit against the hospital. The particular wrongs asserted were not “treatment-related” or caused by a dereliction of a medical professional’s skill in that the death of the patient who was on life support was caused when the life support systems failed due to loss of electrical power and by the hospital’s alleged failure to transfer the patient to another facility. The claims did not require medical expert evidence on the applicable standard of care and alleged breach, and the claims did not involve an assessment of the patient’s condition. The claims did not involve the physician-patient relationship or involve activities that the hospital was licensed to perform. Accordingly, the strictures of the Louisiana Medical Malpractice Act did not apply. *Id.* at 522.

**Suits By the State for Medicaid Fraud.** A suit by the State of Texas against a health care provider for Medicaid fraud is not a health care liability claim, the State of Texas is not a “claimant,” because the State is not a “person” as required by the definition, in Ch 74, and the 120 day expert report requirement does not apply to the State. *Malouf v. State of Texas ex rel. Ellis*, 461 S.W.3d 641 (Tex. App.—Austin, 2015, pet. denied). Further, a suit by the State seeking injunctive and other relief against a nursing home is not a health care liability claim under Ch 74 and no 120 day report is required, even though expert medical testimony will be required to prove the State’s claims. The Court acknowledges the difficulty in excepting out such claims, given the scope of recent expansive Supreme Court pronouncements:
Claims “which require [ ] the use of expert health care testimony to support or refute the allegations” are health care liability claims. *Psychiatric Solutions, Inc. v. Palit*, 414 S.W.3d 724, 727 (Tex. 2013); See Tex. *W. Oaks*, 371 S.W.3d at 182. However, “[e]ven when expert medical testimony is not necessary,” the claim may still be a health care liability claim. *Tex. W. Oaks*, 371 S.W.3d at 182 (citing *Murphy v. Russell*, 167 S.W.3d 835 (Tex. 2005)). The broad language of the TMLA evidences legislative intent for the statute to have expansive application. *Loaisiga*, 379 S.W.3d at 256; See also *Rio Grande Valley Vein Clinic, P.A.*, 431 S.W.3d at 65.

According to the Texas Supreme Court, the “breadth of the statute's text” essentially creates a rebuttable presumption that a claim is a health care liability claim if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement. *Loaisiga*, 379 S.W.3d at 252.

The Court concludes: “....we conclude that the term “damages” in the TMLA does not include civil penalties sought by the State rather than a private litigant.”

**It May Not Even Be Necessary to Be a Patient to Fall Under Chapter 74.** It may not even be necessary to be a patient for claims to fall under Chapter 74. A plaintiff sued two nursing homes, at which she had never been a patient, for negligently retaining and inadequately investigating the background of an employee at those facilities who was terminated from both and went to work at the third facility where she was a patient and where the employee sexually assaulted her. She argued that Chapter 74 did not apply to her claims against the first two nursing homes because she had never been a patient at either one. The court of appeals' reasoning was that the two nursing homes had an administrative duty, created by statute, to report any abuse or neglect by employee, which duty to report also "implicates" their duty as health care providers, and further reasons that, because this duty to report cannot be separated from the two nursing homes' responsibility to ensure resident safety, then the statutory duty to report abuse or neglect by a terminated employee was an inseparable part of the rendition of health care services. Based on thus argument, even though plaintiff was NEVER a patient at either nursing home, Chapter 74 still applied. *Dunn v. Clairmont Tyler, L.P.*, 271 S.W.3d 867 (Tex. App.—Tyler 2008, no pet.).


b. Under 4590i

A few Article 4590i cases may still inform the analysis of Chapter 74.

Section 1.03(a)(4) defined a health care liability claim as:

**A cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the**
patient, whether the patient’s claim or cause of action sounds in tort or contract.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(4) (West Supp. 1996). This definition has had an impact on certain cases and this case law is included as it continues to inform Chapter 74 to the extent that the rationale is still applicable.

1) Fraud in the Health Care Context

A former psychiatric hospital patient brought an action alleging that, through fraudulent acts, the physicians at the inpatient facility induced him to lengthen his stay. Shannon v. Law-Yone, 950 S.W.2d 429 (Tex. App.—Fort Worth 1997, pet. denied). The plaintiff’s claim was deemed not to be a “health care liability claim” as defined under the MLIIA, but rather as a cause of action for common law fraud to which a four-year statute of limitations applied. Id. at 434.

An unnecessary hysterectomy case, which was grounded in fraud was, however, dismissed. The plaintiff in Gomez v. Matey, 55 S.W.3d 732 (Tex. App.—Corpus Christi 2001, no pet.) sued for having been fraudulently induced to have an unnecessary hysterectomy. The plaintiff’s proof of fraud would have been exclusively medical: whether or not the hysterectomy was necessary, what the symptomatology was, etc. Therefore, since all proof of the fraud claim was medical in essence, the case was a medical or health care liability claim, and the plaintiff was required to comply with the requirements of Article 4590i, including § 13.01. Id. at 735.

2) Non-Medical Negligence by a Health care Provider

Does a suit that involves acts of ordinary negligence automatically fall within the definition of a health care liability claim simply because the act of negligence was committed by a health care professional? The Corpus Christi court of appeals held that it did not. Rogers v. Crossroads Nursing Servs., 13 S.W.3d 417 (Tex. App.—Corpus Christi 1999, no pet.). In Rogers, the plaintiff was recovering at home from back surgery when a home nursing agency employee negligently placed a heavy supply bag on a table. The bag fell on the plaintiff re-injuring his back. Id. at 418. “Because the question of how to place a heavy supply bag in a patient’s home so as not to injure the patient is not governed by an accepted standard of safety within the health care industry, but rather is governed by the standard of ordinary care, we find that [the plaintiff’s] cause of action for negligence is not a health care liability claim but is one for common law negligence.” Id. at 419.

3) Duty to Maintain Safe Premises

“In enforcing the Act, however, we must be equally careful not to extend the Act’s reach beyond its stated bounds. Clearly, not every action taken by a health care provider or every injury suffered by a patient falls within the ambit of the Act.” Bush v. Green Oaks Operator, Inc., 39 S.W.3d 669 (Tex. App.—Dallas 2001, no pet.). In Bush, the plaintiff was injured while a patient at the defendant’s medical facility by another patient, who was violently dangerous. In holding that Article 4590i did not apply to the plaintiff’s cause of action, the Dallas court of appeals held that “the duty that Bush alleged Green Oaks owed to her was the duty to provide her with a reasonably safe environment or to warn her of a known danger. This duty is owed by a premises owner to an invitee; it is not a duty owed by a health care provider to a patient.” Id. at 674.

In Cobb v. Dallas-Fort Worth Med. Ctr.-Grand Prairie, 48 S.W.3d 820, 825 (Tex. App.—Waco 2001, no pet.), the Waco court of appeals held that, when a hospital’s central supply delivers an incomplete set of screws to surgery, the issue is “non-medical, administrative, ministerial, or routine care at a hospital,” and is thus general negligence and not a health care liability claim.
In order for a plaintiff to couch a claim for injury in a health care facility as a premises liability claim, a plaintiff must provide evidence of an unreasonably dangerous condition on the premises. Simply recasting a malpractice claim as a premises claim will not allow a plaintiff to evade the dictates of either Article 4590i or Chapter 74. *Herse v. Jimenez*, 2003 WL 22656754 (Tex. App.—San Antonio 2003, no pet.) (mem. op.).

4) **Credentialing as a Health Care Liability Claim**


5) **Hospital Failure to Arrange For Services**

In *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 678 (Tex. App.—Dallas 2004), rev’d on other grounds, 271 S.W.3d 238 (Tex. 2008), the Dallas court of appeals held that the plaintiffs were making a health care liability claim when they alleged that the hospital was negligent in not having emergency echocardiogram services, that it was negligent in failing to provide effective on-call coverage by physicians, and that the hospital failed to communicate its limitations to the community at large. Thus, Article 4590i applied and the plaintiff’s allegations brought them within the definition of “health care liability claim.”

6) **Assault by a Health care Provider**

When a neurologist, during the course of the neurological exam, placed his penis in a patient’s hand as part of her neurological work up, he was “acting in his own prurient interest and ceased to be acting for his employer.” Thus, his conduct did not arise out of the course and scope of his employment and his employer was not liable. *Buck v. Blum*, 130 S.W.3d 285 (Tex. App.—Houston [14th Dist.] 2004, no pet.). However, in an astonishing juxtaposition of concepts, the Houston court of appeals went on to hold that the physician’s conduct did constitute violations of the standard of care (i.e., medical practice) and, thus, were covered under Article 4590i. *Id.* at 291–92.

3. **Definition of “Physician”**

a. **Under Chapter 74**

"Physician" means:

(A) an individual licensed to practice medicine in this state;

(B) a professional association organized under the Texas Professional Association Act (Article 1528f, West's Texas Civil Statutes) by an individual physician or group of physicians;

(C) a partnership or limited liability partnership formed by a group of physicians;

(D) a nonprofit health corporation certified under Section 162.001, Occupations Code; or

(E) a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, West's Texas Civil Statutes).

b. **Under Art. 4590i, § 1.03(a)(8)** defined a physician as:

A person licensed to practice medicine in this state.

This definition, read in conjunction with subchapter N of that statute regarding expert witnesses, resulted briefly in an argument that all expert testimony must be provided by a physician who is licensed to practice medicine in the state of Texas. This contorted reading of the statute was later vitiated when the Legislature amended Article 4590i to provide that the medical licensure of an expert physician need not be from Texas. The point is retained here since the “experts must be from Texas” argument
recurs with whack-a-mole frequency and may be litigated again in the Ch 74 era.

Chapter 74 Conflict with Other Law

§ 74.002. Conflict With Other Law and Rules of Civil Procedure

(iii) In the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict.

(iv) Notwithstanding Subsection (a), in the event of a conflict between this chapter and Section 101.023, 102.003, or 108.002, those sections of this code control to the extent of the conflict.

(v) The district courts and statutory county courts in a county may not adopt local rules in conflict with this chapter.

C. Chapter 74 and Sovereign Immunity

Sovereign immunity is not waived by Chapter 74.

§ 74.003. Sovereign Immunity Not Waived

This chapter does not waive sovereign immunity from suit or from liability.

D. Chapter 74 - The Deceptive Trade Practices Statute

Chapter 74 also provides that the Deceptive Trade Practices Act (DTPA) does not apply to Chapter 74 claims.

§ 74.004. Exception From Certain Laws

(i) Notwithstanding any other law, Sections 17.41-17.63, Business & Commerce Code, do not apply to physicians or health care providers with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(ii) This section does not apply to pharmacists.

E. Notice of Claim

1. Sections 74.051 and 74.052

The Legislature carried forward Article 4590i’s notice requirement virtually intact with the important addition of § 74.052, which now requires potential claimants to submit a medical authorization as drafted in the statute with their notice letter. Thus, the litany of Art. 4590i cases on notice are retained here for their precedential value.

§ 74.051. Notice

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and Section 74.052 and shall provide such evidence thereof as the judge of the court may require to determine if the provisions
of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by Section 74.052 executed by the claimant herein shall be considered compliance by the claimant with this subsection.

(e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization in the form required by Section 74.052 signed by a parent, spouse, or adult child of the deceased or incompetent person.

§ 74.052. Authorization Form for Release of Protected Health Information

(a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

(b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.

(c) The medical authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" (45 C.F.R. Parts 160 and 164).

AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, __________ (name of patient or authorized representative), hereby authorize __________ (name of
Physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. To facilitate the investigation and evaluation of the health care claim described in the accompanying Notice of Health Care Claim; or

2. Defense of any litigation arising out of the claim made the basis of the accompanying Notice of Health Care Claim.

B. The health information to be obtained, used, or disclosed extends to and includes the verbal as well as the written and is specifically described as follows:

1. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated ________ (patient) in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim. (Here list the name and current address of all treating physicians or health care providers, if applicable. This authorization shall extend to any additional physicians or health care providers that may in the future evaluate, examine, or treat ________ (patient) for injuries alleged in connection with the claim made the basis of the attached Notice of Health Care Claim;

2. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated ________ (patient) during a period commencing five years prior to the incident made the basis of the accompanying Notice of Health Care Claim. (Here list the name and current address of such physicians or health care providers, if applicable.)

A. Excluded Health Information—the following constitutes a list of physicians or health care providers possessing health care information concerning ________ (patient) to which this authorization does not apply because I contend that such health care information is not relevant to the damages being claimed or to the physical, mental, or emotional condition of ________ (patient) arising out of the claim made the basis of the accompanying Notice of Health Care Claim. (Here state "none" or list the name of each physician or health care provider to whom this authorization does not extend and the inclusive dates of
examination, evaluation, or treatment to be withheld from disclosure.)

B. The persons or class of persons to whom the health information of __________ (patient) will be disclosed or who will make use of said information are:

1. Any and all physicians or health care providers providing care or treatment to __________ (patient);

2. Any liability insurance entity providing liability insurance coverage or defense to any physician or health care provider to whom Notice of Health Care Claim has been given with regard to the care and treatment of __________ (patient);

3. Any consulting or testifying experts employed by or on behalf of __________ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

4. Any attorneys (including secretarial, clerical, or paralegal staff) employed by or on behalf of __________ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of __________ (patient).

A. This authorization shall expire upon resolution of the claim asserted or at the conclusion of any litigation instituted in connection with the subject matter of the Notice of Health Care Claim accompanying this authorization, whichever occurs sooner.

B. I understand that, without exception, I have the right to revoke this authorization in writing. I further understand the consequence of any such revocation as set out in Section 74.052, Civil Practice and Remedies Code.

C. I understand that the signing of this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

D. I understand that information used or disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and may no longer be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative
The Georgia supreme court found a similar statute unconstitutional. Because the Georgia Malpractice Reform Statute required plaintiffs to turn over their medical records with no appropriate overview or protective measures by courts, the Georgia high court found that the act violated HIPPA’s privacy standards. *Allen v. Wright*, 644 S.E.2d 814 (Ga. 2007).

2. Article 4590i, § 4.01

The notice provision of Article 4590i was contained in § 4.01.

Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

TEX. REV. CIV. STAT. ANN. ART. 4590i, § 4.01(a).

Since the two statutory sections are identical, all pertinent case law under Article 4590i is carried forward herein.

1. SENDING NOTICE

a. Substantial Compliance is Adequate

Where plaintiff mailed her Article 4590i pre-suit notice letter via express mail instead of certified mail, return receipt requested, as specified in Article 4590i, § 4.01, and the defendant did not contest the fact that he had received the notice, but simply argued that the notice was insufficient because the letter was not sent in strict compliance with the notice provision of Article 4590i, “substantial compliance” with the notice requirement set forth in Article 4590i was all that was required and the plaintiff’s notice fulfilled the primary purpose of the provision, which is to encourage pre-suit negotiations in an effort to avoid the costs of litigation. *Butler v. Taylor*, 981 S.W.2d 742, 743 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

b. When Defendant Does Not Pick up the Certified Notice Letter

Defendant failed to pick up the certified mail notice letter, then argued that he had not received notice, and that therefore it was ineffective to toll limitations. His argument failed, with the Court re-emphasizing that notice is effective when sent and that ‘notice to one is notice to all’ for all purposes including tolling limitations. *College Station Medical Center v. Kilaspa*, 494 S.W.3d 307 (Tex. App.—Waco, 2016, pet. denied).

2. PLEADING NOTICE

Section 74.051(b) and Article 4590i, Sec. 4.01(b), state:
In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this Act have been met.

Pleading compliance with § 4.01, by pleading either pre-suit notice or requesting post-suit abatement at least 60 days before filing suit or trial, would appear to satisfy the pleading requirement of § 4.01. In a summary judgment proceeding, the plaintiff’s failure to plead and prove the plaintiff’s timely mailing of pre-suit notice under § 4.01 precluded the court from considering the question of whether the limitations period was tolled for 75 days by the timely sending of a notice letter. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979). The court noted that the plaintiff did not complain on appeal of the trial court’s action in refusing, on motion for rehearing, to consider the tolling effect of the notice. A different result may have been reached if this point had been preserved for appeal.

Pleading pre-suit notice compliance is sufficient to defeat special exceptions to the plaintiff’s petition. *Salcedo v. Diaz*, 650 S.W.2d 67 (Tex. 1983).

3. EFFECT OF NOTICE

Section 4.01(c)—now § 74.051(c)—was probably one of the most litigated sections of Article 4590i because of its impact on the statute of limitations. Subsection (c) provides:

Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

The impact of this section on the statute of limitations is fully discussed in the statute of limitations section of this paper.

The other litigated clause of this provision is the statement that the tolling period shall apply to “all parties and potential parties.”

In *Thompson v. Cnty. Health Inv. Corp.*, 923 S.W.2d 569 (Tex. 1996), the plaintiffs’ suit was dismissed on summary judgment for not properly sending notice. The notice was timely and had been sent to the correct address, but addressed to the wrong person. The Texas Supreme Court held that the plaintiffs’ notice letter met the requirement of Article 4590i that notice be received by “all parties and potential parties.”

4. REMEDY FOR FAILURE TO GIVE NOTICE

Failure to comply with the 60-day notice provision requires abatement of the suit, upon timely motion, for 60 days. *Schepps v. Presbyterian Hosps. of Dallas*, 652 S.W.2d 934 (Tex. 1983); *Permanente Med. Ass’n of Tex. v. Johnson*, 917 S.W.2d 515 (Tex. App.—Waco 1996, orig. proceeding). A defendant must timely request an abatement. To be timely, a request for abatement must accompany the filing of the defendant’s answer or be filed very soon thereafter. *Hines v. Hash*, 843 S.W.2d 464 (Tex. 1992).

Because the 60-day abatement period was mandatory as set forth in Article 4590i, the trial judge could not approve any proceedings that were to take place during such
mandatory 60-day abatement period. *Johnson*, 917 S.W.2d at 515.

In *Hooper v. Sanford*, 968 S.W.2d 392 (Tex. App.—Tyler 1997, no pet.), the trial court dismissed the plaintiff’s case for failure to give the requisite 60-day notice. The plaintiffs appealed and the court held that the plaintiffs’ failure to give notice should have resulted in abatement, not dismissal, regardless of whether the plaintiff could file a new lawsuit. Nonetheless, the court held that it was not reversible error because the plaintiff could file a new cause of action. Note that the defense sought, due to the failure to give notice, to have the Court apply the then new §13.01 requirements, just enacted by the Legislature, to Plaintiff’s claims. The Court rejected this argument. Timely filing, with or without appropriate notice, brought Plaintiff within the then-existing “old law”. Further, dismissal, in this case held to be harmless error, would have been harmful error if it resulted in application of new restrictions which would have prevented Plaintiff from obtaining his full measure of damages.

5. OBTAINING MEDICAL RECORDS

Section 74.051(d) and Article 4590i, § 4.01(d), provide:

All parties shall be entitled to obtain complete and unaltered copies of the claimant’s medical records from any other party within 10 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization executed by the claimant herein shall be considered compliance by the claimant with this section.

Neither statute provides for an additional tolling period in the event that the defendant does not comply with the requirements of section (d) by not providing records. *James v. Personal Care of San Antonio*, 954 S.W.2d 113 (Tex. App.—San Antonio 1997, no pet.). To the extent that a potential party does not comply with this request, a remedy is not provided. *Id.* at 114.

It is permissible for a party to charge a reasonable fee for providing copies of medical records pursuant to § 74.051(d). *Valley Baptist Med. Ctr. v. Morales*, 295 S.W.3d 408 (Tex. App.—Corpus Christi 2009, no pet.).

A request for medical records under §4.01 or §74.051 will not force the health care provider to provide any pertinent arbitration agreement. Thus, these must be separately requested. *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005)(orig. proceeding).

6. NOTICE TO ONE IS NOTICE TO ALL

Timely written pre-suit notice under Article 4590i and, therefore, Chapter 74, to one health care provider tolls the statute of limitations for 75 days as to all other health care providers against whom the claim is ultimately asserted in a timely fashion. *De Checa v. Diagnostic Ctr. Hosp.*, 852 S.W.2d 935 (Tex. 1993). Notice to a Defendant physician was effective when sent, even though he never picked up the certified mail, and tolled the statute of limitations as to all defendants, including the hospital which was not put on notice. *College Station Medical Center v. Kilaspka*, 494 S.W.3d 307 (Tex. App.—Waco, 2016, pet. denied).
7. EFFECT OF FAILURE TO SERVE AUTHORIZATION

If the plaintiff fails to include the required medical release, then his notice letter will not toll the statute for the automatic 75-day period. “The statute of limitations is tolled only if both notice and an authorization form are provided.” Carreras v. Marroquin, 339 S.W.3d 68, 73 (Tex. 2011) (emphasis added). Thus far, notice to one has been notice to all even if the authorization sent with the notice letter is defective, but it is unknown what effect the Carreras holding will have on this rule or on whether constructive notice to the other defendants continues to operate to toll the statute of limitations as to all, noticed or not. See, e.g., Rabatin v. Chavez, 281 S.W.3d 567 (Tex. App.—El Paso 2008, no pet.); Rabatin v. Vazquez, 281 S.W.3d 563 (Tex. App.—El Paso 2008, no pet.); Rabatin v. Kidd, 281 S.W.3d 558 (Tex. App.—El Paso 2008, no pet.).

8. EFFECT OF DEFECTIVE AUTHORIZATIONS

What is the effect of a properly formatted authorization that has been incorrectly filled out? At some point, it is likely that an authorization will be considered so defective that it is treated as having not been sent at all. The only case law on point so far, however, tells us that a statutorily prescribed HIPAA authorization with one blank incorrectly filled out is adequate to trigger the tolling of limitations. Mock v. Presbyterian Hosp. of Plano, 379 S.W.3d 391 (Tex. App.—Dallas 2012, pet. denied).

F. Ad Damnum Clause

Chapter 74 incorporates verbatim the language of Article 4590i. Thus, Article 4590i case law is brought forward here, as it continues to inform the interpretation of Ch 74. Both provide:

Pleadings in a suit based on a health care liability claim shall not specify an amount of money claimed as damages. The defendant may file a special exception to the pleadings on the ground the suit is not within the court's jurisdiction, in which event the plaintiff shall inform the court and defendant in writing of the total dollar amount claimed. This section does not prevent a party from mentioning the total dollar amount claimed in examining prospective jurors on voir dire or in argument to the court or jury.

If special exceptions are filed and sustained, a plaintiff may inform the court and defendant of the specific amount of the damages claimed by an amended pleading, letter or other writing as Ch. 74 does not specify the “writing” required.

A plaintiff’s petition that seeks judgment against the defendant in an amount within the jurisdictional limits of the court, in the absence of special exceptions, is a sufficient ad damnum pleading under Article 4590i, § 5.01, and Rule 47(b) of the Texas Rules of Civil Procedure to support a judgment. Nat’l Med. Enters. of Tex. v. Wedman, 676 S.W.2d 712 (Tex. App.—El Paso 1984, no writ).

G. Informed Consent Chapter 74 Subchapter C

Chapter 74 incorporates virtually verbatim Article 4590i’s provisions regarding the creation of the Medical Disclosure Panel, its duties, and the effect of
the disclosures so required. Only ministerial changes were made, deleting instructions for the original creation of the Panel (which occurred in 1979), and to conform dates and section numbers. Therein, the Legislature provides a specific provision for a claimant bringing a health care liability claim that is based on the failure of a physician or other health care provider to disclose or adequately disclose the risks involved in a particular procedure or method of medical care. The only theory of recovery is that the risks or hazards of a particular procedure, if properly disclosed, could have influenced a reasonable person in making a decision to give or withhold consent, and that the defendant negligently failed to disclose same. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (West Supp. 1996); TEX. CIV. PRAC. & REM. CODE § 74.101.

The Act calls for the formation of a Medical Disclosure Panel, which was created when Article 4590i was enacted in 1977. The Panel is responsible for identifying and thoroughly examining all medical treatments and surgical procedures to determine which of those treatments and procedures do and do not require disclosure of the risks to the patient. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.03(a) (West Supp. 1996); TEX. CIV. PRAC. & REM. CODE § 74.102.

Once the risks have been identified, the Panel is responsible for preparing separate lists of the medical treatments and surgical procedures that do and do not require disclosure. “List A” is a list of all procedures that do require disclosure. “List A” not only contains the list of procedures themselves, but also the degree of disclosure required. “List B” is a list of treatments and procedures that do not require disclosure. If the treatment or procedure does not fall on either list, then the common law governs the reasonableness or unreasonableness of the disclosure. Proper disclosure or non-disclosure of risks in compliance with the statute creates a rebuttable presumption that the physician was not negligent. But a physician’s failure to disclose risks for a procedure located on “List A” creates a rebuttable presumption of negligence. At trial, the jury is instructed on these rebuttable presumptions when they arise. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.07(a)(1) (West Supp. 1996); TEX. CIV. PRAC. & CODE § 74.106(a)(1).

Disclosure of the risks or hazards of a particular medical treatment that is on “List A” is effective if it is given in writing, signed by the patient and a competent witness, is specific regarding the risks and hazards involved in a particular procedure, and the disclosure is in the form and to the degree required by the Panel. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.06 (West Supp. 1996); TEX. CIV. PRAC. & REM. CODE § 74.105.

For a more extensive discussion of the informed consent cause of action, please refer to Section V.C.(8), p. 215.

H. The “Bad Result” Instruction: Article 4590i, § 7.02, and § 74.303(e)(2)

The instruction in this section was left completely unchanged by the 2003 Legislature. However, its discretionary application was limited:

A finding of negligence may not be based solely on evidence of a bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judges of the weight, if any, to be given to any such evidence.

TEX. CIV. PRAC. & REM. CODE § 74.303(e)(2) (West 2011); See also. For cases after 2003, this instruction is mandatory. However, prior to 2003, it was given at the trial court’s discretion if the instruction was reasonably applicable to the
Whether the instruction was applicable to a particular circumstance was reviewable by an appellate court under the abuse of discretion standard. Tex. REV. CIV. STAT. ANN. art. 4590i, § 7.02(c).

I. Subchapter D, Emergency Care

This subchapter was created by the 2003 Legislature. It adopts and modifies the prior Good Samaritan law, it sets a wilful and wanton standard of proof for plaintiffs in defined emergency cases, and adds a jury instruction, long sought-after by emergency departments and physicians, for use in cases arising from hospital-based emergency cases.

§ 74.151 - Liability for Emergency Care

(1) A person who in good faith administers emergency care, including using an automated external defibrillator, is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent.

(2) This section does not apply to care administered:

(a) for or in expectation of remuneration, provided that being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration; or

(b) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration.

(c) Deleted by H. B. 4, Sec. 10.01, 78th Leg., eff. Sept. 1, 2003.

(d) This section does not apply to a person whose negligent act or omission was a producing cause of the emergency for which care is being administered.

§ 74.152 - Unlicensed Medical Personnel

Persons not licensed or certified in the healing arts who in good faith administer emergency care as emergency medical service personnel are not liable in civil damages for an act performed in administering the care unless the act is wilfully or wantonly negligent. This section applies without regard to whether the care is provided for or in expectation of remuneration.

§ 74.153 - Standard of Proof in Emergency Cases

In a suit involving a health care liability claim against a physician or health care provider for injury to or death of a patient arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that the treatment or lack of treatment by the physician or health care provider departed from accepted standards of medical care or health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with wilful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances.

1. Constitutionality

The wilful and wanton standard for emergency room cases is constitutional. Dill v. Fowler, 255 S.W.3d 681 (Tex. App—
Eastland 2008, no pet.). Further, there is no violation of the equal protection clause of either the Texas or U.S. Constitution based on the fact that some claimants in healthcare liability claims have a negligence standard while others have a wilful and wanton standard. In fact, this inequality between plaintiffs does not fail the rational-basis standard of review for constitutional scrutiny. Gardner v. Children’s Med. Ctr. of Dallas, 402 S.W.3d 888 (Tex. App.—Dallas 2013, no pet.).

The standard is not unconstitutional on vagueness grounds, Guzman v. Mem’l Hermann Hosp. Sys., No. CIV A H–07–3973, 2009 WL 780889 (S.D. Tex. Mar. 23, 2009), although it is unknown exactly what “wilful and wanton” negligence constitutes. Traditionally, conduct is either wilful or wanton or negligent, not some combination of all three. So far, authorities are conflicted. In the Fort Worth court of appeals, we are told that wilful and wanton is not the same thing as gross negligence. Benish v. Grottie, 281 S.W.3d 184 (Tex. App.—Fort Worth 2009, pet. denied). However, in Dallas, we are told that wilful and wanton is the same thing as gross negligence. Turner v. Franklin, 325 S.W.3d 771 (Tex. App.—Dallas 2010, pet. denied).

2. Treatment as a Non-Emergency

An interesting question arises when the emergency room health care provider treats the patient’s case as a non-emergency by discharging the patient and then later seeks to avail itself of the willful and wanton emergency standard. One court tells us that the wilful and wanton standard is inapplicable in such cases. Guzman v. Mem’l Hermann, No. H–07–3973, 2009 WL 780889. Despite this, the standard does apply to the diagnosis of non-emergency conditions. Turner, 325 S.W.3d at 785–86. Under this standard, emergency room health care providers are not required to assume the worst-case diagnosis or to protect the patient from that worst case. Turner, 325 S.W.3d at 785–86. Thus, a diagnosis that fails to provide appropriate medical attention to an emergency condition is also covered. Crocker v. Babcock, 228 S.W.3d 159 (Tex. App.—Texarkana 2014, no pet.).

Note further that it is apparently appropriate for appellate courts to re-find the facts found by the jury in the wilful and wanton context. When a jury found wilful and wanton negligence in an emergency room, the Beaumont court of appeals reanalyzed the facts and inserted itself in the place of the jury to find that there was no evidence of wilful and wanton negligence. Christus Health Se. Tex. v. Licatino, 352 S.W.3d 556 (Tex. App.—Beaumont 2011, no pet.).

3. The Emergency Room Physician as a Responsible Third Party

“Chapter 74 does not change the ‘acceptable standard of medical care’: It simply allows one providing emergency medical care to deviate from that standard by a wider margin before becoming liable in damages for its breach. But as discussed further below, even if an emergency room physician has not deviated from the standard of care sufficiently to make him ‘liable’ for damages, he nevertheless may have deviated from it sufficiently to make him ‘responsible.’” A defendant (in this case ExxonMobil) sought to add the emergency room physician under the responsible third party statute, and the court held that ExxonMobil was not required to raise a fact issue whether the conduct was “wilful and wanton”. Nonetheless, ExxonMobil was required to produce sufficient evidence to raise a fact question about whether the emergency room care contributed to causing Plaintiff Decedent’s death. ExxonMobil Corporation v. Pagayon, 467 S.W.3d 36 (Tex. App—Houston [14 Dist.] 2015, pet. granted).

§ 74.001(a)(7) – “Emergency medical care”

Emergency medical care” means bona fide emergency services provided after the sudden
onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

§ 74.001(a)(8) – “Emergency medical services provider”

Emergency medical services provider” means a licensed public or private provider to which Chapter 773, Health and Safety Code, applies.

An interesting start to an analysis of this special protection for health care providers is found in Lucas v. United States, 757 S.W.2d 687 (Tex. 1988). Therein, Justice Kilgarlin, writing for the majority, noted as follows:

Although not necessary in light of our ‘open courts’ holding, one wonders whether the drafters of the Texas Constitution intended for the legislature to enact special laws for the protection of specified classes of tortfeasors. Compare Tex. Const. art. I, § 3 (“[N]o Man, or set of men, is entitled to exclusive...privileges, but in consideration of public service.”) with Tex. Const. art. III, §56 (“[I]n all other cases where a general law can be made applicable, no local or special law shall be enacted....”). A prior Constitution left it to the legislature, “in its judgment,” to decide when a general law could be made applicable. Tex. Const. art. XII, § 40 (1873). This language does not appear in the present Constitution. Tex. Const. art. III, § 56. at page 689.

Lucas, 757 S.W.2d at 689 n.1. The Article I, §3, prohibition against public emoluments has been raised in the Supreme Court before. The plaintiffs in Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) included that section as part of their constitutional challenge to the purported absolute two-year statute of limitations in Article 4590i. Because the Court invalidated the statute of limitations under the open courts provision, Tex. Const. art. I, § 13, consideration of the other constitutional claims, including the equal protection public emoluments argument, was unnecessary.

The next time the term is found in the health care liability context is in Rose v. Doctors Hosp. Facilities, 801 S.W.2d 841 (Tex. 1990), in which, after citing the provision, the Court went on to discuss whether the application of differing standards of treatment for different types of plaintiffs violated the equal protection clause of the Texas Constitution. It did not specifically discuss whether the treatment of different classes of defendants or the accord of public emoluments or privileges to specific individuals or groups violated the Texas Constitution. Similarly, in Lucas, the Court considered the equal protection clause, but its analysis keyed in on the treatment of disparate classes of plaintiffs—not on the special protection afforded to a group or groups of defendants.

Each time the Court has considered the equal protection clause of the Texas
Constitution, it has done so in the context of differentiating between classes of plaintiffs. It has yet to address the argument raised by Justice Kilgarlin in his Lucas footnote, that the drafters of the Texas Constitution never intended for the Legislature to enact special laws for the protection of specified classes of tortfeasors [public emoluments]. Lucas, 757 S.W.2d at 689 n.1. This Constitutional challenge seems uniquely suited to the “willful and wanton” standard of conduct embodied in § 74.153.

Perhaps in order to determine whether health care providers have in fact been set aside as a specially protected class in contravention of Article I, §3, it would be helpful to consider the array of special protections afforded health care providers under Texas law.

No other class of litigants, or citizens enjoys the protection that health care providers have under Texas law. A brief summary of those protections is instructive:

1. Damage Caps. In injury cases, though previously held unconstitutional at the $500,000 level, those caps are now $250,000 for all claimants for intangible damages arising from a single occurrence. In death cases, the caps are now a total of approximately $1.8 million for the entire case, including loss of earnings, and only excepting medical costs.

2. The Stowers Doctrine Does Not Apply. Under Chapter 74, unlike the predecessor statute, the insurance company for the physician enjoys the protection of the caps regardless of whether it negotiates in good faith or exposes the physician to an excess verdict.

In a complicated and perplexing case, a sharply divided Supreme Court holds that the Stowers doctrine does apply to a carrier under Chapter 74, but does not apply to the insured physician. Phillips v. Bramlett, 407 S.W.3d 229 (Tex. 2013).

3. Expert Reports under § 74.351. Plaintiff must, within 120 days of filing suit, provide a fantastically detailed, intricate and complex expert report. A tremendous cottage industry has sprung up in which defense lawyers and their insurers strive to have valid cases dismissed for alleged technical deficiencies in plaintiffs’ reports. The courts have been happily complicit in this endeavor. No other defendant has this unique benefit: not just a peek, but a long look at a plaintiff’s hand before discovery is even well under way.

4. Discovery Stay under § 74.351(s)-(u). Only very limited discovery is allowed before a plaintiff must generate this technically demanding report. No other class of litigants enjoys the boon of having the other side’s case mapped out before having to respond to the allegations. In fact, though not well supported by the language of Chapter 74, the defendant physician cannot even be deposed until after plaintiff’s expert report has been provided. In re Miller, 133 S.W.3d 816 (Tex. App.—Beaumont 2004, orig. proceeding). Why should defendant physicians, unique among defendant litigants, have before them a road map of a plaintiff’s claims before they can testify to what they did, why they did it, what they observed, and so on?

5. Sixty (60) Day Notice Letter of Intent to File Claim under § 74.051. With the exception of governmental entities, no other class of litigants is entitled to this kind of warning. The government gets it because of the common law notion that “the King can do no wrong.” No such fiction, at common law, applied to health care providers. The stated legislative purpose of § 74.051 is to encourage early negotiation and settlement. Yet the statistics make this a mockery. The notice period does, however, allow plenty of time before court authority can be invoked to prevent chicanery with the records.

6. Rigid Two (2) Year Statute of Limitations under § 74.251. This provision (or its Article 4590i predecessor) has been construed so strictly that, in some delayed onset cases, the plaintiff’s cause of
action is extinguished before it could have been filed. This protection is unique to health care providers. In death cases, the statute in health care liability cases can run before the patient dies—thus precluding suit—something else found with no other class of wrongful death defendants.

7. The Peer Review Privilege. Former Article 4495b, §§ 5.06 and 4.05, and Texas Health and Safety Code § 161.032 create a privilege for properly constituted peer review proceedings. Problematically however, these privileges have been construed so broadly that plaintiffs are often precluded from discovery of the only information available to prove their claims. No other industry has such an all-encompassing exception from discovery into post-tort investigations. The privilege is based on the increasingly fictional nature of collegial, self-policing health care practice.

8. Proof of Malice in Negligent Credentialing Claims. Since Agbor v. St. Luke’s Episcopal Hosp., 952 S.W.2d 503 (Tex. 1997), the plaintiff’s burden of proof in negligent credentialing cases, including credentialing of drug-impaired physicians, requires proof of malice on the part of the hospital. Needless to say, no such proof is required in cases involving negligent association or retention in any other profession, such as the legal, architectural or engineering professions.

9. The Wilful and Wanton Burden of Proof in Emergency Care under § 74.153. All other tortfeasors in our society are held to a standard of negligence. Uniquely, health care providers can only be found liable if a plaintiff can prove wilful and wanton negligence in the emergency room context.

10. The National Physicians Databank. The National Physician’s Databank (NPDB), to which insurers are required to submit data any time a health care liability claim is paid on behalf of a doctor, whether by way of settlement, verdict or final judgment, is closed to the public. Only hospitals and insurance carriers have access to this information. This federally-managed database is unique in keeping this mandatory data from the public, which would clearly be well-served by having access to information about the claims history of its health care providers. Such protection has led to gamesmanship on the part of the industry in significantly under-reporting settlements by physicians.

11. Mandatory Payment for Future Losses under § 74.501. Only health care liability insurance companies are afforded this boon. Personal injury and wrongful death damages are considered “liquidated damages,” that is, the best assessment of the net present value of damages, including future damages, is made at the time of settlement or judgment and the amount of the recovery is based upon that calculation. Thus, insurers pay the net present value of future damages at the time of settlement. Only health care insurers in Texas are provided the protection of a return of future payments should the hapless claimant die before payments are fully made. The insurance industry thus gets a multiple reduction: the value of future payments is reduced to net present value for purposes of computing the amount of the judgment and, yet, if the claimant does not live to receive all his/her payments, the funds are returned to the carrier.

12. Rule 202 Depositions. The political battle over whether Rule 202 depositions are permitted in Chapter 74 cases has been resolved with the Supreme Court siding with health care defendants. The Supreme Court has ruled that Rule 202 depositions are not permitted in Chapter 74 cases. In re Jorden, 249 S.W.3d 416 (Tex. 2008) (orig. proceeding). “Because the statute here specifically applies to ‘a cause of action against a health care provider,’ it applies both before and after such a cause of action is filed. To the extent a presuit deposition is intended to investigate a potential claim against a health care provider, it is necessarily a ‘health care liability claim’ and falls within the coverage of Section 74.351(s).” Id. at 422.
13. Suits Involving the Death of an Unborn Child. Physicians are the only class of tortfeasors against whom no cause of action may be asserted for the wrongful death of an unborn child. Texas Civil Practices & Remedies Code § 71.003(c) provides a cause of action for negligently causing the death of an unborn child. This section was added by the 2007 Legislature. It provides an exemption, however, for physicians:

(c) this subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against: …

(4) A physician or other health care provider licensed in the state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.

J. Section 74.154 - New Jury Instruction

§ 74.154. Jury Instructions in Cases Involving Emergency Medical Care

A. In an action for damages that involves a claim of negligence arising from the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

(1) whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) the presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;

(3) the circumstances constituting the emergency; and

(4) the circumstances surrounding the delivery of the emergency medical care.

B. The provisions of Subsection (a) do not apply to medical care or treatment:

(1) that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient;

(2) that is unrelated to the original medical emergency; or

(3) that is related to an emergency caused in whole or in part by the negligence of the defendant.

K. Res ipsa loquitur

This section is carried forward from Article 4590i into Chapter 74 verbatim as § 74.201—except to reconcile the effective date language.

1. In General

Essentially, res ipsa loquitur is a doctrine of circumstantial evidence, which permits the jury to conclude that the defendant was guilty of negligence. There are three requirements that must be met to trigger the doctrine: (1) the occurrence would ordinarily not happen in the absence
of negligence; (2) the instrumentality causing injury was within the sole control of the defendant; and (3) the plaintiff has not contributed to his own injury.

2. The Statutes

Both Article 4590i, § 7.01, and § 74.201 provide:

The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physician in those cases to which it has been applied by the appellate courts of this state as of [4590i: the effective date of this subchapter][Chapter 74: August 29, 1977].

3. Case Law

Expert reports must still be filed even if a res ipsa contention is valid. Further, the res ipsa exception to expert proof does not exempt the plaintiff from the requirement of proof of causation testimony. Garcia v. Marichalar, 185 S.W.3d 70 (Tex. App.—San Antonio 2005, no pet.).

A few Texas cases have stated that res ipsa loquitur is not applicable in medical malpractice actions. See, e.g., Bell v. Umstattd, 401 S.W.2d 306 (Tex. Civ. App.—Austin 1966, writ dism’d). However, it has been stated that an exception to the rule is recognized “where the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, where the negligence alleged is in the use of mechanical instruments, operating on the wrong portion of the body, or leaving surgical instruments or sponges within the body.” Sullivan v. Methodist Hosps. of Dallas, 699 S.W.2d 265, 267 (Tex. App.—Corpus Christi 1985) writ ref’d n.r.e. per curiam, 714 S.W.2d 302 (Tex. 1986); Martin v. Petta, 694 S.W.2d 233 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.).

One appellate court held that surgery that is begun on the correct body part but injures another body part is not a circumstance where res ipsa loquitur may be invoked—at least where the two body parts “touch.” Wendenburg v. Williams, 784 S.W.2d 705, 707 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (spine surgery perforated iliac artery and vein). In order for this res ipsa claim to exist, the physician must “intentionally” operate on the wrong body part under the “mistaken impression” that it was the correct part. Id. See also Manax v. Ballew, 797 S.W.2d 71 (Tex. App.—Waco 1990, writ denied) (doctrine of res ipsa loquitur applied when surgeon operated on wrong part of patient’s back to remove a lipoma). Also, surgical tools such as a “rongeur” are not within common knowledge of lay people. Id. See also Haddock v. Arnspiger, 793 S.W.2d 948 (Tex. 1990) (use of a flexible colonoscope which perforated patient’s colon was not within knowledge of ordinary lay persons). Injury to the urethra during placement of a foley catheter also was not sufficiently within the knowledge of lay persons to permit the invocation of res ipsa loquitur. Spinks v. Brown, 103 S.W.3d 452 (Tex. App.—San Antonio 2002, pet. denied).

In a foreign object case, expert testimony was not necessary to prove negligence, but expert testimony and evidence of the custom of medical care was admissible and sufficient to support a finding that leaving a surgical instrument in the body was not negligence. Kissinger v. Turner, 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.). The Fort Worth court of appeals distinguished the Corpus Christi court of appeals’ holding in Sullivan v. Methodist Hosps. of Dallas by noting that the operation in Sullivan was brief and uncomplicated and the sponge was left because of a faulty sponge count, while the surgery in Kissinger was difficult and the condition of the patient’s internal organs contributed to the inability to account for the surgical instrument left behind.
Also, note that as a **matter of law**, leaving a surgical instrument or sponge in a case is negligence. “Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are hard-pressed to discover the wrong.” *Walters v. Cleveland Reg’l Med. Ctr.*, 307 S.W.3d 292, 298 (Tex. 2010).

4. **Res Ipsa** in a Summary Judgment

*Steinkamp v. Caremark*, 3 S.W.3d 191 (Tex. App.—El Paso 1999, pet. denied) pinpoints the Catch-22 in a *res ipsa loquitur* medical malpractice action because, while a plaintiff may not need expert testimony to establish the standard of care and the breach in the standard of care, a plaintiff almost always needs expert testimony to establish the causal link between the breach of the standard of care and the injury.

Note further that the res ipsa doctrine may not be invoked where no general negligence or special allegations of res ipsa are pled. *Prieto v. Val Verde Mem’l Hosp.*, 747 S.W.2d 487 (Tex. App.—San Antonio 1988, no pet.). In other words, the doctrine cannot be raised on appeal when only specific acts of negligence have been pled. *Id.* at 489. But it is not necessary for the plaintiff to completely eliminate the possibility of other causes in order to uphold a verdict based on the theory of *res ipsa loquitur*. The possibility of any such other causes, however, must be “so reduced that the jury can reasonably find by a preponderance of the evidence that the negligence, if any, lies at the defendant’s door.” *Farm Servs. Inc. v. Gonzales*, 756 S.W.2d 747, 752 (Tex. App.—Corpus Christi 1988, writ denied).

L. **Statute of Limitations and Repose**

The statute of limitations in Article 4590i saw more litigation, particularly more constitutional litigation, than any other section of that statute. Since the 2003 Legislature left this section completely undisturbed, with one notable addition, the decades of jurisprudence governing the interpretation of the statute of limitations in health care liability cases should still control. The only appellate case law construing the statute of limitations seems to assure litigants of such jurisprudential continuity, and well-established principles of statutory construction and stare decisis support the conclusion that the body of law surrounding the statute of limitations embodied in Article 4590i, §§ 10.01 and 10.02, carries forward through the enactment of § 74.251.

As stated above, the Legislature left this section undisturbed except in one critical parameter: the addition of Subsection (b). The new language is in bold type.

(a) **Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim.**

Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.
(b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Analysis of the statute of limitations in health care liability claims thus necessarily begins with study of Article 4590i and the case law relevant thereto.

1. Limitations Under Article 4590i

a. Article 4590i, §§ 10.01 and 10.02

Section 10.01 purports to impose an absolute two-year statute of limitations period in all health care liability claims involving adults occurring on or after August 29, 1977—the effective date of Article 4590i. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1997).

b. The Pre-4590i Statute of Limitations

For a detailed history of the statute of limitations prior to the enactment of Article 4590i, See II K.2, p. 26ff.

c. Article 4590i, § 10.01, Not Retroactive

As a historical footnote, note that Article 4590i, § 10.01 was held not to apply retroactively because § 10.01 applied only to medical malpractice claims arising from conduct subsequent to the effective date of the Act—August 29, 1977. Baldridge v. Howard, 708 S.W.2d 62 (Tex. App.—Dallas 1986, writ ref’d n.r.e.). In Baldridge, the court allowed a plaintiff to assert a cause of action where the alleged malpractice arose in 1973 (before the enactment of Article 4590i) but was not discovered until 1982 (after the enactment of Article 4590i). The Dallas court of appeals held that Article 5526 and the discovery rule applied, not Article 4590i, § 10.01, because the claim arose before Article 4590i was enacted. In pure theory, it is still possible that claims exist to which pre-4590i law would still apply, though the impact of § 74.251(b) will be discussed below.

d. Events From Which Limitations Run—Occurrence of Breach or Tort and Continuing Treatment Doctrine

1) Occurrence of Breach or Tort

Events from Which Limitations Run—Occurrence of Breach or Tort and Continuing Treatment Doctrine

Section 10.01 provides for two events, either one of which may begin the running of limitations on health care liability claims: (1) the date of the occurrence of the breach or tort, or (2) the date of completion of the medical or health care treatment or hospitalization made the basis of the claim. See Kimball v. Brothers, 741 S.W.2d 370 (Tex. 1987); Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985); Wilson v. Braeuer, 788 S.W.2d 186 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ); Shook v. Herman, 759 S.W.2d 743, 745 (Tex. App.—Dallas 1988, writ denied); Atha v. Polsky, 667 S.W.2d 307 (Tex. App.—Austin 1984, writ ref’d n.r.e.); Neie v. Stevenson, 663 S.W.2d 917 (Tex. App.—Amarillo 1983, no writ).

2) “Continuing Treatment” Rule

(i) Generally

When there is no precise or ascertainable date of the tort, malpractice claims are not barred by § 10.01 if the claim is brought within two years “from the date the medical or health care treatment that is the subject of the claim” was completed. Tex. Rev. Civ. Stat. Ann. Art. 4590i, § 10.01 (Vernon Supp. 1989); See Jones v. Cross, 773 S.W.2d 41, 42 (Tex. App.—Houston [1st Dist.] 1989, writ denied); This is referred to as the “continuing treatment”
provision of § 10.01. Vinklarek v. Cane, 691 S.W.2d 108, 109 (Tex. App.—Austin 1985, writ ref’d n.r.e) (referring to the phrase in section 10.01 as “continuing treatment” provision or doctrine). It extends the time before the period of limitations starts to run in a situation where a patient received treatment over an extended period of time and the date of the tort during the course of that treatment is not ascertainable. Kimball v. Brothers, 741 S.W.2d 370 (Tex. 1987); Morrison v. Chan, 669 S.W.2d 205 (Tex. 1985). A determination of when treatment was concluded for the purpose of analyzing the facts under the alternative continuing treatment rule under Article 4590i is a question of law, not of fact. Chambers v. Conaway, 883 S.W.2d 156 (Tex. 1993). Some cases that have interpreted the “continuing treatment” provision of § 10.01 are Jones, 773 S.W.2d at 42; Vinklarek, 691 S.W.2d at 109; Lamar v. Graham, 598 S.W.2d 727 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e); Coffman v. Hendrick, 437 S.W.2d 60 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref’d n.r.e).

(ii) “Self-Treatment” is not “Continuing Treatment”

The Texas Supreme Court dealt with the continuing treatment doctrine in Rowntree v. Hunsucker, 833 S.W.2d 103 (Tex. 1992). In Rowntree, a patient taking medications prescribed by the defendant was held to have been engaged in “self-treatment,” rather than “continuing treatment” by the doctor. The Court held that the date of the last treatment must run from the last contact with the physician. The Court treated the continued use of medication, although it was prescribed by a physician, as “self-treatment.” This was because there was no further attention from the physician regarding the taking of the medication. It is only if the physician had controlled the treatment and continued to render medical services that the taking of medication would constitute “continuing treatment.” Because the physician’s last contact with the patient was more than two years before the filing of the suit, the claim was barred. Rowntree, 833 S.W.2d at 105–06. See also Winston v. Peterek, 132 S.W.3d 204 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

One court has held that a fourteen-month interval in follow-up exams for orthodontic treatment, as a matter of law, is not “continuing treatment.” Damron v. Ornish, 862 S.W.2d 683 (Tex. App.—Dallas 1993, writ denied).

(iii) When “Continuing Treatment” Equals “Continuing Negligence”

In Jones v. Cross, 773 S.W.2d 41 (Tex. App.—Houston [1st Dist.] 1989, writ denied), the court of appeals reversed dismissal because the plaintiff alleged and introduced summary judgment evidence that the defendant’s negligence occurred not only during the surgical procedures but during the course of the defendant’s continuing treatment of the plaintiff. Hence, the appellate court held that the defendant had failed to meet his burden of conclusively establishing a specific beginning date for the two-year limitation period. Id. at 43–44.

Conversely, in Ericson v. Roberts, 910 S.W.2d 608 (Tex. App.—Tyler 1995, no writ), the plaintiffs’ claim was that the defendant negligently removed too much foreskin from Mr. Ericson’s penis, during circumcision, which caused inflammation and disfigurement. Id. at 610. In holding for the defendants, the court of appeals stated that the plaintiffs did not allege in their pleadings, nor did they provide any controverting evidence, that Dr. Roberts performed a negligent act after the circumcision. Id. If a specific date for the negligent act can be ascertained, the period of limitations accrues then. Id. at 611 (citing Rowntree v. Hunsucker, 833 S.W.2d 103, 105–06 (Tex. 1992) and Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987)).

Where a plaintiff fails to allege that negligence was committed subsequent to a
negligently performed surgery, the continuing treatment doctrine does not apply. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999).

In the absence of allegations of post-surgical negligence, the date of the negligently performed surgery provided an ascertainable date giving rise to a malpractice claim. *Desiga v. Scheffey*, 874 S.W.2d 244 (Tex. App.—Houston [14th Dist.] 1994, no writ).

In *Gross v. Kahanek*, 3 S.W.3d 518 (Tex. 1999), the Texas Supreme Court held that, while the continuing course of treatment doctrine governed the plaintiffs’ claims, the course of treatment ended more than two years and 75 days before the date the plaintiffs filed suit and, thus, their wrongful death claims were barred. But, because the decedent was a minor, the statute of limitations was tolled until the date of death as to the survival claim. Thus, the Supreme Court held that those claims not tolled by minority were time-barred. Limitations on a wrongful death claim are not tolled because the decedent is a minor. *Id.* at 521 (citing *Baptist Mem’l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120 (Tex. 1996)). As to the survival claim, however, the statute of limitations had not run. The survival cause of action is the same cause of action that the minor had the day she died. *Id.* at 521 (citing Tex. Rev. Civ. Stat. Ann. art. 4590i, § 10.01 (West Supp. 1990). See also *Vinklarek v. Cane*, 691 S.W.2d 108 (Tex. App.—Austin 1985, writ ref’d n.r.e.) (interpreting § 10.01); *Desemo v. Gafford*, 692 S.W.2d 571 (Tex. App.—Eastland 1985, writ ref’d n.r.e.) (applying § 10.01 to date plaintiff was “last treated” and “aware” of her claim); *Atha v. Polsky*, 667 S.W.2d 307 (Tex. App.—Austin 1984, writ ref’d n.r.e.) (construing “continuing treatment” provision of Art. 5.82, § 4, of the Texas Insurance Code).

In *Martin v. Cohen*, 804 S.W.2d 201 (Tex. App.—Houston [14th Dist.] 1991, no writ), the court of appeals held that the two-year statute of limitations began to run when the patient discovered an infection allegedly caused by a dentist’s negligence and the fact that the dentist continued to treat the patient after the date the infection was discovered did not toll the statute of limitations. Here, since the date in controversy that was the subject of the claim was “readily ascertainable,” the continuing treatment rule could not be invoked as the basis by which the statute of limitations would be measured. *Id.* at 203. *See also Dougherty v. Gifford*, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ) (continuing treatment rule does not apply where negligent misdiagnosis occurred on a specific date).

Thus, a general continued physician-patient relationship for medical conditions not connected to the claim following the date of treatment that is the “subject of the claim” is immaterial to the imposition of the two-year period under § 10.01, in the absence of circumstances justifying the “fraudulent
concealment” or “new discovery rule” exceptions. See Vinklarek, 691 S.W.2d at 109; Atha, 667 S.W.2d at 309 n.3.

(v) Determining “Date of Last Treatment”

In Estate of Magness v. Hauser, 918 S.W.2d 5 (Tex. App.—Houston [1st Dist.] 1995, writ denied), the court of appeals addressed the issue of whether suit was timely filed against the defendant doctor. The real issue before the court was on what date was the defendants’ health care treatment of the decedent completed? The plaintiffs contended that they had until on or before two years and 75 days from the date of the decedent’s death. The defendants, on the other hand, argued that limitations began running on the date that the decedent attempted suicide resulting in a coma from which she never emerged. The defendants reasoned that, because the decedent was immediately rendered brain-dead from the attempted suicide, her psychiatric treatment by Dr. Hauser necessarily ceased at that time. The court of appeals agreed. Id. at 8.

3) Application of Both Rules

The Supreme Court has ruled that a plaintiff is not free to select the best date in deciding what the statute of limitations is. In Husain v. Khatib, 964 S.W.2d 918 (Tex. 1998), a per curiam opinion, the Supreme Court held that, if there is an ascertainable date of negligence—even if there is a continuing course of treatment involving the injury or area of the body in question—then the statute of limitations begins to run from that ascertainable date.

Accordingly, in Voeglin v. Perryman, 977 S.W.2d 806 (Tex. App.—Fort Worth 1998, no pet.), the court of appeals held that the statute of limitations began to run the last day on which the physician had the opportunity to negligently fail to detect the patient’s breast cancer. Because the plaintiffs did not file suit until more than two years after the last day on which the doctor could have negligently failed to detect the cancer, their suit was untimely. Note that there was at least one other later date when the patient saw the defendant, but, since under the facts of the Voeglin case, he could not have been negligent on that later date, the statute ran from the last date of possible negligent conduct.

Further, multiple claims against a single defendant may reveal that some are based on an alleged tort of a date certain, while others allegedly occurred over time. For example, in King v. Sullivan, 961 S.W.2d 287 (Tex. App.—Houston [1st Dist.] 1997, writ denied), the plaintiff brought a medical malpractice claim against her physician for misdiagnosing her with HIV on two occasions and breaching doctor/patient confidentiality when he disclosed the results to family members without specific authorization from the plaintiff. The trial court granted summary judgment for the defendant on the grounds that the statute of limitations began on the ascertainable date of the plaintiff’s initial test results. The defendant alleged that the subsequent misdiagnosis and unauthorized disclosure did not affect the statute of limitations. The court of appeals, however, held that the plaintiff alleged and presented evidence of different torts occurring on different dates and that the statute of limitations began to run at different times with regard to the different torts. Thus, while partial summary judgment barring suit for the plaintiff’s initial misdiagnosis was proper, complete summary judgment was not and the court remanded the case to the trial court for further proceedings.

Streich v Lopez, 2004 WL 1902116 (Tex. App.—Corpus Christi 2004, no pet.) (mem. op.) reminds us that if there is an ascertainable date of tort, then the continuing treatment rule will not extend the statute of limitations. In this case, the plaintiff had a catheter inserted on November 3, 1999. Any injury, on the facts of this case, occurred on that date. On March 2, 2000, the plaintiff discovered that the catheter had caused an injury. This was
approximately four months after the defendant performed the procedure. Thus, as the opinion states, the plaintiff “had approximately twenty months after discovering his injury to file suit and still fall within the two-year limitations period.” Streich, 2004 WL 1902116, at *3. The case re-emphasizes two well-established principles:

1. the discovery rule will “toll” limitations only when discovery occurs outside of the limitations period (or so close to its expiration as to make filing of suit practicably impossible within limitations); and

2. the continuing course of treatment doctrine will extend the statute only in cases where no ascertainable date of tort exists.

Because the plaintiff did not file within limitations, despite discovery well within the two years, no extension of the statute was merited in his case.

2. The Open Courts Exception to the Statute of Limitations Since 1977

a. Exceptions to the Absolute Two Year Rule

By enacting § 10.01, with the now well-elaborated “notwithstanding any other law” clause, the Legislature attempted to completely abolish all exceptions to a strict two-year statute of limitations (with the limited exception for minors contained in § 10.01). Yet by 1983, the Texas Supreme Court had begun to recognize constitutionally-based exceptions to an absolute two-year rule.

Conceptually, it is important to distinguish between “exceptions” to a strict two-year statute of limitations that are contained within § 10.01, which fall primarily into the “tolling” category and “exceptions” later engrafted by the courts—most of which are constitutionally-based.

We will first address the constitutionally-based exceptions to the strict two-year statute. They are: the so-called “New Discovery Rule,” minority, and mental incompetence.

b. New Discovery Rule

1) What is a “Reasonable Time” for Filing?

The evolution of the statute of limitations in medical malpractice cases is instructive. At common law, the general statute of limitation applicable to all tort cases applied to medical malpractice cases. Article 5526 provided for a two-year statute of limitations from the date of accrual of the cause of action. In malpractice cases, “accrual” was deemed to occur when “the incision was closed,” regardless of the discoverability of the injury.

The Supreme Court recognized the injustice of such a rule in cases of undiscoverable injury in Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (“Accordingly, we hold that the cause of action, for the negligent leaving of a foreign object in a patient’s body by a physician accrues when the patient learns of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body.”)

Thereafter, in response to the then-perceived liability insurance crisis, the Legislature enacted Article 5.82, § 4, of the Texas Insurance Code. In a now eerily familiar recitation, Article 5.82 was described by the Texas Supreme Court as follows:

Article 5.82 was enacted to establish standards for setting liability insurance rates for physicians and other health care providers ... Specifically, the legislation’s proponents argued that the number and
amount of health care claims had increased to the point that it was indirectly affecting the availability and quality of health care. This effect was due to the higher costs of medical malpractice insurance and its unavailability. The general purpose of the statute, therefore, was to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability.


The new Legislative enactment, Article 5.82, provided as follows:

Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Tex Rev. Civ. Stat. Ann. art. 4437f (West)), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

Note the abolition of the prior “accrual” language, and a first attempt at the creation of an absolute two-year statute of limitation (with the exception of minority).

The first blow to Article 5.82 occurred in 1983, when it was held invalid as to minors. *See Sax*, 648 S.W.2d at 667.

As for the effect of Article 5.82 on claimants with injuries that were undiscoverable within the two-year period, we *See* the first application of the Texas open courts provision to the statute of limitations in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984).

In *Nelson*, the plaintiffs’ child suffered from a genetic disorder, Duchenne Muscular Dystrophy. The plaintiffs had sought pre-natal diagnosis during the pregnancy, to assure themselves that he, unlike his older brother, did not carry the lethal and agonizing disease. They alleged that defendant negligently misdiagnosed their child, in utero, as being free of Duchenne’s. They therefore went on to have this second child and a third son as well. Duchenne’s is not diagnosable until after age two, when a child begins to walk and demonstrates a clumsy and lordotic gait. Thus, “discovery,” or “discoverability” of the second child’s muscular dystrophy was not possible under these undisputed
summary judgment facts until well beyond the two-year absolute rule purportedly set forth in Article 5.82.

The limitation period of Article 5.82, § 4, if applied as written, would require the plaintiffs to do the impossible—to sue before they had any reason to know that they should sue. Observing that such a result is rightly described as “shocking” and is so absurd and so unjust that it ought not be possible, the Court concluded:

We hold that Article 5.82, Section 4 of the Insurance Code as applied in this case violates the open courts provision of Article I, Section 13 of the Texas Constitution. Therefore, the parents’ cause of action for “wrongful birth” is not barred by limitations.

_Nelson_, 678 S.W.2d at 923.

Thus, the re-appearance of the Discovery Rule despite legislative attempts to abolish it.

Subsequently, in 1977, the Texas Legislature enacted Article 4590i, § 10.01. Section 10.01 repeated the “notwithstanding any other law” language of § 5.82:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

_Tex. Rev. Civ. Stat. art. 4590i, § 10.01 (West 1977)._  

The constitutionality of Article 4590i, in cases of undiscoverable injury, was first tested in cases of undiscovered injury in a post-appendectomy retained-sponge case. The sponge was not detected until more than two years post-operatively. Summary judgment based on § 10.01 was granted. The Supreme Court, with very little discussion, reaffirmed the extensive analysis of _Nelson v. Krusen_, 678 S.W.2d 918 (Tex. 1984), which addressed Article 582 of the Texas Insurance Code and made it applicable to Article 4590i.

The open courts provision of our Constitution protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit.


Thus, since _Nelson v. Krusen_ and _Neagle v. Nelson_, Article 4590i has been modified by the “New Discovery Rule.”

It is critical to note, however, that from its inception, the new discovery rule was not unfettered. As early as 1985, the Court made clear that it was not granting a full two years of additional time after discovery to file suit and that any exception for constitutional purposes would be narrowly drawn.

In _Morrison v. Chan_, 699 S.W.2d 205 (Tex. 1985), the plaintiff discovered her injury (a radiation-caused burn and perforation causing urine to leak from her perforated bladder through her vagina) within six months of the alleged negligence that caused the burn and created the hole. She did not, however, bring suit until after the two-year limitation period had expired. She urged that § 10.01 allowed a choice between three dates from which limitations would run:

a) the occurrence or breach; or

b) the occurrence of the tort; or
c) the date of the completion of the health care made the basis of the claim.

She urged the application of option b), the occurrence of the tort, and further agreed that the tort did not accrue until the injury manifested (six months after last treatment). Thus she argued for a two-year long period from that date (i.e., the traditional discovery rule permitting a full two years from the date of discovery to filing).

The Court, in declining to reinstate the traditional discovery rule, engaged in important statutory construction.

In assessing Morrison’s argument that the statute of limitations begins to run when the “tort” accrues, it must be remembered that the 64th Legislature had before it the “accrued” language from Article 5526, and the judicial interpretations thereof, when it passed Article 5.82, Section 4, the predecessor to Article 4590i, Section 10.01. The term “accrual”, however, that appears in article 5526 was excluded from Article 5.82, Section 4, and was subsequently excluded from Article 4590i, Section 10.01. Every word excluded from a statute must be presumed to have been excluded for a reason. Thus, we must presume the Legislature did not intend the term “tort” to refer to the time a cause of action accrues.

Morrison would have us reinstate the discovery rule [providing a full two years after discovery before filing]. We hold that the Legislature’s intent in passing Article 4590i, Section 10.01, was to abolish the discovery rule.”

Morrison, 699 S.W.2d at 208.

Within months of Morrison, however, the Supreme Court made short work of invalidating § 10.01 in cases in which the statute purported to cut off a plaintiff’s access to the courts without a reasonable opportunity to discover an injury.

It is Neagle’s contention that Article 4590i Section 10.01, as applied to his cause of action, also violates the open courts provision. We agree. The open courts provision of our constitution protects a citizen, such as Neagle, from legislative acts that abridge this right to sue before he has a reasonable opportunity to discover the wrong and bring suit.


Following the enactment of Chapter 74 in 2003, the Supreme Court issued twin opinions elucidating the status of the discovery rule under that statute: Walters v. Cleveland Reg’l Med. Ctr., 307 S.W.3d 292 (Tex. 2010) and Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010). As will be discussed below, the Court reemphasized the discovery rule exception to the two-year statute of limitations in cases where the plaintiff raises a fact issue as to the undiscoverability of his/her injury, while affirming the constitutionality of a ten-year statute of repose in undiscoverable injury cases.

Thus, we See two important lines of analysis, which have since affected decades of statute of limitations analysis, beginning to take shape: First, the Legislature must
not unreasonably restrict a claimant’s right to bring a cause of action; and, second, a claimant must proceed with reasonable diligence to pursue such cause of action. The interplay has continued ever since and, with it, an enormous body of continually-evolving case law. See Appendix “A” for a partial listing of cases in this area.

1) Burden of Proof on Plaintiff

The Supreme Court’s ruling that § 10.01 violated the open courts provision of the Texas Constitution was based on the assumption that a plaintiff reasonably could not have known of his injury or potential malpractice claim during the limitations period in § 10.01. See Hellman v. Mateo, 772 S.W.2d 64 (Tex. 1989). It is the plaintiff’s burden to plead and prove the “new discovery rule” as in other tort actions. See Stotter v. Wingo, 794 S.W.2d 50 (Tex. App.—San Antonio 1990, no writ). If this fact is controverted by the defendant, the plaintiff has the burden of showing non-discoverability because the plaintiff is the party challenging the constitutionality of the statute. Neagle v. Nelson, 685 S.W.2d 11, 14 (Tex. 1985).

This approach—placement of the burden of proof on the plaintiff—is consistent with the holdings under the traditional “discovery rule” application in malpractice cases before the enactment of Article 4590i, § 10.01, and Article 5.82, § 4 of the Texas Insurance Code. See Weaver v. Witt, 561 S.W.2d 792 (Tex. 1977); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

2) The Discovery Rule and Its Application to Discovery of the Injury Immediately Prior to the Running of Limitations

A troublesome question concerning what constitutes a “reasonable” amount of time sufficient to permit the plaintiff to file suit arises when the plaintiff discovers the injury immediately prior to the running of limitations. Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ); Maddux v. Halipoto, 742 S.W.2d 59 (Tex. App.—Houston [14th Dist.] 1987, no writ).

This issue is particularly significant for a plaintiff with only a short period of time between discovery of an injury and the running of limitations. Because a plaintiff must discover or suspect the injury, consult an attorney, have an expert evaluate the claim, and give notice and/or file suit to prevent limitations from running, it is suggested that there must be a point where the time between discovery and limitations is unreasonably short. See Statute Note, Questions Surrounding the Texas Medical Malpractice Statute of Limitations, 38 BAYLOR L. REV. 751, 760 (1986).

When the plaintiff discovered that she had cancer with four months remaining on the statute of limitations, she was required to file suit during that four months even though the defendant did not send her the records within that time and, in order for her to discover that there had been negligence in reading an earlier mammogram, expert review would be required. The Austin court of appeals stated that, upon discovery of her cancer, the plaintiff “had discovered her alleged wrong and had four months to file suit before the statute ran.” O’Reilly v. Wiseman, 107 S.W.3d 699, 708 (Tex. App.—Austin 2003, pet. denied). While acknowledging that “the application of this absolute limitations to Mrs. O’Reilly under these circumstances [was] exceedingly harsh,” the court of appeals went on to hold that her claim was time barred, even though: (1) as a practical matter, it would have been impossible for her to know the content of the mammogram before it was revealed to her; (2) as a practical matter, she would have had to file a baseless lawsuit in alleging negligence in the reading of a mammogram she had never been permitted to see, much less have an expert review, and (3) even though she had discovered that she had cancer, but in no way could demonstrate that it had existed at the time of the earlier mammogram. Id.
This issue is currently left to arguments involving principles of common law and equity to render a fair result when the plaintiff claims an unreasonable period for filing suit between discovery and the limitations date. See generally Terry L. Jacobson & Kevin L. Wentz, A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise, 23 TEX. TECH. L. REV. 769 (1992) (emphasizing the problems with the statute of limitations in medical malpractice cases.) See the attached chart, Appendix “A,” for some of the plethora of cases on this issue.

3) Two Step Analysis

Once the plaintiff establishes that it was impossible or exceedingly difficult for the plaintiff to discover his or her injury during the two-year period, a court moves to the second step of analysis: whether the plaintiff filed within a reasonable time of discovery. Davila v. Vanover, 2003 WL 22187161 (Tex. App. —San Antonio 2003, no pet.) (mem. op.).

4) The Statute Can Run Before the Damages Occur

A plaintiff may be required to file her suit before her injury occurs. Jennings v. Burgess, 917 S.W.2d 790 (Tex. 1996). In Jennings, the plaintiff sued her primary care physician, claiming that he negligently referred her to another general practitioner for the treatment of a cancerous nasal lesion. The Supreme Court held that the two-year statute of limitations began to run on the date of the referral and, since the plaintiff had a reasonable opportunity to discover the alleged wrong, which the Supreme Court characterized as the negligent referral to a non-specialist, and bring suit, the open courts provision did not prevent the statute of limitations from applying. Note, however that neither damages nor causation could have been proved in a suit filed within the two-year statute of limitations period. This is not a medical malpractice phenomenon-only aberration. The same rule that a plaintiff is required to file suit before the injury has occurred applies in accounting malpractice cases as well. Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1997).

5) Application of The Open Courts Doctrine To The Discovery Rule

When Plaintiff Dies During Pendency Of The Litigation

At common law, no personal injury cause of action survives to a deceased tort victim’s heirs, and the heirs have no claim for their own losses resulting from the tortious act. Diaz v. Westphal, 941 S.W.2d 96, 100 (Tex. 1997). For years, no Texas court had examined, however, whether a cognizable common-law cause of action to which the discovery rule applied was still protected by the open courts provision when the plaintiff died during the pendency of the litigation. There is authority for the proposition that the open courts provision does apply and these claims are not barred by limitations. Martin v. Catterson, 981 S.W.2d 222 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

In Martin, the plaintiff brought a cause of action against the defendants nine months after discovery of the cancer and four months after tests performed revealed that the cancer probably existed while defendants were treating the plaintiff. The trial court granted summary judgment for the defendants on the grounds that the common-law causes of action were transformed by the death of the decedent to statutory causes of action and, thus, were time-barred because the open courts provision does not apply to statutory claims.

On appeal, the Houston court of appeals held that the plaintiff’s claim was not time-barred and that transformation of the common-law claims to statutory claims because of the plaintiff’s death “does not suddenly end their protection under the open courts doctrine.” Id. at 226. The court of appeals reasoned that the claims were not
statutory when filed or at any time before the plaintiff’s death, and thus, were not barred by limitations. Such an argument, the court held, “would reward negligent doctors for the deaths of their patients. For no good reason, such a rule would make it cheaper in some cases (like this one) to kill a patient than to maim him. Further, it would encourage defendants to prolong litigation in the hope that a plaintiff’s claim would die with him.” *Id.* at 225–26. Thus, the court reversed the trial court’s grant of summary judgment and remanded the case.

In *Batten v. Hunt*, 18 S.W.3d 235 (Tex. App.—Austin 1999, pet. denied), the plaintiffs attempted to rely on the discovery rule to save their cause of action from being time-barred by the statute of limitations. In this “delay in diagnosis of cancer” case, the patient sought treatment for a colon tumor in 1989. The tumor was removed by the defendant in May 1989. The patient continued to see his primary care physician between 1989 and late 1997 when he was finally diagnosed with colon cancer. However, the patient never saw the physician who had removed the tumor in May 1989 after that time. The plaintiffs brought suit in 1998, claiming that the defendant-physician negligently failed to advise the patient of the need for follow-up tests for polyps and tumors. The plaintiffs also sued the patient’s primary care physician for failing to recommend follow-up colonoscopies and other similar diagnostic tests, based on the patient’s subsequent symptoms.

The issues before the Austin Court of Appeals were: 1) did the discovery rule apply to save the plaintiffs’ claims, and 2) if the discovery rule did apply to save the claims, were the derivative statutory survival and wrongful death claims saved? Taking the issues out of order, the appellate court addressed the statutory nature of the survival and wrongful death claims first. The defendants argued that the Texas open courts provision did not apply to save the plaintiffs’ claims because, with the death of the decedent, the claims had transformed from common-law negligence claims to statutory wrongful death and survival claims and were, therefore, not entitled to constitutional protection. The court of appeals did not agree.

The *Batten* court distinguished the underlying case from *Diaz v. Westphal*, 941 S.W.2d 96 (Tex. 1997) and *Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995), in which the Supreme Court held that the open courts provision did not protect statute-based survival and wrongful death claims. In those cases, the claims were initiated by the survivors and, therefore, originated as statutory claims. In this case, however, the decedent filed suit for medical negligence before his death and, as such, the claim was a recognized common-law cause of action. Simply because the patient died during the pendency of the lawsuit, the court opined, did not suddenly transform the common-law claims into statutory claims, thus ending their protection under the open courts doctrine. “Though the claims are now statutory, they were not statutory when the negligence occurred, when the suit was filed, or at any time before [the patient] died.” *Id.* at 238 (citing *Martin v. Catterson*, 981 S.W.2d 222, 225 (Tex. App.—Houston [1st Dist.] 1998)).

The *Batten* court’s analysis, while helpful in distinguishing between the two types of cases, was essentially moot because the court of appeals found that the open courts provision did not apply to save this claim. The basis for the plaintiffs’ claim was that the defendant who had removed the tumor in 1989 negligently failed to advise the patient of the need for follow-up tests for polyps and tumors. This allegation was not sufficient to invoke the application of the discovery rule because the plaintiffs also pleaded that, between 1989 and 1997, the patient “had signs and symptoms to indicate the possibility of colon cancer while under the care and treatment of [his primary care physician], including severe fatigability, episodes of weight loss, severe diarrhea, and blood in his stools.” *Id.* at 239. The plaintiffs pleaded themselves out of the
discovery rule, which provides that the statute of limitations does not “cut off an injured person’s right to sue before the person has a reasonable opportunity to discover the wrong and bring suit.” Id. at 238 (citing Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)). Based on these facts, the court of appeals held that, even if it were unreasonable to require the patient to know in May 1989 that he had colon cancer or that he should continue follow-up treatment for colon cancer, the patient’s continuing symptoms certainly should have provided enough incentive for the patient to seek further diagnostic tests between 1989 and 1997. The court stated, “once [the patient] reasonably should have felt the need to be examined, any failure by [the physician] to tell him to get examined became a non-factor [in the patient’s] course of treatment.” Id. at 239.

In Kallam v. Boyd, 232 S.W.3d 774 (Tex. 2007), the Supreme Court declined in a per curiam opinion to address key related issues. In Boyd, the plaintiff died during the pendency of her case. She had asserted discovery rule exceptions to the statute of limitations, but the defense contended that her death, which by necessity converted her common-law injury claim to a statutory wrongful death/survival claim, retroactively vitiated the application of the open courts discovery rule exception to the statute of limitations. Boyd, 232 S.W.3d at 776.

6) The Impact of Chapter 74.251 on the New Discovery Rule

Indisputably, the 2003 Legislature attempted, now for the third time, to impose an absolute time limit on the filing of health care liability claims in Texas. The first attempt, Chapter 5.82 of the Insurance Code, enacted in 1975, was held to be invalid in cases of undiscoverable injuries under the open courts provision of the Texas Constitution. See Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984). The second attempt, § 10.01 of Article 4590i, enacted in 1977, was held to be invalid in such cases as well. See Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985). Section 74.251 of the Civil Practice & Remedies Code enacted in 2003 represents the third such attempt. Therein, the Legislature attempted to address the constitutional issues raised in Nelson, Neagle, Sax and a host of other cases by the addition of the following language:

a. notwithstanding any other law and subject to subsection (b) ...

b. a claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

The issue for Texas litigants and courts is whether a statute of repose enjoys different statutory weight and presumptions of validity than does a statute of limitations. The Texas Supreme Court has told us that a statute of repose does, in fact, enjoy greater constitutional deference from courts than does a statute of limitations. In companion cases, the Supreme Court held, on the one hand, that the reiteration by the Legislature of the absolute two-year statute of limitations was nonsensical if there were no exceptions to that absolute statute of limitations in view of the simultaneous enactment of a ten-year statute of repose. In other words, what is the purpose of a ten-year statute of repose if, in fact, the “absolute” two-year statute of limitations is truly “absolute?” Thus, in Walters v. Cleveland Reg’l Med. Ctr., 307 S.W.3d 292 (Tex. 2010), the Court followed established precedent and allowed the claimant greater than two years to file suit after the negligent failure to remove a surgical sponge from her abdomen. It held that “[t]reating the two-year limitations period as absolute in all circumstances would render the new statute...
of repose meaningless.” Walters, 307 S.W.3d at 298. However, simultaneously, in Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010), the Court affirmed the legislative authority to enact an absolute ten-year statute of repose, even though such statute would unfairly preclude the plaintiff from bringing suit for her undiscovered foreign object. Despite the fact that the plaintiff in Rankin discovered the existence of the sponge more than ten years from the time after it was left inside of her and that the Court acknowledged that she could not have discovered it sooner, the Rankin Court upheld the Legislature’s authority to put some limit on the time for filing suit in discovery of retained foreign body cases.

It is important to note that, in Rankin and Walters, the Court limits both holdings to retained foreign body cases. It does not tell us what the effect of the statute of repose would be on minors, cases involving fraudulent concealment, or cases involving mental incompetents. See infra discussion at Sec. E, 2, p. 63ff.

(i) Minors

(a) Generally

Article 4590i, § 10.01, tolls limitations with respect to medical malpractice claims of minors “provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim.” TEX. REV. CIV. STAT. ANN. art. 4590i (West Supp. 1992). Under the reasoning of Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995), the limitations provision found in § 10.01 is unconstitutional in injury cases involving minors. Chapter 74 reiterates the same statute of limitations and the Supreme Court to date (2012) has not considered whether the statute, by adding a ten-year “absolute” statute of repose preempts minor claims or not. The only Texas appellate court that has considered the statute in a case involving a minor has held that precedent is binding on it, as an intermediate court, and that the two-year statute of limitations is unconstitutional as written. Adams v. Gottwald, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied).

As of now, the same may not be said for the statute of repose, at least in some cases. In August 2014, the Texas Supreme Court upheld the application of the statute of repose to bar a minor’s claim, brought by a next friend, for lack of diligence. See discussion infra Part E.1A at 65; Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014).

Too, the Supreme Court has reached a different result when the issue involved a minor bringing a wrongful death claim for the death of a parent due to medical negligence and there are multiple nuances involving the interplay of the statute of limitations with various other causes of action. A chart, Appendix “B,” is appended to help in this complex area.

(b) In Injury-to-the-Minor Cases

The Supreme Court addressed the issue of whether the Article 4590i statute of limitations is unconstitutional as applied to minors in Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995) and held that § 10.01 of the Medical Liability Act is indeed unconstitutional. In reaching this decision, the Court first reviewed the history of the medical malpractice statute of limitations, including a synopsis of Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983). The Court held that § 10.01, like its predecessor Article 5.82, is unconstitutional as it applies to minors because it purports to cut off a minor’s cause of action before he or she reaches the age of majority. In Sax, § 4 of Article 5.82 provided that minors under the age of six would have until their eighth birthday in which to file suit. The Sax Court held this to be unconstitutional as it purported to cut off minors’ access to the courts before the disability of minority could be removed. Thereafter, Article 4590i was enacted, which provided that minors under the age of twelve would have until their fourteenth birthday in which to file suit. The Supreme Court found the requirement
that a child bring suit by age eight or by age fourteen unconstitutional because, in either instance, a minor child is legally disabled from pursuing a suit on his or her own. \textit{Id.} at 318. It is important to note that the holding in Weiner is applicable only to cases involving minors who have been injured by medical malpractice.

The Austin court of appeals has gone even further to clarify the issue of determining the proper method for computing the two-year limitations period as it applies to a minor’s health care claims. In \textit{Medina v. Lopez-Roman}, 49 S.W.3d 393 (Tex. App.—Austin 2000, pet. denied), a former patient brought health care liability claims against the physicians who treated him while he was a minor. Medina filed suit on his twentieth birthday. The trial court granted summary judgment on limitations grounds. In reversing the trial court’s judgment, the appellate court computed limitations by starting on the calendar date that a minor obtains majority and then using the same date two years later to determine when the limitation period expires. Thus, under Article 4590(i), a minor has until his twentieth birthday to file suit. \textit{Id.} at 399. Under Chapter 74, we know that the two-year statute of limitations as to minors is unconstitutional. \textit{Adams v. Gottwald}, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied). The Supreme Court has denied the petition in Adams.

(c) In Injury-to-a-Parent Cases

In a minor’s claim for loss of parental consortium, the running of the statute of limitations on the parent’s claim is a valid defense against a minor’s claim for loss of parental consortium. \textit{Nash v. Selinko}, 14 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 1999, pet denied). In \textit{Nash}, the children filed suit against various defendants for their alleged role in injuring their father. The children filed suit well after the two-year statute of limitations had run on the father’s personal injury claim, but before they turned 18-years old. The defendants moved for summary judgment, asserting that the loss of consortium claim was barred by the two-year statute of limitations on the father’s medical malpractice claim because loss of parental consortium is derivative of the parent’s cause of action. \textit{Id.} at 316. Any defense that would bar all or part of the injured parent’s recovery would have the same effect on the child’s recovery. \textit{Id.} at 317 (citing \textit{Regan v. Vaughn}, 804 S.W.2d 463 (Tex. 1990)). Therefore, because the statute of limitations barred the father’s right to bring his medical negligence claim, the children could not bring their own loss of consortium claim. \textit{Id.}

Without conducting any analysis of its own, the appellate court simply declined to extend the Weiner holding to save the minors’ claim for loss of consortium.

(d) In Death-of-a-Parent Cases

After the Supreme Court’s pronouncement in Weiner, the Fort Worth court of appeals held that the statute of limitations found in 4590i was not unconstitutional as it applies to minors. \textit{Povolish v. Bethania Reg’l Health Care Ctr.}, 905 S.W.2d 66 (Tex. App.—Fort Worth 1995, no writ). In \textit{Povolish}, the plaintiffs were the son and daughter of the decedent. The daughter was seventeen and the son was sixteen at the time of their mother’s death. Their mother died on February 4, 1991, and the plaintiffs initiated their lawsuit on July 30, 1993, more than two years later. The defendants filed a motion for summary judgment, which the trial court granted. The plaintiffs appealed alleging that the statute of limitations found in Article 4590i as it applies to minors violated the due process clause of the Texas Constitution. The court disagreed with the plaintiffs, stating that the Legislature may limit the time period to bring suit as long as a reasonable amount of time is given to bring suit. \textit{Id.} at 67 (citing \textit{Alvarado v. Gonzales}, 552 S.W.2d 539, 542 (Tex. Civ. App.—Corpus Christi 1977, no writ)). Because the plaintiffs brought wrongful
death and survival causes of action, which are both statutorily created, there is no guaranteed constitutional right. If there is no constitutional right, then there only needs to be a rational relationship between the statute and the legislative purpose for the statute. *Id.* The court of appeals held that the rational relationship between the statute and its legislative purpose existed. Therefore, the statute of limitations as it applies to minors bringing wrongful death and survival causes of action do not violate the due process clause. *Id.*

The plaintiffs also alleged that the statute of limitations as it applied to minors violated the Equal Protection Clause. The court of appeals again did not agree. The plaintiffs were sixteen and seventeen at the time of their mother’s death and had both reached majority status when the statute ran. Therefore, the statute of limitations found in Article 4590i, § 10.01 did not entirely abrogate the plaintiffs’ suit; it just limited the time frame in which the plaintiffs could sue. *Id.* In support of this holding, the court cited Weiner as holding that § 10.01 is unconstitutional as it applies to common law causes of action. In reaching this result, the Fort Worth court of appeals made this plea:

We are unable to discern why there is such a narrow exception to the general provision that a minor child has until two years after their eighteenth birthday to bring suit. ... we urge the Supreme Court to revisit whether the provision of the MLIIA, as it applies to minor claimants, violates the Equal Protection Clause of the Texas Constitution.

*Id.* at 68.

Contrast this result, however, with that in *Bangert v. Baylor Coll. of Med.*, 881 S.W.2d 564 (Tex. App.—Houston [1st Dist.] 1994, writ denied), in which similar facts resulted in a different result. The deceased parent in Bangert died only days after the allegedly negligent medical care made the basis of the suit. Thereafter, well past the two-year mark, the decedent’s children brought suit against various defendants. Because the parent’s cause of action against those defendants was not time-barred at the time of her death, the minor children were not barred from filing suit. A similar result was reached in *Richardson v. Monts*, 81 S.W.3d 889 (Tex. App.—Austin 2002, pet. denied).

(e) In Death-of-the-Child Cases

In *Gross v. Kahane*, 3 S.W.3d 518 (Tex. 1999), the parents of a minor brought suit against a physician for failing to prescribe appropriate medication or monitor their daughter while she was taking the drug Tegretol.

The plaintiffs filed their suit two years from the date of their daughter’s death and more than two years and 75 days from the last day of treatment. The plaintiffs alleged that the physician’s treatment of their daughter ended with the death of their daughter.

The Supreme Court held that the statute of limitations had run as to the wrongful death claim, but was tolled as to the survival claim. The statute of limitations on a wrongful death claim is not tolled because the decedent is a minor. *Id.* at 521. See also *Baptist Mem’l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex. 1996). As to the survival claim, however, the statute of limitations had not run. The survival cause of action is the same cause of action that the minor had the day she died. *Id.* at 122. (citing Tex. Civ. Prac. & Rem. Code § 71.021; *Brown v. Shwarts*, 968 S.W.2d 331, 334 (Tex. 1998); *Russell v. Ingersoll-Rand Comp.*, 841 S.W.2d 343, 345 (Tex. 1992)). Because the child was a minor at the time of her death, the statute of limitations was tolled for her claim until her death. Because the parents filed the survival action within two years and 75 days of their daughter’s death, the survival of the estate claim was not barred. *Id.*
(f) Limitations May Begin in Utero

The limitations period in a medical malpractice action may begin to run before birth if treatment began in utero. *Brown v. Shwartz*, 968 S.W.2d 331, 334 (Tex. 1998). In *Brown*, the plaintiff went to a local emergency room with several complaints, was treated by a physician, and told to return if she got worse. Four days later, the plaintiff returned to the ER and another doctor discovered that her membranes had ruptured and that she had been leaking amniotic fluid for several days, including during her previous visit to the ER. She delivered prematurely and her child died the following day. Two years and 76 days after she was treated for the first time in the ER, the plaintiff sued the physician who saw her on that visit for wrongful death and survival causes of action.

The Court held that the parents had two years from the date that the ER doctor treated their child (by treating the mother) to give notice of their wrongful-death claim, which they did. In other words, because treatment occurred while the child was in utero, the limitations period started to run before the child’s birth. The parent’s notice tolled the limitations period for 75 days but, because the parents waited one day too long to file suit, the wrongful death claim was barred by the limitations period. *Id.* at 334.

Like the wrongful death claim, the survival cause of action began to run on the day that the physician treated the child. Nonetheless, the Court acknowledged that § 10.01 tolls the limitations period, giving minors under twelve until their fourteenth birthday to sue. The statute thus tolled the limitations period until the child’s death, when he was no longer a minor under twelve to whom the statute would apply. Thus, the parents’ survival cause of action was tolled for 75 days from the date of notice and was therefore timely filed. Thus, the Court reversed and remanded as to the survival cause of action.

(g) Minority Tolling and Corporate Dissolution


In an instance in which Texas Business Corporations Act, Art. 7.12 applies, the statute of limitations in Chapter 74 is superseded. In *Gomez*, the plaintiff’s minor son had a claim against Pasadena Healthcare Management, Inc. That entity dissolved. At the expiration of three years from corporate dissolution, under Texas Business Corporation Act, Art. 7.12, claims against the entity are extinguished. Even though the minor child had a far longer statute of limitations under Chapter 74, his claims were barred under Art. 7.12. *Gomez v. Pasadena Healthcare Mgmt., Inc.*, 246 S.W.3d 306 (Tex. App—Houston [14th Dist.] 2008, no pet.).

(h) Minority Tolling and The Texas Tort Claims Act


(i) At Common Law

In *Tinkle v. Henderson*, 730 S.W.2d 163 (Tex. App.—Tyler 1987, writ ref’d), the Tyler court of appeals held that the absolute two-year limitation of Article 5.82, § 4, was violative of the open courts provision of the Texas Constitution in a case in which it operated to bar a cause of action brought by one who has been mentally incompetent from the time of injury until suit was filed. The Corpus Christi court of appeals
followed the *Tinkle* decision in *Felan v. Ramos*, 857 S.W.2d 113 (Tex. App.— Corpus Christi 1993, writ denied). However, the Eastland court of appeals held that the tolling provisions for a “person of unsound mind” under Article 5535 are not applicable to Article 4590i, § 10.01. *Desemo v. Gafford*, 692 S.W.2d 571 (Tex. App.—Eastland 1985, writ ref’d n.r.e.).

(ii) Under Article 4590i

Persons who are mentally incompetent were given special consideration under the unconstitutionality argument. In *Felan v. Ramos*, 857 S.W.2d 113 (Tex. App.—Corpus Christi 1993, writ denined), the plaintiff alleged that the surgery performed on his wife by the defendant left her mentally incompetent. The surgery was performed on June 6, 1988. On March 13, 1991, the plaintiff brought suit against the defendant as next friend of his wife. The plaintiff’s wife died on July 26, 1991, never having regained consciousness or mental competency. On October 17, 1991, the plaintiff amended his suit to allege survival and wrongful death causes of action and the trial court granted summary judgment for the defendant. The Corpus Christi court of appeals, in reversing the trial court, relied on the rationale of *Tinkle v. Henderson*, 730 S.W.2d 163 (Tex. App.—Tyler 1987, writ ref’d), which stated that mentally incompetent persons present an even more compelling case than minors for their legal protection because “frequently, they are less communicative and more vulnerable than children.” *Id.* at 117 (citing *Tinkle*, 730 S.W.2d at 166).

In an odd opinion, the Supreme Court conflated mental disability claims with discovery/discoverability claims, holding that a plaintiff who proves continuous mental disability through competent summary judgment evidence still does not benefit from the tolling provision as a result of that mental incompetence unless she can also show some reason why a defendant was not named with the two-year statute: “On this record, there is no fact issue establishing that Yancy…did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations, or that she sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save Yates’s time-barred negligence claims.” *Yancy v. United Surgical Partners*, 236 S.W.3d 778, 785 (Tex. 2007).

(iii) Under Chapter 74

We have no holding as to the effect of Chapter 74 on the claims of mental incompetents as of the date of this writing (2012). We know that the statute of limitations is unconstitutional as to minors as a result of *Adams v. Gottwald*, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied). We also know that the statute of limitations is unconstitutional as it relates to undiscoverable injuries, *see Walters v. Cleveland Reg’l Med. Ctr.*, 307 S.W.3d 292 (Tex. 2010), but that the statute of repose is constitutional as to undiscoverable injuries. *Methodist Healthcare Sys. v. Rankin*, 307 S.W.3d 283 (Tex. 2010). It seems likely that mental incompetents will be treated similarly to claimants with undiscoverable
injuries, but the Supreme Court in both Walters and Rankin went out of its way to describe retained sponge cases as sui generis when it carved out its this constitutional exception to the two-year statute of limitations. It remains unclear what direction the Court will go as to either the statute of limitations or the statute of repose with regard to mental incompetents under Chapter 74.

However, it seems possible that mental incompetents could receive the same treatment as minors under the statute of repose. Citing Yancy for the proposition that “a guardian’s lack of diligence may operate to bar a legally incompetent person’s open courts challenge,” the Supreme Court in Tenet Hosps. Ltd. v. Rivera held that the statute of repose does not violate the open courts provision as applied to the next friend of a minor, who failed to exercise due diligence when she sent the hospital notice of the minor’s claim, but waited over six-and-a-half years to bring suit. See discussion infra Part E.1A at p. 65. Amid its reasoning, the court noted, “[t]he law, our precedent, and our rules of procedure all treat minors and legally incompetent persons alike as lacking the legal capacity to sue, such that they must appear in court through a legal guardian, a next friend, or a guardian ad litem.” Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d at 705 (citations omitted). Derivative Claims

Nonetheless, while the Article 4590i statute of limitations was deemed unconstitutional under the Texas open courts provision when applied to an incompetent, it was not unconstitutional when it as applied to the derivative claim of the spouse of the mentally incompetent patient. The rationale is that the spouse is considered to be of sound mind at all times. Therefore, he or she does not fall within the mentally incompetent exception. Palla v. McDonald, 877 S.W.2d 472 (Tex. App.— Houston [1st Dist.] 1994, no writ). Although the decedent’s mental incompetence would have tolled the statute of limitations for the decedent had he filed suit prior to his death, it did not operate to toll the statute for his survivors since their claims—wrongful death and survival claims—were both statutory in nature and, thus, not protected by the open courts provision of the Texas Constitution. Romero v. Inst. for Rehab. and Research, 2004 WL 1441049 (Tex. App.— Houston [14th Dist.] 2004, no pet.) (mem. op.).

(iv) The Disability Must Be Continuous

Note, however, that the disability of mental incompetence must be continuous from the date of malpractice forward. Any interruption in the incompetence, or any period of lucidity, ends the tolling of the statute of limitations. West v. Moore, 116 S.W.3d 101 (Tex. App.— Houston [14th Dist.] 2002, no pet.).

(v) Under the Texas Tort Claims Act

In Dinh v. Harris Cnty. Hosp. Dist., 896 S.W.2d 248 (Tex. App.— Houston [1st Dist.] 1995, writ dism’d), the Houston court of appeals held that the notice provision of the Texas Tort Claims Act does not violate the open courts provision. The Texas Tort Claims Act was a legislatively-created right of recovery and, therefore, does not fall within the realm of protection of the open courts provision because the open courts provision only applies to common law causes of action. Dinh, 896 S.W.2d at 250. At common law, a litigant had no right of recovery whatsoever against any government body. In enacting the Texas Tort Claims Act, the Legislature, in essence, gave a litigant more rights than he or she had before. Therefore, “any legislative restriction found in the Act itself was not a true abrogation of a constitutional right.” Id. at 252. (citing Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355 (Tex. 1990)). Rather, the Legislature simply did not grant as extensive a right as it might have. Moreno, 787 S.W.2d at 355.

The court of appeals in Putthoff v. Ancrum, 934 S.W.2d 164 (Tex. App.— Fort
Worth 1996, writ denied) reached a similar result as did the Dinh court, but with a different analysis. In Putthoff, the plaintiffs, who were the parents of a possible homicide victim, sued the county and medical examiners under the Texas Tort Claims Act, alleging that the autopsy performed on their daughter had been done negligently. However, the facts supporting a claim for negligence were not discovered for more than a year after the daughter’s death. The court of appeals held that, following the plain language of the statute, the discovery rule does not apply to claims made under the Texas Tort Claims Act. *Putthoff*, 934 S.W.2d at 174.

The holding of this case is stringent and emphasizes that, when filing a claim under the Texas Tort Claims Act, strict adherence to its procedural provisions is critical. While Putthoff is not a statute of limitations case per se, its holding has the effect of essentially shortening the statute of limitations in a Texas Tort Claims Act to six months.

(vi) Tolling of Mental Incompetence in Wrongful Death Cases

The mental incompetence of a decedent does not toll the statute of limitations for representatives of the decedent’s estate. Although the decedent’s mental incompetence would have tolled the statute of limitations for the decedent had he filed suit prior to his death, it did not operate to toll the statute for his survivors since their wrongful death and survival claims were statutory in nature and, thus, not protected by the open courts provision of the Texas Constitution. *Romero v. Institute for Rehab. & Research*, No. 14-03-01284-CV, 2004 WL 1441049 (Tex. App.—Houston [14th Dist.] June 29, 2004, no pet.) (mem. op.).

3. Tolling of the Statute of Limitations Since 1977

a. Fraudulent Concealment

1) Physician’s Duty

Fraudulent concealment is a subcategory of the doctrine of equitable estoppel. It prevents a defendant from availing himself of the protection of the affirmative defense of statute of limitations when the defendant actively conceals a cause of action from the plaintiff. In the medical negligence context, a physician has a duty to disclose a negligent act or injury when he or she has a physician-patient relationship with the potential claimant. This special relationship dictates that a physician must not conceal the true nature of the patient’s injuries. *Evans v. Conlee*, 741 S.W.2d 504 (Tex. App.—Corpus Christi 1987, no writ).


A plaintiff’s evidence of fraudulent concealment must show that the defendant had a “fixed purpose to conceal the alleged wrong” or the plaintiff will not be able to sustain a tolling argument based on fraudulent concealment. *Mills v. Pate*, 225 S.W.3d 277 (Tex. App.—El Paso 2006, no pet.).

2) Fraudulent Concealment Doctrine — *Borderlon v. Peck*

In *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983), the Supreme Court held that Article 4590i, § 10.01 does not abolish the common law concept of fraudulent concealment as an equitable basis for tolling limitations. The Court ruled that, where a physician or health care provider actively conceals the malpractice from a person for more than two years after the date of malpractice or the last treatment at issue,
the person may bring suit after he or she learns of facts, conditions or circumstances which would cause a reasonable person to inquire and discover the concealed conduct. The Court did not treat this fraudulent concealment exception as an application of the discovery rule, but rather as an estoppel of the defendant from claiming the protection of the statute of limitations. \textit{Borderlon}, 661 S.W.2d at 908. See also \textit{Warner v. Sunkavalli}, 795 S.W.2d 326, 328 (Tex. App.—Eastland 1990, no writ).

In a case out of the Texarkana court of appeals, the plaintiff prevailed on a claim of fraudulent concealment of a defendant’s identity, which prevented joinder until after the statute of limitations had expired. \textit{Dougherty v. Gifford}, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ). In this case, the defendant performed all of the pathology work for the hospital where the plaintiff was diagnosed. The defendant sent a report, which incorrectly diagnosed the plaintiff as having malignant cancer. The defendant’s name was on the pathology report, the defendant billed the plaintiff for its services and prepared an addendum to the report after the error was discovered. However, the defendant did not disclose to the plaintiff that the pathology work had been done by another physician until after the statute of limitations had expired. The court of appeals found sufficient evidence to support the jury’s finding of fraudulent concealment. \textit{Id.} at 673–74. The defendant knew of the other physician’s involvement and, since a physician-patient relationship existed between the defendant and plaintiff, the defendant had a duty to disclose. \textit{Id.} at 674–75. The Texarkana court of appeals held that silence in the face of a duty to disclose may be an act of concealment. \textit{Id.} at 675.

Where the plaintiff had actual knowledge of the injury years prior to filing, there was no fraudulent concealment. Furthermore, the duty to disclose ends when the physician-patient relationship ends. \textit{Thames v. Dennison}, 821 S.W.2d 380, 384 (Tex. App.—Austin 1991, writ denied).

The doctrine of fraudulent concealment has arisen in another context. In \textit{Cox v. Upjohn Co.}, 913 S.W.2d 225 (Tex. App.—Dallas 1995, no writ), the Dallas court of appeals addressed whether the doctrine of fraudulent concealment was, as a matter of law, an exception to the statute of limitations under § 16.003(b) of the Texas Civil Practice & Remedies Code. In adopting the reasoning of \textit{Borderlon}, the Cox court held that the doctrine of fraudulent concealment does apply to wrongful death cases. The court stated that Texas courts have long held that “fraud vitiates whatever it touches.” \textit{Id.} at 231 (citing \textit{Stonecipher v. Estate of Buttes}, 591 S.W.2d 806, 809 (Tex. 1979); \textit{Morris v. House}, 32 Tex. 492, 495 (1870)).

3) Burden of Proof on Plaintiff

The plaintiff has the burden of pleading and offering proof raising a fact issue of fraudulent concealment under \textit{Borderlon} when it is relied upon as an estoppel to the defense of limitations. See \textit{Warner v. Sunkavalli}, 795 S.W.2d 326, 328 (Tex. App.—Eastland 1990, no writ) (plaintiff successfully raised fact issue as to whether doctors knew of patient’s remaining gallstones and fraudulently concealed that knowledge from patient). See also \textit{Miller v. Providence Mem’l Hosp.}, 690 S.W.2d 335 (Tex. App.—Eastland 1985, writ ref’d n.r.e.).

In \textit{Marchal v. Webb}, 859 S.W.2d 408 (Tex. App.—Houston [1st Dist.] 1993 writ denied), the plaintiff, in an attempt to defend against a summary judgment based on the expiration of the statute of limitations, alleged that the defendants had fraudulently concealed the cause of her eye injuries. The defendants argued that the plaintiff had waived her cause of action for fraudulent concealment because she failed to present that cause of action in her response to the motion for summary judgment. \textit{Marchal}, 859 S.W.2d at 417 (citing \textit{Manges v. Astra Bar, Inc.}, 596 S.W.2d 605, 611 (Tex. Civ. App.—Corpus Christi 1980, writ denied)). Noting that Rule 166(a) requires
litigants to expressly present grounds and issues to the trial court in summary judgment, the court of appeals, citing *McConnell v. Southside Indep. School Dist.*, 858 S.W.2d 337 (Tex. 1993), held that “issues a nonmovant contends avoid the movant’s entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence.” *Id.* at 418.

Whether a plaintiff was aware of facts, conditions or circumstances that would cause a reasonably prudent person to inquire about the true nature of his condition and thereby discover the fraudulently-concealed malpractice is a fact question. *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983); *Evans v. Conlee*, 741 S.W.2d 504 (Tex. App.—Corpus Christi 1987, no writ). However, a claim by the plaintiff that a defendant-physician did not apprise her of her medical condition without more does not create a fact issue of fraudulent concealment. *Lopez v. Hink*, 757 S.W.2d 449, 451 (Tex. App.—Houston [14th Dist.] 1988, no pet.). Similarly, a plaintiff’s affidavit stating that the defendants’ negligent acts caused the death of his wife did not raise a fact issue as to the defendants’ actual knowledge that a wrong occurred or a fixed purpose to conceal a wrong. *Wilson v. Rudd*, 814 S.W.2d 818, 823 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Work v. Duval*, 809 S.W.2d 351, 354 (Tex. App.—Houston [14th Dist.] 1991, no writ). A fact issue on fraudulent concealment was found to exist where the plaintiff asserted that a defendant-surgeon engaged in active concealment about a breast deformity following breast reconstructive surgery for over four years following the operation and three years and eight months after the date of last treatment. *Evans v. Conlee*, 741 S.W.2d 504 (Tex. App.—Corpus Christi 1987, no writ). The *Evans* court concluded that a fact issue existed concerning the date upon which the plaintiff knew or reasonably should have known of facts that would have led to the discovery of the concealed facts about her breast condition. Despite conflicting affidavit and deposition testimony by the plaintiff on this issue, the court of appeals accepted her allegations as true for summary judgment purposes because it would be improper for the court of appeals to consider the credibility or the sufficiency of the plaintiff’s evidence. In so holding, the Evans court rejected the holding in *Stephens v. James*, 673 S.W.2d 299 (Tex. App.—Dallas 1984, writ ref’d n.r.e.) because “the court in that case improperly considered the factual sufficiency of the summary judgment evidence” wherein the plaintiff gave conflicting affidavit and deposition testimony as to the date of his discovery of purportedly-concealed facts and then proceeded to consider all contrary evidence, concluding that the plaintiff knew or should have known of the relevant facts before the date attested to in his affidavit. *Evans*, 741 S.W.2d at 508 (citing *Stephens*, 673 S.W.2d at 302–03). *See also Gatling v. Perna*, 788 S.W.2d 44 (Tex. App.—Dallas 1990, writ denied) for a similar fact issue, which was raised concerning fraudulent concealment as an exception to the statute of limitations.

In *Earle v. Ratliff*, the plaintiff brought suit against the defendant physician for various causes of action including negligence stemming from 1991 and 1993 back surgeries, for fraudulent concealment and for violation of the Deceptive Trade Practices Act. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999). The plaintiff underwent back surgery in 1991, at which time the defendant installed orthopedic hardware in the plaintiff’s spine. The plaintiff’s condition continued to deteriorate for two years, ultimately resulting in another surgery in 1993. Two months after this second surgery, the plaintiff saw a program on television that spotlighted and criticized the type of hardware that the defendant had installed in the plaintiff’s back. Two months later, the plaintiff filed suit.

The plaintiff contended in his petition that the physician was negligent in
misdiagnosing the need for the original surgery, in failing to disclose the attendant risks of surgery before surgery and in performing unwarranted surgery. The plaintiff did not complain about the postsurgical treatment that followed the 1991 surgery. Because of that, the Supreme Court held that the statute of limitations barred any claims pertaining to the 1991 surgery. *Earle*, 998 S.W.2d at 893.

The plaintiff also alleged that the defendant fraudulently concealed that the surgery was unnecessary and risky. *Id.* at 887. However, in attempting to defeat summary judgment, the plaintiff offered no evidence that 1) the defendant had actual knowledge of the fact that the surgery was unnecessary or risky, or 2) that the defendant had a fixed purpose to conceal the necessity and risk of the surgery from the plaintiff. *Id.* at 888. The Supreme Court stated that proof of fraudulent concealment requires more than that the physician’s conduct fell below the standard of care. It requires evidence that the defendant actually knew that the plaintiff had been injured and that the defendant concealed that fact to deceive the plaintiff. *Id.* In this case, there were no facts to support either one of the elements of fraudulent concealment. *Id.*

4) Time for Filing Suit After Discovery of Actively Concealed Malpractice

The Supreme Court decision in *Borderlon v. Peck*, 661 S.W.2d 907 (Tex. 1983) does not discuss the question on the specific length of time a person has to file suit after discovery of the actively concealed wrongdoing or malpractice. In Borderlon, the plaintiff was not only allowed to bring a malpractice suit more than two years from the date of surgery and the date of last treatment by the defendant, but some twenty-three (23) months and twenty-seven (27) days after the alleged date of “discovery.” The Court held that a fact issue existed concerning the “discovery date.” A two-year delay in filing after discovery, however, is unreasonable as a matter of law. *West v. Moore*, 116 S.W.3d 101 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The estoppel effect of a physician’s concealment ends when a patient learns of facts that would have caused a reasonably prudent person to make inquiry, which, if pursued, would have led to the discovery of the concealed cause of action. *Borth v. Kelleher*, 2002 WL 75767 (Tex. App.—Amarillo 2002, pet. denied) (mem op.).

(i) Minors

Minority provides both a judicially-created exception to the statute of limitations in 4590i and statutory tolling. The tolling provision provides that minors under the age of twelve shall have until their fourteenth birthday to bring suit. The constitutionality of this statute of limitations has been addressed supra at 14.

However, a new challenging problem now confronts practitioners: What is the impact of the ten-year statute of repose imposed by the 2003 Legislature? Questions that immediately arise are:

(1) The courts have been protective, and unequivocal, in protecting minors’ rights to access to the courts until they reach majority. Thus, the tolling of the two-year statute of limitations by 4590i’s age 12-14 clause has been moot since the Supreme Court held it unconstitutional in *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). Yet now the Legislature has shortened even the time previously held unconstitutional. How will the courts apply stare decisis to this situation?

(2) Section 74.251 is inconsistent on its face. It provides the now-familiar 12-14 tolling for minors, but also creates a ten-year statute of repose, which, in some cases will be shorter. Which controls?

(3) Will the courts give greater deference to a statute of repose than to the prior well-elaborated statute of limitations?
Simply put, will the minority-tolling section of Chapter 74 continue to be informed by prior judicial analysis of its identically-worded predecessor in Article 4590i and, thus, be held unconstitutional because it abridges minors’ access to the courts before they have the ability to file? Or will the new statute of repose be allowed to overrule this well-established analysis? See discussion at Section E.1., p.61ff.

Questions, some of which are answered in part by Tenet Hosps. Ltd. v. Rivera, but many of which are now even more confounding for the practitioner, as Rivera, for the first time in Texas jurisprudential history, imports the concept of diligence by the next friend into the minor statute of limitations analysis. See infra, Part E.1.A at p. 65.

(ii) Notice Period

(a) Generally

Article 4590i provided for a period of time in which the two-year limitations period was temporarily “toggled.” Section 4.01(c) provided that the mailing of the pre-suit notice of claim tolls the statute of limitations under § 10.01 from running for a period of 75 days following the giving of notice. The 75-day tolling period begins when the notice is mailed to the potential defendant-physician or health care provider. See McClung v. Komorn, 629 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.). If notice is given before the limitations period expires, the 75-day tolling provision of § 4.01(c) suspends the limitations period for those 75 days, after the expiration of which the plaintiff still has the number of days that remained when the notice was given to file suit. See Phillips v. Sharpstown Gen. Hosp., 664 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1983, no pet.).

It does not matter when during the limitations period notice is given. The Amarillo court of appeals held, in De Romo v. St. Mary of Plains Hosp. Found, 843 S.W.2d 72 (Tex. App.—Amarillo 1992, writ denied), that “the statute of limitations is tolled for 75 days no matter when during the two-year limitations period notice is given.” Id. at 74. The plaintiffs notified the hospital of their claim ten and a half months before the two-year limitations period would have expired. This notice tolled the statute of limitations for 75 days, effectively creating a two-year and 75-day statute of limitations. Id. at 75. Thus, although the “extra” 75 days provided in § 4.01(c) was not “needed” to allow the plaintiff to sue after the original two-year statute of limitations had run, since the 60-day notice period ran completely during the original two years, the plaintiff nonetheless was permitted to wait 75 days after the original two years to file suit.

(b) Notice Given After Limitations Has Run

A notice of claim given after the § 10.01 limitations period had run does not extend the period of limitations 75 days from the date of notice. See Kimball v. Brothers, 712 S.W.2d 538 (Tex. App.—Waco 1986), aff’d, 741 S.W.2d 370 (Tex. 1987).

(c) 60 Days vs. 75 Days: Waiting vs. Tolling

Section 4.01(a) provides that suit may be filed after 60 days from the giving of notice. Thus, a plaintiff must allow for this 60-day statutory waiting period and file suit within the 60-day/75-day tolling period “window.” The result of the interaction between the mandatory 60-day abatement and the 75-day tolling provision is that a claimant has an extra 15 days after the 60-day abatement period in which to file suit.

A plaintiff who timely gives notice but fails to file suit within the 75-day tolling period is subject to a statute of limitations defense if the statute ran during the 75-day period. See, e.g., Sanchez v. Mem’l Med. Ctr., 769 S.W.2d 656 (Tex. App.—Corpus Christi 1989, no writ); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ); Shook v. Herman, 759 S.W.2d 743 (Tex. App.—Dallas 1988, writ denied).
(d) Due Diligence Required

Filing suit did not toll limitations under § 10.01 nor does it do so under § 74.251 unless the plaintiff exercises due diligence in procuring the issuance and service of citation. *Sanchez v. Providence Mem’l Hosp.*, 679 S.W.2d 732 (Tex. App.—El Paso 1984, no writ). In Sanchez, the plaintiff timely sent pre-suit notice of claim letters and filed suit, but failed to secure service of citation until 32 months after filing suit. The El Paso court of appeals held that, under these circumstances, diligence was not exercised and the two-year limitations of § 10.01 continued to run even though notice was given and the petition was timely filed. Id. at 732 (citing *Rigo Mfg. Co. v. Thomas*, 458 S.W.2d 180 (Tex. 1970) and *Hamilton v. Goodson*, 578 S.W.2d 448 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)). The Sanchez court pointed out that other courts have held that even shorter times established a lack of diligence as a matter of law. See, e.g., *Rigo*, 458 S.W.2d at 182 (17½ months); *Hamilton*, 578 S.W.2d at 449 (6½ months); *Williams v. Houston Citizens Bank & Trust Co.*, 531 S.W.2d 434 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.) (7 2/3 months); *Buie v. Couch*, 126 S.W.2d 565 (Tex. Civ. App.—Waco 1939, writ ref’d) (8 1/3 months).

The same analysis applies under Chapter 74. In *Montes v. Villarreal*, 281 S.W.3d 552 (Tex. App.—El Paso 2008, pet. denied), the plaintiff waited four months beyond the statute of limitations (and four months and nine days after filing suit) to serve process because plaintiff’s counsel believed that issuing service would violate the sixty-day abatement period in § 74.052 and did not want to cause defendant to incur attorney's fees and costs until counsel had received an expert report that satisfied statutory requirements. The El Paso court of appeals held that: one, no abatement occurs when the notice is timely and properly sent with an authorization, so there was no reason to delay for a putative “abatement period;” and, two, a delay of four months and nine days in obtaining service was not diligent and, thus, the statute of limitations was not tolled for that length of time. A plaintiff’s tactical and cost-saving decision does not “negate the requirement that diligence be used in attempting service once the limitations period has passed.” *Montes v. Villarreal*, 281 S.W.3d 552, 557 (Tex. App.—El Paso 2008, pet. denied).

(e) Fraudulent Concealment

Under Chapter 74

We have no holding as to the effect of Chapter 74 on the claims of plaintiffs with allegedly fraudulently-concealed injuries as of the date of this writing (2012). We know that the statute of limitations is unconstitutional as to minors, *Adams v. Gottwald*, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied), and we know that the statute of limitations is unconstitutional as it relates to undiscoverable injuries, *Walters v. Cleveland Reg’l Med. Ctr.*, 307 S.W.3d 292 (Tex. 2010), but that the statute of repose is constitutional as to undiscoverable injuries, *Methodist Healthcare Sys. v. Rankin*, 307 S.W.3d 283 (Tex. 2010). It seems likely that plaintiffs with allegedly fraudulently-concealed injuries will be treated similarly to plaintiffs with undiscoverable injuries, but the Supreme Court in both Walters and Rankin went out of its way to describe retained sponge cases as sui generis when it carved out its constitutional exception to the two-year limitations period. It remains unclear what direction the Court will go as to either the statute of limitations or the statute of repose as to claimants with allegedly fraudulently-concealed claims under Chapter 74.

(f) Pre-suit Notice is Not Sufficient

Similarly, mailing the pre-suit notice of claim in a timely manner without timely filing the lawsuit will not toll limitations beyond two years and 75 days. *Desemo v. Gafford*, 692 S.W.2d 571 (Tex. App.—Eastland 1985, writ ref’d n.r.e.) (notice timely given, but suit filed some 104
days after the 2 year and 75 day period expired).

(g) Notice to One is Notice to All

Timely written pre-suit notice under Article 4590i to one health care provider tolled the statute of limitations for 75 days as to all other health care providers against whom the claim was ultimately asserted in a timely fashion. De Checa v. Diagnostic Ctr. Hosp., Inc., 852 S.W.2d 935 (Tex. 1993). The De Checa opinion was a response to a certified question from the Dallas court of appeals. Previously, there were two cases in conflict on the issue: Rhodes v. McCarron, 763 S.W.2d 518 (Tex. App.—Amarillo 1988, writ denied), which held that Article 4590i notice to one defendant tolls the statute as to “all potential parties” as the Supreme Court had held in De Checa, and Maddux v. Halipoto, 742 S.W.2d 59 (Tex. App.—Houston [14th Dist.] 1987, no writ), in which the Houston court of appeals held to the contrary. See also Yanez v. Milburn, 932 S.W.2d 725 (Tex. App.—Amarillo 1996, writ denied).

This rule applies under Chapter 74 as well. Rabatin v. Kidd, 281 S.W.3d 558 (Tex. App.—El Paso 2008, no pet.) (“We hold the notice letter sent with the medical authorization form on October 7, 2005 to [one of the defendants] was sufficient to toll the statute of limitations as to all the defendants through constructive notice while the December 29, 2005 letter and authorization form provided actual notice to all the defendants.”). Notice to one is still notice to all—even if the authorization sent with the notice letter is defective. Constructive notice to the other defendants operates to toll the statute of limitations as to all, noticed or not. Rabatin v. Chavez, 281 S.W.3d 567 (Tex. App.—El Paso 2008, no pet.); Rabatin v. Vazquez, 281 S.W.3d 563 (Tex. App.—El Paso 2008, no pet.); Rabatin v. Kidd, 281 S.W.3d 558 (Tex. App.—El Paso 2008, no pet.).

However, an invalid authorization does not provide tolling. A medical authorization signed by the daughter of an incapacitated nursing home patient was defective. The authorization, to be valid under Chapter 74, had to show that the daughter had authority to make medical decisions and waive confidentiality as to health care matters. Additionally, the authorization was defective in that it did not identify all the patient’s prior physicians for the same condition (decubitus ulcers). Accordingly, due to the defects, the authorization was not valid under Chapter 74, and did not result in the availability of the tolling provisions of the Ch 74 notice letter. Thus, the statute of limitations ran.

(h) Effect of Failure to Include Authorization with Notice Letter

A plaintiff’s failure to include the authorization form required by Chapter 74 when providing notice of claim to a health care provider within the statute of limitations period bars tolling of limitations. Carreras v. Marroquin, 339 S.W.3d 68 (Tex. 2011).

(i) Defenses Available to Employers Protect Employees

A non-health care defendant that hired a physician, who then allegedly negligently treated the plaintiff, was entitled to the same statute of limitations defenses to which the physician would be entitled. Since liability could be applied to the employer only because of the acts of the employee, the employer was entitled to the same defenses, including the strict two-year statute under Article 4590i. This is true even though the employer is a non-health care provider. Lab. Corp. of Am. v. Compton, 126 S.W.3d 196 (Tex. App.—San Antonio 2003, pet. denied).

(j) Plaintiff Must Plead and Prove Compliance

Once timely notice of suit is accomplished, it is also necessary for the plaintiff to plead and produce proof of the
tolling provisions of § 4.01 if a limitations defense is asserted by the defendant-physician or health care provider. *Hill v. Milani*, 686 S.W.2d 610 (Tex. 1985). In *Hill*, the Supreme Court affirmed a summary judgment for the defendant on a limitations defense where the plaintiff gave timely notice and filed suit under § 4.01, but plaintiff’s counsel failed to plead, offer any proof, or argue that the tolling provisions of § 4.01 controlled in response to the defendants’ assertion of a limitations defense before summary judgment was granted by the trial court.

(k) **Strict Compliance vs. Substantial Compliance**

In *Butler v. Taylor*, 981 S.W.2d 742 (Tex. App.—Houston [1st Dist.] 1998, no pet.), the Houston court of appeals had the opportunity to address whether a claimant had complied with the notice requirements of Article 4590i. Section 4.01(a) provided that a claimant must send notice by certified mail, return receipt requested. The plaintiff in *Butler* sent her notice of claim letter by Express Mail instead of certified mail two days before the statute of limitations ran. The defendant did not receive notice until the day after the statute of limitations ran. In moving for summary judgment, the defendant alleged that the statute ran because the plaintiff had not complied with the certified mail requirement and, therefore, was not entitled to the 75-day tolling period. If the plaintiff was not entitled to a 75-day tolling period, then she should have filed suit by the 60th day after sending her notice of claim letter. She did not do so and defendant moved for summary judgment.

While the requirement that a claimant give notice is mandatory, the requirement that the notice be sent certified mail is “merely directory and is meant to ‘promote the proper, orderly and prompt conduct of business.’” *Butler*, 981 S.W.2d at 743 (citing *Schepps v. Presbyterian Hosps. of Dallas*, 652 S.W.2d 934, 936 (Tex. 1983)).

(l) **A Previously Filed and Non-Suited Case Does Not Toll the Statute**

A plaintiff who voluntarily nonsuited and then re-filed his lawsuit did not have the advantage of tolling of the statute of limitations during the pendency of the previously-filed suit. The statute of limitations continues to run after a lawsuit is filed. *Cook v. Withers*, 2004 WL 768948 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (mem. op.).

4. **Interaction of Article 4590i and Chapter 74 With Other Statutes**

a. **Wrongful Death and Survival Actions**

The complexity in the area of the wrongful death and survival causes of action arises from the interplay of the two statutes with Article 4590i and Chapter 74. The Texas wrongful death statute provides that the cause of action for wrongful death “accrues” at the time of death. Tex. Civ. Prac. & Rem. Code Ann. §71.003. The malpractice statute, however, provides that:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1997).

b. **Wrongful Death**

1) **Article 4590i and Chapter 74 Apply**

After several years of conflicting intermediate appellate court decisions, the Texas Supreme Court finally addressed the
issue of which statute of limitations applies in a wrongful death case where the death was caused by medical negligence. The Court held that, by including the language “notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years...,” the Legislature unequivocally expressed its intent that, when the limitations of § 10.01 conflicts with any other law, § 10.01 governs. *Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995). The Court also held that this provision does not violate the open courts provision of the Texas Constitution because plaintiffs have no common-law right to bring either a wrongful death or a survival cause of action. *Id.* at 893. Therefore, the Legislature may limit those statutory rights that it creates. *Id.* See also *Gilliam v. Wilson*, 2003 WL 760269 (Tex. App.—Eastland 2003, pet. denied) (mem. op.). Holding that when a minor does not die or file within two years of negligence, then dies still during minority, the minor’s surviving parents’ claims are barred by the statute of limitations, the Dallas Court re-emphasized both *Bala* and *Baptist Mem’l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex. 1996) (per curiam) (interpreting § 10.01):

Civil practice and remedies code § 16.003(b) provides the general limitations period for wrongful-death claims. But § 74.251(a) overrides § 16.003(b) if the wrongful-death claim is also a health-care-liability claim. *See Bala v. Maxwell*, 909 S.W.2d 889, 892–93 (Tex. 1995) (per curiam) (interpreting § 10.01). Furthermore, § 74.251(a)’s tolling provision for minors under age 12 does not apply to an adult’s wrongful-death claim based on the death of a minor under 12. *See Baptist Mem’l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex. 1996) (per curiam) (interpreting § 10.01).

c. Informal Marriage Statute

The Court considered the interplay between the Texas Family Code’s § 1.91(b) one-year statute of limitations within which one must claim the existence of a common-law marriage and the statute of limitations governing wrongful death and survival causes of action. *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998). The plaintiff in Shepherd claimed to be the common-law wife of the decedent and filed a wrongful death and survival claim for medical malpractice. The trial court found for the plaintiff and the court of appeals affirmed, holding that Texas Family Code §1.91(b) did not bar the plaintiff’s wrongful death cause of action and that the plaintiff had standing to bring the survival claim.

On the issue of the wrongful death cause of action, the Supreme Court held that § 1.91(b) does not conflict with § 10.01 and that, when the one-year time period in § 1.9(b) expires, the party asserting an informal marriage is barred only from proving the marriage’s existence. The Court reasoned that the plaintiff did not have to file her wrongful death claim within one year of her common-law husband’s death, but that she only had to initiate a proceeding to prove the requisite elements of an informal marriage within the one-year period. Because the plaintiff failed to bring a proceeding proving common-law marriage within the one-year statutory period, her action to recover damages for wrongful death—an action reserved under the statute for the surviving spouse, child, and parents—was barred. *Shepherd*, 962 S.W.2d at 33.

As to the survival claim, the Court held that heirs-at-law can bring a survival suit during the four-year period that the law allows for instituting administrative proceedings if they allege and prove that no administrative proceedings are pending and none are necessary. The record in this case
showed that the decedent owned no real property, had no children, owed no debts, and that his personal estate vested immediately in plaintiff. Because the plaintiff had made an agreement with other family members permitting her to take possession of the decedent’s minimal assets, no administration was necessary and the plaintiff had standing to sue on behalf of the estate. *Id.* at 34.


1) Assumed Name/Misnomer

The applicability of rules that are procedural in nature will not be foreclosed by § 10.01’s “notwithstanding any other law” language. In *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999), the Supreme Court addressed the statute of limitations in Article 4590i in the context of Texas Rule of Civil Procedure 28, which permits a party to sue or be sued in an assumed name, and held that, because the plaintiff sued the defendant physician individually, that was effective to commence suit against the association doing business under the name of the individual. *Id.* at 829. Turning to the argument that § 10.01 of Article 4590i precludes the application of Rule 28, the Supreme Court held that, because Rule 28 does not extend the time within which a health care liability claim can be commenced, its application is not foreclosed by § 10.01. *Id.* Rule 28 is a procedural rule that provides that if an entity conducts business under an assumed or common name, it may be sued in that same name. *Id.* The statute of limitations is not tolled by Rule 28 and, therefore, Rule 28 is not “any other law” that extends limitations within the meaning of § 10.01. *Id.* A proper party is sued when that party is sued in its assumed or common name. *Id.*

2) The Mailbox Rule

In a case subsequent to Chilkewitz, the Tyler court of appeals held that, like Rule 28, the application of Rule 5 of the Texas Rules of Civil Procedure was not precluded by the “notwithstanding any other law” language of the statute of limitations provision of Article 4590i. In *Forrest v. Danielson*, 77 S.W.3d 842 (Tex. App.—Tyler 2002, no pet.), the time line of events is as follows:

- November 12, 1996 – The plaintiffs’ claims accrued;
- November 12, 1998 – The plaintiffs mailed their notice letter extending the statute of limitations by 75 days;
- January 25, 1999 – The plaintiffs deposited their petition in the U.S. mail adding the defendants;
- January 26, 1999 – The two-year and 75-day statute of limitations ran;
- January 28, 1999 – The Smith County Clerk’s office file-marked the plaintiffs’ petition.

Because the petition was not file-marked until two days after the extended limitations period had run, the defendants alleged that the claims against them were barred. *Id.* at 844. The plaintiffs argued that Rule 5 of the Texas Rules of Civil Procedure, which is essentially a codification of the “mailbox” rule, made their filing timely. Rule 5 provides:

If any document is sent to the proper clerk by first class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than 10 days tardily, shall be filed by the clerk and be deemed filed in time. A legible post mark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.
TEX. R. CIV. P. 5.

Like the defendants in Chilkewitz, the defendants in the underlying case argued that Rule 5 was precluded by the “notwithstanding any other law” language of § 10.01 of Article 4590i. However, like the Supreme Court’s decision in Chilkewitz, the Tyler court of appeals held that because Rule 5 is not a tolling provision and does not otherwise extend limitations within the meaning of § 10.01, it is not subject to the “any other law” foreclosure. Id.

Similarly, plaintiff is entitled to rely on the mailbox rule with regard to the presumed time of filing in determining which law controls when the Legislature creates a statute with an effective date for “suits filed after” a certain date. Bailey v. Hutchins, 140 S.W.3d 448 (Tex. App.—Amarillo 2004, pet. denied). In Bailey, the plaintiffs mailed their original petition to the district clerk by placing it in the U.S. Mail on August 29, 2003. It was received by the district clerk on September 2, 2003, one day after the effective date of Chapter 74. The plaintiffs then filed their expert report in compliance with the 180-day rule of Article 4590i, rather than the 120-day rule of § 74.351(a). The Amarillo court of appeals held that the mailbox rule applied and that the suit was deemed filed upon mailing. Thus, the 180-day rule applied.

5. Tolling Provision and the Effect of Defective Pleadings

a. Misnomer - Relation Back

If the plaintiff misnames the correct defendant, the statute of limitations is tolled and a subsequent petition properly naming the defendant relates back to the original filing. Enserch Corp. v. Parker, 794 S.W.2d 2, 4 (Tex. 1990). In Dougherty v. Gifford, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ), the plaintiff sued M. K. Dougherty d/b/a Marshall K. Dougherty, M.D. and Associates. After limitations had run, the defendant claimed that he was sued in the wrong capacity. The plaintiff amended and named the defendant in its corporate capacity. The court of appeals rejected the defendant’s argument that the statute of limitations, as applied to the corporation, had expired. Since the plaintiff merely misnamed the defendant, as opposed to naming the wrong defendant, the amended petition related back to the original filing. Id. at 677. The court of appeals also noted that the defendant had notice of the claim and that no prejudice was shown on the record. Id. at 677. See also Chilkewitz v. Hyson, 22 S.W.3d 825 (Tex. 1999); Sheldon v. Emergency Med. Consultants, 43 S.W.3d 701, 702 (Tex. App.—Fort Worth 2001, no pet.) (“Under the theory of misnomer, when an intended defendant is sued under an incorrect name, the Court acquires jurisdiction after service with the misnomer if it is clear that no one was mislead or placed at a disadvantage by the error.”). The theory of “misnomer” is, therefore, not “any other law” that extends or tolls limitations in contravention of §10.01’s prohibition. Instead, misnomer treats a misnamed party as a properly sued party relating back to the time of the filing of the suit with the misnomer.

Similarly, a defendant who is sued after the statute of limitations has run, but has notice of the original suit in which the wrong defendant was named, can still be liable. The doctrine of equitable tolling of limitations applies in such instances. Felan v. Humana Inc., 163 S.W.3d 95 (Tex. App.—San Antonio 2004, no pet.). In Felan, the plaintiff sued a Humana entity, but the wrong one. In testimony, a vice president of the correct entity acknowledged having known of the suit against the incorrect entity. This justified equitable tolling of the statute of limitations.

When Humana acquired actual knowledge of the suit facts, it either knew or should have known that it was the intended target of [Plaintiff’s] claims. Accordingly, it would have had as much opportunity to prepare a defense then as if
it had been named the original defendant. But whether or not Humana was mislead or disadvantaged by the pleading error is a fact issue that is unresolved by this record.

Felan, 163 S.W.3d at 98.

b. Non-Joinder Relation Back

In Bradley v. Etessam, 703 S.W.2d 237 (Tex. App.—Dallas 1985, writ ref’d n.r.e.), the Dallas court of appeals upheld the later inclusion of additional beneficiaries in a wrongful death cause of action through amended pleadings. The Bradley court held that such an addition was permissible so long as the original petition was timely filed within the § 10.01 two-year limitation period.

6. Statute of Limitations and Its Effect on Derivative Claims

The Supreme Court has upheld a minor’s right to recover for loss of parental consortium. Regan v. Vaughn, 804 S.W.2d 463 (Tex. 1990). Since the child’s right to recover on these grounds is derivative of the parents’ cause of action, any defenses available against the parents’ cause of action would also bar the child’s cause of action. Id. at 468. In Regan, the Supreme Court held that a child’s cause of action to recover for loss of consortium was barred by the statute of limitations since the parents’ cause of action was barred by limitations. In Westphal v. Diaz, 941 S.W.2d 96 (Tex. 1997), the Supreme Court reached a similar result, barring a minor’s wrongful death claim when the patient’s claim for injuries would have been time-barred at the time of death.

7. Weekends and Holidays Do Not Extend the Statute

The “notwithstanding any other law” language of §10.01 moot the contention that Saturdays, Sundays and holidays are not included within the two-year statute of limitations. McDaniels v. Mittemeyer, 2004 WL 578581 (Tex. App.—Amarillo 2004, pet. denied) (mem. op.). In McDaniels, the health care complained of occurred on May 16, 2000. Assuming timely notice of the claim was given to the potential defendants, the plaintiff had until July 30, 2002 in which to file suit. However, the plaintiff did not file suit until August 12, 2002. The plaintiff tried to argue that Saturdays, Sundays and holidays were excluded from the 75-day grace period, but the court of appeals rejected this argument as unsupported by any authority or Texas Rule of Civil Procedure 4, which governs the calculation of time.

8. Minority Tolling and Corporate Dissolution


9. Effect of Plaintiff’s Bankruptcy

A plaintiff is required, if, in addition to being a health care liability plaintiff under Chapter 74, he is also a petitioner in bankruptcy court, to list his health care liability claim as an asset of the estate. Once the bankruptcy claim is filed, the medical liability claim vests in the bankruptcy estate. The bankruptcy trustee, who is the representative of the bankruptcy estate, then becomes the real party in interest and is the only party with standing to prosecute the underlying health care liability claim. Whether the claim is declared by the bankruptcy petitioner as an asset of the bankruptcy estate or not is not relevant to the issue of whether the claim is timely pursued by the bankruptcy estate. If it is timely filed by the plaintiff in state court—even if it is not listed as an asset of the estate (because it was not disclosed to the bankruptcy trustee)—then the bankruptcy
trustee is not estopped from pursuing the claim even outside Chapter 74’s statute of repose. This is true even if the plaintiff may ultimately benefit from the Chapter 74 claim, even though outside the statute of limitations, if there is a surplus after all debts and fees have been paid in the bankruptcy court. Further, federal law (i.e., the Bankruptcy Code), which provides the bankruptcy trustee time to evaluate and file suit independent of state statutes limiting those time periods, controls. This is true whether the statutes are called statutes of limitation or statutes of repose. Bankruptcy trustees may pursue any action that would otherwise be time-barred under state law. Further, this federal rule trumps § 74.251(a)’s “notwithstanding any other law” language. “State law is naturally preempted to the extent of any conflict with a federal statute.” *Tow v. Pagano*, 312 S.W.3d 751, 761 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)).

10. **The Effect of Chapter 74, Section 74.251**

The 2003 Legislature, in repealing Article 4590i and replacing it with Chapter 74, made yet another attempt to impose an absolute time limit by which health care liability claims in Texas must be asserted. The Legislature re-codified § 10.01 verbatim with one very significant addition:

(a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

(b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

The section raises many questions, particularly in light of the rich constitutional history of its predecessors: § 10.01 of Article 4590i and § 6 of Article 5.82 of the Texas Insurance Code.

1) To what extent will the prior well-established Texas case law operate to make § 74.251 unconstitutional?

A. Will the “new discovery rule” and its constitutional underpinnings vitiate § 74.251 in cases of undiscoverable injury?

B. Will constitutional due process and open courts provisions have the same effect in cases involving minority?

C. Will such concerns vitiate the statute of repose in cases involving fraud or fraudulent concealment?

D. Will patients suffering from mental disability be protected by the Courts?

2) To what extent is a statute of repose given greater deference in
barring claims than a statute of limitations?

III. The Historical Statute of Limitations in Health Care Liability Claims

A. The Common Law

At common law, the general statute of limitations, applicable to all tort cases, applied to medical malpractice cases. Article 5526 provided for a two-year statute of limitations from the date of accrual of the cause of action. In malpractice cases, “accrual” was deemed to occur when “the incision was closed,” regardless of the discoverability of the injury. Carrell v. Denton, 157 S.W.2d 878 (1942); Stewart v. Janes, 393 S.W.2d 428 (Tex. Civ. App. 1965, writ ref’d.).

The Supreme Court recognized the injustice of such a rule in cases of undiscoverable injury in Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (“Accordingly, we hold that the cause of action for the negligence of leaving a foreign object in a patient’s body by a physician accrues when the patient learns of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body.”).


B. Article 5.82, § 4

Thereafter, in response to the then perceived liability insurance crisis, the Legislature enacted The Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act (Ch. 330, 1975 Tex. Gen. Laws 864), amending Chapter 5 of the Insurance Code by adding Article 5.82, which changed the law with respect to limitations for minors in medical malpractice actions and abolished the “accrual” concept from the statute. Article 5.82, provided as follows:

Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Art. 4437f, West’s Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

In a now eerily familiar recitation, Article 5.82 was described by the Texas Supreme Court as follows:

Article 5.82 was enacted to establish standards for setting liability insurance rates for physicians and other health care providers ... Specifically, the
legislation’s proponents argued that the number and amount of health care claims had increased to the point that it was indirectly affecting the availability and quality of health care. This effect was due to the higher costs of medical malpractice insurance and its unavailability. The general purpose of the statute, therefore, was to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability.


With this abolition of the prior “accrual” language, Texas embarked on its first attempt at the creation of an absolute two-year time limit on the filing of health care liability claims (with the exception of minority). More importantly, Texas, by enacting a statute that eliminated “accrual” of the cause of action as the starting point for the clock to run, created, though not so named, a statute of repose in health care liability claims.

A “statute of limitation” is defined as “a statute establishing a time limit for suing in civil cases based on the date when the claim accrued...” BLACK’S LAW DICTIONARY 1422 (7th ed. 1999). A “statute of repose” is defined as “a statute that bars a suit a fixed number of years after the defendant acts in some way...even if this period ends before the plaintiff has suffered an injury. BLACK’S LAW DICTIONARY 1423 (7th ed. 1999). Clearly, since the enactment of Article 5.82, Texas courts and litigants have been contending with various iterations of a statute of repose in health care liability claims.

The first blow to Article 5.82 occurred in 1983, when it was held invalid as to minors. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). Article 5.82, § 4, provided that minors under the age of six had until their eighth birthday in which to file suit. The *Sax* Court held this unconstitutional as it purported to cut off minors’ access to the courts before the disability of minority could be removed.

We hold, therefore, that the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected...

Article 5.82 was enacted to establish standards for setting liability insurance rates for physicians and other health care providers. See TEX. INS. CODE. ANN. art. 5.82, caption; *Littlefield v. Hays*, 609 S.W.2d 627 (Tex. Civ. App.—Amarillo 1980, no writ). Specifically, the legislation’s proponents argued that the number and amount of health care claims had increased to the point that it was indirectly affecting the availability
and quality of health care. This effect was due to the higher costs of medical malpractice insurance and its unavailability. The general purpose of the statute, therefore, was to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability. In analyzing the litigant's right to redress, we first note that the litigant has two criteria to satisfy. First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute....

Texas courts have long recognized that a minor has a well-defined common law cause of action to sue for injuries negligently inflicted by others....

We conclude that as to that part of the cause of action for medical malpractice unique to the minor, article 5.82, section 4, is unreasonable. This statute effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative....

Therefore, we declare the limitations provision of Article 5.82, Section 4, to be in violation of Article I, Section 13 of the Texas Constitution.

Sax, 648 S.W.2d at 666–667.

The basis for Article 5.82 was the same as the basis for the later-enacted Article 4590i and the current Chapter 74: a so-called “insurance crisis.” Yet the Court invalidated Article 5.82 as it applied to minors. Stare decisis thus decrees that, unless the newly named “statute of repose” differs in some material way from the prior identically-worded “statute of limitations,” the new statute must also fail the constitutional challenge as to minors.

The Texas Supreme Court addressed the effect of Article 5.82 on claimants with injuries that were undiscoverable within the two-year period in Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984). In Nelson, the plaintiffs’ child suffered from a genetic disorder, Duchenne Muscular Dystrophy. The parents had sought pre-natal diagnosis during the pregnancy to assure themselves that he, unlike his older brother, did not carry the lethal and agonizing disease. They alleged that the defendant negligently misdiagnosed their second son, in utero, as being free of Duchenne’s. They therefore went on to have that child and a third son as well. Duchenne’s is not diagnosable until after age two when a child begins to walk and demonstrates a clumsy and lordotic gait. Thus, “discovery” or “discoverability” of the child’s muscular dystrophy was not possible under these undisputed summary judgment facts until well beyond the two-year absolute rule purportedly set forth in Article 5.82.

The limitation period of Article 5.82, § 4, if applied as written, would require the plaintiffs to do the impossible—to sue before they had any reason to know they should sue. Observing that such a
result is rightly described as “shocking” and is so absurd and so unjust that it ought not be possible, the Nelson Court concluded:

> We hold that Article 5.82, Section 4 of the Insurance Code as applied in this case violates the open courts provision of Article I, Section 13 of the Texas Constitution. Therefore, the parents’ cause of action for “wrongful birth” is not barred by limitations.

_Nelson_, 678 S.W.2d at 923.

Thus, the re-appearance of the Discovery Rule despite legislative attempts to abolish it.

C. **Article 4590i, § 10.01**

Subsequently, in 1977, the Texas Legislature enacted § 10.01 of Article 4590i. Section 10.01 repeated the “notwithstanding any other law” language of Section 5.82:

> Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

TEX. REV. CIV. STAT. art. 4590i, § 10.01 (West 1977).

The absolute bar of Article 4590i fell, as it applied to minors, in _Weiner v. Wasson_, 900 S.W.2d 316 (Tex. 1995), in which the Court applied its holding as to Art. 5.82 in Sax to Article 4590i:

> In Sax, a unanimous Court explicitly considered and rejected the argument that the ability of a child’s parent to bring suit on behalf of the child was a reasonable substitute—the same argument made by Weiner in this case. _See_ Sax, 648 S.W.2d at 667. Furthermore, standing for the premise that the Legislature has no power to make a remedy contingent upon an impossible condition, Sax has been frequently cited as authority by this Court, the courts of appeals, and even by the high courts of other states, e.g., _Whitlow v. Bd. of Educ._, 438 S.E.2d 15 (W.Va. 1993); _Mominee v. Scherbath_, 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717, 721 (1986); _Strahler v. St. Luke’s Hosp._, 706 S.W.2d 7, 10-11 (Mo. 1986); _Barrio v. San Manuel Div. Hosp._, 692 P.2d 280, 286 (Ariz. 1984). Indeed, Sax has been the cornerstone of many of our subsequent decisions, e.g., _Neagle v. Nelson_, 685 S.W.2d 11, 12 (Tex. 1985) (holding that section 10.01 could not cut off a cause of action before the plaintiff knew of the wrong’s existence); _Nelson v. Krusen_, 678 S.W.2d 918 (Tex. 1984) (holding that article 5.82 could not cut off a cause of action before the plaintiff knew of the wrong’s existence); _See also Tinkle v. Henderson_, 730 S.W.2d 163, 167 (Tex. App.—Tyler 1987, writ ref’d) (holding that article 5.82 could not cut off the claim of a mental incompetent.).
Weiner, 900 S.W.2d at 319.

The constitutionality of Article 4590i in cases of undiscoverable injury was first tested in cases of undiscovered injury in a post-appendectomy retained-sponge case. The sponge was not detected until more than two years post-operatively. Summary judgment based on § 10.01 was granted. The Supreme Court, with very little discussion, reaffirmed the extensive analysis of Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) [relative to Section 5.82, Texas Insurance Code] and made it applicable to Article 4590i. Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985) (“The open courts provision of our Constitution protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit.”).

Rule” enunciated in Nelson v. Krusen in cases of injuries undiscoverable during the two-year statutory period.

D. Chapter 74, § 74.251.

Indisputably, the 2003 Legislature attempted, now for the third time, to impose an absolute time limit on the filing of health care liability claims in Texas. The first attempt, Chapter 5.82 of the Insurance Code, enacted in 1975, was held invalid in cases of undiscoverable injuries under the open courts provision of the Texas Constitution in Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984), and as to minors in Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983). The second attempt, § 10.01 of Article 4590i, enacted in 1977, was held invalid in discovery rule cases in Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985), and as to minors in Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995). The third attempt, § 74.251 of the Texas Civil Practice & Remedies Code, was enacted in 2003. Therein, the Legislature attempted to address the constitutional issues raised in Nelson, Neagle, Sax and a host of other cases by the addition of the following language:

1. notwithstanding any other law and subject to subsection (b) ...
2. a claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred

The issue for Texas litigants and courts is whether a statute now called a statute of repose enjoys different constitutional weight and presumptions of validity than does the prior statute of repose that was called a statute of limitations.

The Court has told us that, at least with regard to retained sponge cases, which it characterizes as sui generis, the statute of repose does enjoy greater judicial deference than the statute of limitations. In twin cases, Walters v. Cleveland Reg’l Med. Ctr., 307 S.W.3d 292 (Tex. 2010) and Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010), the Court held that the two-year statute of limitations was unconstitutional in cases of undiscoverable retained foreign objects, but that the ten-year statute of repose was constitutional in factually-identical cases. Recognizing that the statute of repose would operate to unfairly cut off some claimants, the Court nevertheless gave judicial deference to the legislative choice, which places some absolute limitations on the ability to sue, even when the injury is not discoverable.

So at least with regard to retained sponge cases and the interplay of the discoverability issue and the new statute of repose, there is some coherent guidance that at least addresses the relation of the ruling to established constitutional case law. Not so, unfortunately, in the minor statute of limitations circumstance, where the Court, in the Rivera case, has hopelessly confused
the legal analysis, as is discussed infra, Part E1.A at p. 65

E. Stare Decisis

1. Limitations

As to the purportedly absolute statute of limitations, Texas’ stare decisis is clear: it is unconstitutional as to minors and as to those with undiscoverable injuries.

a. Minors

Texas law has historically protected minors’ access to the courts with some vigor. See, e.g., Weiner v. Wasson, 900 S.W.2d 316, 318–19 (Tex. 1995) (“We do not doubt the Legislature’s power to remove a minor’s legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf, but the Court unanimously agrees that the Legislature did not do so in Section 10.01.”) (emphasis added); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

In Weiner, however, the Court gave a view of the route by which the Legislature might make inroads into minors’ time for filing suit: remove the legal disability of minority. (Interestingly, at one point, HB4—which was codified as Chapter 74—contained just such a removal of disabilities. Yet this language was stripped from the final bill and the statute of repose inserted in its place.) But the Weiner Court also suggested that the weight of stare decisis could prove to be a formidable impediment to 900 S.W.2d legislative efforts to shorten minors’ statute of limitations:

Of course, we have, on occasion and for compelling reasons, overruled our earlier decisions, but undeniably, Sax has become firmly ensconced in Texas jurisprudence. Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in Sax. See Quill Corp. v. North Dakota, 504 U.S. 298, 321, 112 S.Ct. 1904, 1916, 119 L.Ed.2d 91 (1992) (J. Scalia, concurring) “[R]eliance on a square, unabandoned holding of the Supreme Court is always justifiable reliance...” Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking [sic] process that differs dramatically from that properly employed by the political branches of government. See Vasquez v. Hillery, 474 U.S. 254 (1986). (“[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”). Weiner, 900 S.W.2d at 319–20.

And, in fact, one Texas appellate court has so held in a case involving a minor claimant. In holding the Chapter 74 statute of repose unconstitutional as to minors, the San Antonio court of appeals held that if the
new law were to stand as to minors, Sax and Weiner would have to be overruled. Adams v. Gottwald, 179 S.W.3d 101, 103 (Tex. App.—San Antonio 2005, pet. denied) ("If this argument [the constitutionality of Chapter 74] is to prevail, it must do so in the Supreme Court of Texas. We are bound by Sax and Weiner.").

Most recently, however, the Texas Supreme Court ruled that the statute of repose does not violate the open courts provision as applied to the next friend of a minor, who sent the hospital notice of the minor’s claim, but waited over six-and-a-half years to bring suit.” Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698, 704-06 (Tex. 2014). Relying on prior precedent and noting that “the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit,” the Court ruled that the open courts challenge, as applied to the plaintiff, failed for lack of diligence. Id. at 703-04. Most noteworthy is that NO prior precedent has ever required any diligence as to minors.

The conflation of the diligence concept, which has only applied heretofore in the discovery context, hopelessly confuses decades of precedent in this area. It is now utterly impossible for lawyers to advise their clients, plaintiff or defense, what the statute of limitation may be in any given fact pattern involving minors. No litigation will be final until after it has been to the Supreme Court, where the justices will determine, factually, whether or not diligence was employed.

In a noteworthy opinion rendered after the Supreme Court’s ruling in Tenet, however, the San Antonio Court has held that a minor has until two years after his/her eighteenth birthday to file suit. The general tolling provision of CPRC § 16.001 provides for tolling of minors’ statute of limitations until two years after they reach majority, and this applies in the Ch 74 context as well. Additionally, the 75 day tolling provision of the Notice requirement applies to minors’ claims, so the effective statute of limitations is the now adult’s 20th birthday plus 75 days. Montalvo v. Lopez, 466 S.W.3d 290 (San Antonio, 2015, pet. denied).

b. Undiscernible injuries

There is not much reason to anticipate different results in cases involving undiscoverable injuries. The precedential language of Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) is powerful and will be difficult to distinguish.

The limitation period of Article 5.82, Section 4, if applied as written, would require the Nelsons to do the impossible – to sue before they had any reason to know they should sue. Such a result is rightly described as “shocking” and is so absurd and so unjust that it ought not be possible.

Nelson, 678 S.W.2d at 923.

The Supreme Court, in the twin cases of Walters v. Cleveland Reg’l Med. Ctr., 307 S.W.3d 292 (Tex. 2010) and Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010), has told us that such a “shocking” result, though it is so absurd and so unjust that it ought not to be possible, is in fact permissible in cases in which the “shocking” result is brought about by a statute of repose rather than a statute of limitations. The Court defers to the legislative policy decision to put some absolute limitation on cases, even if such limitation in fact unfairly deprives the plaintiff of the ability to bring a well-established common-law cause of action. Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010).

The 2016 version of the PJC, Section 50.8, for the first attempts to provide appropriate jury questions in a discovery rule case, and [in the author’s view] incorrectly phrases the question in terms of the discovery of the negligence.
QUESTION_____

Do you find that Paul Payne, Jr., did not [actually discover or] have a reasonable opportunity to discover the negligence you found in response to Question[s] ______ [applicable liability question(s)] on or before [statutory two-year limitations expiration date]?

Answer “Yes” or “No.”

Answer:_____

If you answered the above question “Yes,” then answer the following question. Otherwise, do not answer the following question.

QUESTION_____

Do you find that Paul Payne, Jr., filed suit within a reasonable time against those you found negligent in response to Question[s] ______ [applicable liability question(s)] after Paul Payne, Jr., [actually discovered or] reasonably should have discovered the negligent act or acts in issue?

Answer “Yes” or “No”

Answer:_____

F. Limitation on Damages - §§ 74.301, 74.302 and 74.303

The 2003 Legislature made extensive changes to Article 4590i in the area of limitations on damages. Older case law under Article 4590i no longer applies in this area, so attention to the date of case law is critical in determining its effect on the statutory scheme.

(1) § 74.301. Limitation on Noneconomic Damages

(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.

(c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

§ 74.302. Alternative Limitation on Noneconomic Damages

(a) In the event that Section 74.301 is stricken from this subchapter or is otherwise to any extent invalidated by a method other than through legislative means, the following, subject to the provisions of this section, shall become effective:....
becomes effective only if Section 74.301 is ruled unconstitutional.

§ 74.303. Limitation on Damages

(a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average--All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

(c) Subsection (a) does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.

(e) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors:

(1) "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law."

(2) "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence."

Analysis of these sections reveals these key points:

- The caps are “per claimant,” not “per defendant”.
- “Claimant” is defined as ALL members of the claiming group, including derivative plaintiffs. All must share in one cap or set of caps.
- The $250,000 cap on intangible damages in injury cases is “new” in that the prior attempt to cap injury damages had been held unconstitutional. See infra p. 69 ff.
- The cumulative maximum cap (in the unlikely event that two institutions are both found negligent) is $750,000.
- According to one court, the intangible damages cap is included within the overall wrongful death cap, so that claimants, in addition to the overall $500,000 (escalating with CPI) cap have a $250,000 maximum
intangible recovery available to them. *THI of Tex. at Lubbock I, LLC. v. Perea*, 329 S.W.3d 548 (Tex. App.—Amarillo 2010, pet. denied). This reasoning was followed in

- The wrongful death cap is applied “per claimant,” not “per defendant.”
- Since earnings loss is included in the wrongful death cap, the new statute makes it impossible for Texas families who have lost a bread-winner to recover their full economic losses in most cases.
- Punitive damages are not included in the noneconomic damages cap. See *TEX. CIV. PRAC. & REM. CODE §41.001(12): “‘Noneconomic damages’ means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.’”
- Loss of household services are not included in the intangible damages cap. *Ellis v. United States*, 673 F.3d 367 (5th Cir. 2012) (applying Texas law); See also *i.*
- Pre-Judgement interest is not included under the intangible cap. *Chesser v. Lifecare MGMT*, 356 S.W. 3d 613 (Tex. App.—Fort Worth, 2011, pet. denied.)
- The punitive damages limitations provision in § 41.008(b) applies and must be juxtaposed with the non-economic damages limitations in § 74.301(b). Thus, economic damages are doubled, non-economic damages as capped by § 74.301(b) are added, but only up to the maximum $250,000 limit. Although punitive damages are not specifically included in the § 74.301(b) cap on intangible damages, the limitation on those damages will necessarily limit the amount of punitive damages that can be recovered when the calculation is made in this fashion. *THI of Tex. at Lubbock I, LLC. v. Perea*, 329 S.W.3d 548 (Tex. App.—Amarillo 2010, pet. denied).

There is no cost of living (CPI) increase factored into the statute. For example, in December, 2014, $250,000 in 2003 dollars is worth only $194,309 using the CPI calculator.

1. CPI Adjustment to the Death Cap

Chapter 74 also provide for an adjustment of this damages limitation. When there is an increase or decrease in the consumer price index, the liability limits
must be increased or decreased by an amount equal to the amount of the limits multiplied by the percentage increase or decrease in the consumer price index between the effective date of 4590i (1977) and the time in which the damages subject to the limits are awarded by final judgment or settlement. The consumer price index calculation is as follows:

1. Divide the most recent CPI figure by the August, 1977 (effective date under predecessor statute 4590i) CPI to determine the “multiplier”:
   - January 2016 CPI = 236.916
   - August, 1977 CPI = 61.2
   - Multiplier = 3.871

2. Multiply the multiplier by the cap to determine the current value of the medical liability damages cap:
   - 3.871 x $500,000 = $1,935,500

To obtain the most current CPI figure, practitioners can use the Internet by logging on to www.bls.gov or by calling (214) 767-6971 or (713) 718-3753.

2. The Constitutionality of the Damage Caps

Sections 74.301, 74.302 and 74.303 impose damage caps in health care liability claims despite prior judicial rulings holding 4590i’s less restrictive caps unconstitutional in injury cases (although constitutional in death cases).

Do the legislative changes made to § 74.301 serve to save it from judicial holdings that it suffers from the same constitutional infirmities as its predecessor?

A federal court challenge to the caps has been rejected, with a ruling that the caps are constitutional. Watson v. Hortman, 844 F.Supp.2d 795 (E.D. Tex. 2012). At least one state court has addressed the constitutionality of section 74.301 and found that it passes muster under the constitutions of Texas and the United States. Prabhakar v. Fritzgerald, 2012 WL 3667400, at *12–13 (Tex. App.—Dallas 2012, no pet. h.) (following Watson, 844 F.Supp.2d 795 as to the federal constitutionality issue). Analysis of the Constitutional issue and relevant precedent is included below for those litigants still involved in other challenges.

   a. The Constitutional History of Article 4590i, § 11.02.

   As it relates to injury cases, the Texas Supreme Court held Article 4590i, § 11.02, unconstitutional in Lucas v. United States, 757 S.W.2d 687 (Tex. 1988). The Court’s reasoning turned on the open courts provision of the Texas Constitution, Article I, Section 13. The statute unconstitutionally infringed on the rights of catastrophically-damaged malpractice victims seeking a “remedy by due course of law.” Lucas, 757 S.W.2d at 690. The Court found the restrictions both unreasonable and arbitrary and that the Legislature failed to provide plaintiffs any adequate substitute to obtain redress for their injuries. A general societal benefit [potential reductions in insurance rates] was insufficient. “In the context of persons catastrophically injured by medical negligence, we believe that it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. [The Constitution] guarantees meaningful access to the courts whether or not liability rates are high.” Id. at 691.

   Accordingly, the inquiry must be whether changes in Chapter 74, including perhaps changes in the legislative findings or preamble, will serve to protect Chapter 74 from the same constitutional deficiencies found by the Court in Lucas.

   Further, note that Lucas was decided only on the open courts provision. Neither the Texas nor the federal due process or equal protection clauses were addressed by the Court. Those must therefore be
considered in light of likely challenges to Chapter 74. Those are considered infra at p.73ff.

a. Differences Between Article 4590i, § 11.02 and Chapter 74, § 74.301.

The Legislature indisputably attempted to meet some of the challenges to § 11.02 in its codification of Chapter 74.

1) Preamble

The Legislature made no changes to the Preamble, or findings, which support the enactment of Chapter 74. That section is a verbatim re-enactment of the justification for Article 4590i. Accordingly, nothing in the legislative underpinnings for Chapter 74 will save it from the same findings of constitutional infirmity that doomed the damages caps of Article 4590i.

2) Changes Within the Statute and Their Constitutional Implications

i. The caps in § 74.301 are now applied “per claimant,” not “per defendant.”

Interestingly, Justice Raul Gonzalez, in his dissenting opinion to Lucas v. United States, 757 S.W.2d 687 (Tex. 1988), objected to the majority’s holding of the damage limitations in Article 4590i as unconstitutional. Where the majority found that the damage cap on injury claimants unconstitutionally violated the open courts provision of the Texas Constitution, Justice Gonzalez found four distinct reasons why 4590i’s damage caps were constitutional:

   a. Claimants are allowed to recover all past and future medical expenses without limitations [unchanged by Chapter 74]

   b. Claimants may recover up to $500,000 of non-medical damages [reduced to $250,000 by Chapter 74]

   c. The damage caps are adjustable by the Consumer Price Index [eliminated by Chapter 74]

   d. The statute imposes a limit on the liability of each health care provider, rather than an absolute ceiling on the amount a Claimant can recover [reversed by Chapter 74]

Because of those four characteristics of Article 4590i, Justice Gonzalez found that it met constitutional muster and was particularly emphatic in stating, “[I]t is clear, therefore, that the Legislature was concerned with limiting the liability of each Defendant, not with unreasonably and arbitrarily limiting the amount a Plaintiff can recover.” Lucas, 757 S.W.2d at 699 (Gonzalez, J., dissenting). Clearly, if the legislative purpose is to reduce the possibility of “runaway verdicts” against health care providers, the cap serves that purpose. What purpose, however, is served by capping a claimant’s entire recovery against multiple defendants with one minuscule cap?

ii. “Claimant” is defined as all members of the claiming group, including derivative plaintiffs.

The same question applies here. If the legislative purpose is to eliminate the possibility of “runaway juries,” that purpose is clearly served by capping the exposure of each defendant. What purpose, however, is served by capping the legitimate damage claims of all claimants, including derivative claimants, under only one cap?

iii. The cumulative maximum cap (in the unlikely event that two institutions are both found negligent) is $750,000.

iv. Punitive damages are not included in the non-economic damages cap. See Tex. Civ. Prac. & Rem. Code § 41.001(12) (“Non-economic damages’ means damages awarded for the purpose of compensating a Claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment,
loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages.”) (emphasis added).

v. There is no cost of living (CPI) increase factored into the statute. For example, in June, 2008, $250,000 in 2003 dollars is worth only $213,000 using the CPI calculator. It is very difficult to see how any of the substantive changes to the injury damages cap make it more constitutionally palatable than its predecessor. They restrict, rather than enhance a claimant’s ability to recover, lower the cap, restrict the claiming family to one cap regardless of the number of defendants, and eliminate the CPI escalator. To the extent that the predecessor statute was constitutionally infirm, this statute is worse.

However, most significant of all, the lobby forces that drove the enactment of Chapter 74 also drove the passage of Proposition 12, a constitutional amendment to Article 3 specifically giving the Legislature permission to limit damage awards:

Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, if a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to contribute to, disease, injury, or death of a person.

Tex. Const. art. III, § 66(b).

Without doubt, the lobby proponents of HB4 and the Proposition 12 constitutional amendment intended to solve the Lucas problems by the passage of the amendment. Does it do so? It certainly flies in the face of the long-standing public emoluments clause and does not repeal that clause. One class of tortfeasors—health care providers—is accorded protections unavailable to any other class of tortfeasors.

Constitutional due process and equal protection scrutiny therefore follows. Recall that Lucas was decided only on open courts grounds. A threshold question, then, is whether the Texas equal protection clause provides additional protection. While the wording of our equal protection clause is broader than the corresponding provision of the United States Constitution, no decision of a Texas court has ever actually held that this textual distinction makes a difference. Lucas, 757 S.W.2d at 703. Courts and commentators have concluded that the protections are identical. Id. This analysis, however, relates to the treatment of different classes of plaintiffs. Courts have yet to address the treatment of different classes of defendants, such as Chapter 74 provides to health care providers.

With regard to traditional equal protection analysis, the United States Supreme Court has articulated, and Texas courts have adopted, three levels of scrutiny. “The choice of applicable tier is determined by examining both the classes and the rights affected by the distinctions made in the challenged statute.” Lucas, 757 S.W.2d at 703. Strict scrutiny, the most rigorous level, is applied to a law that burdens an inherently-suspect class or affects a fundamental liberty right. The party defending such a distinction has the burden of justifying it and the law cannot be upheld unless it serves a compelling state interest and is “closely tailored to effectuate only those interests.” Id. at 704. The next level of scrutiny, intermediate or middle-tier scrutiny, is applied when a statute burdens a sensitive but not a suspect class or impinges on an important but not a fundamental right. Under such scrutiny, challenged laws “must serve important governmental objectives and must be substantially related to the
achievement of those objective.” *Id.* Lastly, remaining legislation is subject to “minimal scrutiny,” and is upheld as long as the classifications made are “rationally related to a legitimate state interest.” *Id.* Thus far, only race and perhaps national origin have been used by the federal courts to justify the application of strict scrutiny. And only “fundamental liberty rights” merit such scrutiny. The right of access to the courts has not been considered such a fundamental right. *Id.* Thus, according to dissenting Justice Phillips, Texas has no independent equal protection analysis of its own, relies on federal constitutional analysis, and applies the rational basis test as a measure by which to judge legislation such as damages cap. *Id.* at 708 (Phillips, J., dissenting) (“Being grounded in the common law, not the Constitution, the right is simply not fundamental.”). Note, however, that the Texas Constitution does provide “the right to trial by jury shall remain inviolate.” Tex. Const. art. I, § 15.

The Texas Constitution does provide a constitutional right to trial by jury upon which Chapter 74 certainly infringes and upon which it infringes far more harshly than Article 4590i ever did.

iv. SECTION 74.303 - “Limitation on Damages.” (Death Cases)

a. In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless of the number of separate causes of action on which the claim is bases.

b. When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers’ families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average - All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

c. Subsection (a) does not apply to the amount of damages awarded on a health care claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

d. The liability of any insurer under the common law theory of recovery commonly known in Texas as the “Stowers Doctrine” shall not exceed the liability of the insured.

e. In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the
court’s written instructions to the jurors:

1. “Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.”

2. “A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence.”

3. The Constitutional History

Unlike in injury cases, the Texas Supreme Court upheld the legislative restriction of wrongful death damages. Rose v. Doctors Hosp. Facilities, 801 S.W.2d 841 (Tex. 1990). Therein, the Court held that the legislative cap on damages in malpractice cases was constitutional insofar as it limited recovery in wrongful death actions. The Court reviewed its previous holding in Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) and reasoned that victims of medical negligence have a well-defined common-law cause of action to sue for injuries, concluding that the legislative limit on recoveries that were based on common law was unreasonable and arbitrary when balanced against the purpose and basis of this statute. The Court rejected the Rose plaintiffs’ argument that the holding in Lucas had voided the statute in all respects.

The Court rationalized its holding on the statute’s severability clause. The fact that a part of a statute may be held unconstitutional does not authorize a court to declare the remainder void. The statutory definition of “health care liability claims” expressly mentions both common law personal injury and wrongful death claims. In Lucas, the Court struck down the statute’s application to common-law claims; the Court was free to enforce the statute as to other independent claims such as those for wrongful death. In short, the open courts provision of the Texas Constitution applies only to common-law claims; it does not apply to statutory claims. The Rose remedy—one for wrongful death—was conferred by statute, not by common law. The Court further held, though without analysis, that the statute did not violate the open courts provision or the equal protection provision of the Texas Constitution and was constitutional insofar as it limited damages in wrongful death cases.

The Court, relying upon its earlier opinion in Baptist Hosp. of Se. Tex., Inc. v. Baber, 714 S.W.2d 310 (Tex. 1986), also held that the damages cap provision was to be calculated on a “per defendant” basis.

v. Significant Changes to the Death Cap

1. The caps in Section 74.301 are now applied “per claimant” not “per defendant.”

2. “Claimant is defined as all members of the claiming group, including derivative claimants.

3. The cumulative maximum cap (in the unlikely event that two institutions are both found negligent) is $750,000.00.

4. Since earnings loss is included in the wrongful death cap, the new statute makes it impossible for Texas families who have lost a bread-winner to recover their full economic losses in most cases.

Again, as in injury cases, nothing about the changes to the death cap make it any more
constitutionally palatable. Most importantly, in death cases, economic losses are capped. Can this harsh cap withstand constitutional scrutiny, particularly in light of the new constitutional amendment? The new amendment makes it clear that damages “other than economic damages” in claims for injury or death may be capped. Ironically, while capping intangible damages, the Legislature has given renewed deference to a claiming family’s ability to recover economic damages. It may well be that the economic cap within the death statute falls to constitutional challenge before any other.

4. Article 4590i’s Damages Cap and Its Interaction with Other Damages Provisions

a. Interaction with the Federal Tort Claims Act

The United States Fifth Circuit Court of Appeals has held that the damages limits of Article 4590i, § 11.02(a), apply to medical malpractice actions against the federal government under the Federal Tort Claims Act (FTCA). Lucas v. United States, 807 F.2d 414 (5th Cir. 1987). The Lucas court explained that the FTCA assures the federal government the same treatment as private parties in Texas and that § 11.02 applies to “federally operated hospitals” under the FTCA because “hospitals and health care providers” licensed in Texas are subject to the § 11.02 liability limit.

The Fifth Circuit also held that the defendant-government’s failure to affirmatively plead the defense of the § 11.02 damages limit constitutes a waiver by the defendant under the Rule 8(c) of the Federal Rules of Civil Procedure. Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987). Section 11.02’s damages limit is not waived by the defendant-government, although not pleaded affirmatively under Rule 8(c), where it is raised during trial “at a ‘pragmatically sufficient time.’” Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986).

b. Interaction with Texas Civil Practice & Remedies Code

In a factually complex case, the Texas Supreme Court decided, and then redecided, the issue of whether § 33.012 of the Texas Civil Practice & Remedies Code requires a court to credit a former plaintiff’s settlement with defendants against a judgment for the remaining plaintiffs. Utts v. Short, 81 S.W.3d 822 (Tex. 2002) (op. on reh’g). The Court’s conclusion, amid intense internal debate, represented by the bare majority, concurrence and dissent, is that, if the non-settling plaintiffs receive a benefit from the settling plaintiffs’ settlement, then the non-settling defendant receives a credit. The Court imposed a requirement on the non-settling defendants to urge their settlement credit motion before the case is submitted and permitted them to introduce evidence after verdict of the benefit received by the non-settling plaintiff. In the Utts case specifically, the case was remanded to the trial court for determination of whether or not the non-settling plaintiff could rebut the defense’s evidence of benefit.

Thereafter, the Court decided Roberts v. Williamson, 111 S.W.3d 113 (Tex. 2003), in which the defendant complained that the trial court had erred in determining her dollar liability based on her percentage of responsibility, as assigned by the jury, before deducting any credit for settlement by plaintiffs with other defendants. The defendant’s percentage of liability was only 15%. Thus, she was not jointly and severally liable. The Court quoted the statute and concluded:

And Section 33.013(a) specifically pertains to defendants who, like Dr. Roberts here, are not jointly and severally liable. That section provides that a severally liable defendant’s monetary liability is calculated by multiplying the damages found by the
trier of fact by the defendant's percentage of responsibility. See C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 321 (Tex. 1994).

Roberts, 111 S.W.3d at 123.

Thus, at least for defendants who are not jointly and severally liable, they receive no benefit from pre-trial settlements by plaintiffs.

The entire Utts scenario has led to scrutiny of plaintiffs’ motives in effectuating settlements.

In the In re Lux, 52 S.W.3d 369 (Tex. App.—Texarkana 2001, no pet.) case, the Texarkana court of appeals refused to allow defense counsel to discover attorney-client privileged information based on allegations that an unequal division of settlement proceeds among plaintiffs amounted to fraud and vitiating the privilege. The court of appeals held that, absent a prima facie case of fraud, such discovery is impermissible and that “Utts-ing” (the unequal division of settlement proceeds) is not, in and of itself, evidence of such fraud.

More recently, the Texas Supreme Court decided Battaglia v. Alexander, 177 S.W.3d 893 (Tex. 2005) and, in doing so, rescinded, in part, its reliance on C & H Nationwide. In Battaglia, the Court held that, with regard to the award of prejudgment interest in cases in which there are also pre-trial settlements, the "principal" on which prejudgment interest accrued should not have included the settlement credit. In this regard, the Court specifically disapproved of Samples v. Graham, 76 S.W.3d 615 (Tex. App.—Corpus Christi 2002, no pet.) and abrogated its own opinion in C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 315 (Tex. 1994) despite its recent reliance on that opinion in Roberts. The Battaglia Court also held that a settlement credit should be applied first to retire past damages and prejudgment interest before it is applied to future damages.

c. Interaction with Punitive Damages Statute

Does the damage cap found in § 11.02 of Article 4590i limit the amount of either prejudgment interest or punitive damages available to a claimant? Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887 (Tex. 2000) answered these questions. In this nursing home case, the jury awarded compensatory damages in the amount of $2,371,000 and exemplary damages in the amount of $90,000,000. On appeal, the nursing home argued that the damages cap applied to reduce both the compensatory and exemplary damages—and any prejudgment interest thereon—to an amount equal to one cap. The court of appeals disagreed and held that punitive damages awards in health care liability claims are not capped by Article 4590i, § 11.02, but, instead, are capped under § 41.007 of the Texas Civil Practice & Remedies Code. Horizon/CMS Healthcare Corp. v. Auld, 985 S.W.2d 216, 224, 234 (Tex. App.—Fort Worth 1999), rev’d in part on other grounds, 34 S.W.3d 887 (Tex. 2000).

The Supreme Court first addressed exemplary damages. In its analysis, the Court relied on several factors in holding that the cap did not apply to reduce the amount of exemplary damages available to a claimant. First, the Court determined that the common-law meaning of “damages” is not readily ascertainable.

Then the Court looked to the legislative history surrounding the promulgation of Article 4590i. Specifically, the Court considered the purpose of Article 4590i—to make insurance coverage affordable. The Court also considered the official transcript of the Medical Professional Liability Study Commission. The Court pointed out that, while discussing the “damages” at the root of the so-called health care crisis that prompted the Legislature to enact Article 4590i, the Commission addressed compensatory, but not punitive damages. The Court reasoned
that if the Commission intended to include punitive damages, the Legislature could have indicated that intent. The Court also pointed out that the Texas Medical Association (TMA), one of the leading proponents of Article 4590i, repeatedly stated that the cap in Article 4590i does not include punitive damages. Again, if the TMA desired punitive damages awards to be included in the cap, it provided no hint of that desire. Furthermore, during the hearings before the Senate Jurisprudence Committee, a TMA representative made no mention of punitive damages.

In addition to Article 4590i’s legislative history and statements made by the TMA suggesting that punitive damages are not included in the cap, the Texas Insurance Code passed during the same legislative session as Article 4590i and its legislative history point to the same conclusion. The Insurance Code provision provides that professional medical liability insurance policies cannot include coverage for punitive damages that may be assessed against a physician or health care provider. The Court reasoned that this statutory mandate coincides with Article 4590i’s underlying purpose—to make insurance coverage affordable. Defining damages in the statutory cap to include punitive damages would not have the effect of lowering insurance rates or increasing the availability of medical care in Texas since insurers cannot insure against punitive damages anyway. A contrary conclusion that included punitive damages in the damages to be capped would not promote the purpose of Article 4590i—to make insurance coverage affordable—and would conflict with the purpose of awarding punitive damages, which is to deter and punish culpable conduct.

d. Interaction with Prejudgment Interest Statute

Pre-judgment interest on non-economic damages is NOT included in the intangible damages caps of Chapter 74. Chesser v. LifeCare Mgmt., 356 S. W. 3d 613, 642 (Tex. App.—Fort Worth 2011, pet. denied) holds: “….prejudgment interest as damages derived from the concept that a judgment debtor wrongfully deprives the judgment creditor of the amount of damages ultimately awarded in the judgment between the time the damages accrue and date of judgment……in section 74.001, prejudgment interest does not fall within the statutory definition of noneconomic damages – which are the only damages limited by Section 74.301.” Christus Health Gulf Coast v. Houston, 2015 WL 9304373 (Tex. App.—Houston [1st], 2015, n.p.h.) (not designated for publication).

Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887 (Tex. 2000) also addressed whether prejudgment interest is capped under Article 4590i. The defendant nursing home contended that the amount of the prejudgment interest should be added to the amount of the compensatory damages so that the total of the two would be reduced by the damages cap. The Supreme Court agreed. The Court found that it is clear from the language in the applicable statute and the legislative intent that the Legislature placed an unequivocal limit on the amount a health care provider must pay in a final judgment for non-punitive damages under Article 4590i. The Court, therefore, concluded that prejudgment interest is not excepted from the cap and is included in the cap.

Subsequently, in Columbia Hosp. Corp. of Houston v. Moore, 92 S.W.3d 470 (Tex. 2002), the Court went on to hold that prejudgment interest is capped in cases accruing after 1995 as well, despite vigorous dissent (Phillips, C.J., and Hankinson, J. and Baker, J.) that the Legislature’s clear intent was to the contrary. See also Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214 (Tex. App.—Amarillo 2003, no pet.) (holding that the statutes require calculation of prejudgment interest on the amount of damages found by the jury before application of any caps).

e. Post-Judgment Interest
Post judgment interest is not included in the Chapter 74/article 4590i caps, and it ordinarily begins to run from the date of the original judgment in cases in which there are multiple judgments and appeals. See Phillips v. Bramlett 407 S.W.3d 229 (Tex. 2013).

5. Unanswered Questions

a. Is There More Than One Cap When Other Defendants are Only Vicariously Liable?

The Rose decision left unanswered whether defendants who are only vicariously liable entitle the plaintiff to an additional cap. The holding in Rose was that there is one cap per defendant. However, in dicta, the Court stated that there is one cap per “culpable” defendant. Subsequently, the issue has been clarified. Where general partners were vicariously liable for the acts of one negligent health care provider, the fact that there were multiple liable defendants did not multiply the number of available caps. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214 (Tex. App.—Amarillo 2003, no pet.).

For a discussion on this, please see Mark D. Clore, “Multiple Party Settlements: Caps, Credits & Stowers,” State Bar of Texas Advanced Medical Malpractice Course, 1999.

Of course, as noted earlier, this discussion is moot under Chapter 74, which provides one damage cap per case.

b. Does the Damages Cap Apply in a Stowers Action?

Article 4590i, § 11.02(c), provided:

This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the “Stowers Doctrine.”

The plain meaning of the statute indicated that, to the extent the underlying medical negligence case resulted in a subsequent Stowers action, the damages cap would not apply. This section, however, was eliminated in the Chapter 74 recodification,

In a complicated and perplexing case, a sharply-divided Texas Supreme Court held that the Stowers doctrine does apply to a carrier under Chapter 74, but does not apply to the insured physician. Phillips v. Bramlett, 288 S.W.3d 876 (Tex. 2009). Substantial quotes from both the majority and dissent are included below because the intricacy of the disagreement between the two opinions precludes meaningful analysis.

The majority, consisting of Justice Medina, Wainwright, Brister, Johnson and Willett, analyzes the change to Art. 4590i when Chapter 74 was enacted as follows:

FN5. The Medical Liability Insurance Improvement Act, Article 4590i of the revised civil statutes, was repealed by the 78th Legislature in 2003, after the filing of this lawsuit. The cap in section 11.02 was, however, carried forward in section 74.303(a) of the Texas Civil practices and Remedies Code. The Stowers exception in section 11.02(c) was not carried forward, but rather replaced by section 74.303(d) which expressly provides that the insurer can now use the cap to limit its liability:

(d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the “Stowers Doctrine” shall not exceed the liability of the insured.
TEX. CIV. PRAC. & REM. CODE § 74.303(d). We view this as a substantive change. The Dissent apparently does not.

Phillips, 288 S.W.3d at 880.

The Court went on to note:

Because Stowers is concerned with insurance coverage, and the cap is not, this disconnect between the two creates the following conundrum: the cap does not apply to insurers if Stowers facts exist, but the cap prevents one critical element of Stowers, excess liability, from arising in whole or in part. The two courts of appeals that have considered this conundrum are of different minds about the Legislature’s purpose in enacting Section 11.02(c)’s Stowers exception. Compare Welch v. McLean, 191 S.W.3d 147, 166–71 (Tex. App.—Fort Worth, 2005, no pet.) with Phillips v. Bramlett, 258 S.W.3d 158, 177–81 (Tex. App.—Amarillo 2007, reversed by Phillips v. Bramlett, 407 S.W.3d 229 (Tex. 2013).

From section 11.02’s language, the Legislature’s intention to do two things is unmistakable. First, it intended to cap the liability of a physician or other health care provider according to the statutory formula. Tex. Rev. Civ. Stat. Art. 4590i, §11.02(a). Second, it intended that the cap should not benefit any insurer when Stowers facts exist.

Thus, we conclude that both the statutory cap and its exception can be applied as written by confronting the judgment against the physician to Section 11.02(a)’s cap and reserving for another case any suit against the insurer under Section 11.02(c)’s Stowers exception. When insurance coverage is below the cap, this Stowers-exception claim may be shared by the insured physician and the injured third party because both will potentially have excess claims when the damages finding exceeds the cap. When insurance coverage is above the cap, however, the physician is fully protected, and only the injured third party has incentive to pursue the statutory Stowers exception.

In any event, the judgment here against the physician on the underlying health care liability claim may not exceed the statutory cap, and the court of appeals accordingly erred in affirming the excess judgment in this case.

Id. at 779–881.

The dissent by Justice O’Neill, joined by Justices Jefferson, Hecht and Green, argued in response:

By extending Stowers protection beyond the actual peril to which the insured is exposed, the Court ventures into uncharted waters with no footing in the statutory text or the common law. In my view, section 11.02(a) does not cap the amount an insured may recover from
its insurer in a future Stowers action; it does not
pin that potential recovery on a hypothetical judgment
for which the insured is not liable.

Phillips, 288 S.W.3d at 884 (O’Neill, J.,
dissenting).

The majority addressed this argument in a footnote:

FN6. Part of our disagreement with the Dissent is about what the statute means by the existence of “facts... that would enable a party to invoke... the ‘Stowers Doctrine.’ ” Our understanding is that this refers to the facts as found in the case, which in this case is the jury’s verdict. The Dissent, on the other hand, argues that the only operative Stowers fact to be gleaned from the underlying third party liability suit is whether the judgment, capping the damages found by jury, exceeds the amounts of insurance in the case. Thus, the Dissent views the legal effect of that verdict as the operative Stowers fact rather than the underlying fact itself. Because the Stowers exception begins with the admonition that the cap is not to limit the liability of the insurer, using the cap as part of the operative Stowers fact leads to the circular reasoning previously discussed.

Id. at 881 n.6.

c. Is the Damage Cap for One Defendant Who Is Found Jointly And Severally Liable Multiplied By the Number of Other Liable Defendants?

In a case of first impression, Columbia Hosp. Corp. of Houston v. Moore, 92 S.W.3d 470 (Tex. 2002), the Court held that, even if a defendant is found jointly and severally liable (that is, greater than 50% liable) and the total damages awarded by the jury exceed the cap and other defendants are found liable such that there are other “per defendant caps” available, the jointly and severally liable defendant is liable only for one damage cap under Article 4590i.

Of course, as noted earlier, this discussion is moot under Chapter 74, which provides one damage cap per case.

B. Chapter 74, Subchapter H, The Expert Report Requirement

The expert report requirement is another area in which the 2003 Legislature enacted substantial changes. Please note that the 2013 legislature amended section 74.351(a). The changes are in bold letters below.

1. CPRC Section 74.351, The Expert Report

This extremely contentious area of malpractice litigation, already problematic under 4590i, became even more so with the enactment of ch 74 and its revisions in 2003 and in 2005. Texas Supreme Court rulings in Loaisiga, Potts, Scoresby, Ross and Van Ness discussed below may finally reduce some of the excessive friction, cost and uncertainty brought on by the creation of this section. The Supreme Court emphatically reaffirmed that the standard of review for a trial court’s decision that a report is adequate is an abuse of discretion standard. Thus, such decisions will theoretically be difficult to overturn on appeal, particularly given the lenient standard articulated in Scoresby, infra. Van Ness v. ETMC, 461 S.W.3d 140, (Tex. 2015).
SUBCHAPTER H. PROCEDURAL PROVISIONS

§ 74.351. Expert Report

(a) In a healthcare liability claim, a claimant shall, not later than the 120th day after the date of each defendant's [the] original answer is [petition was closed] filed, serve on that [each] party or party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or healthcare provider against whom a claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant, physician or healthcare provider whose conduct is implicated must file and serve any objections to the sufficiency of the report not later than the later of the 21st after the date the report is [it was] served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

1. awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

2. dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

[Subsections (d)-(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (i), an expert report served under this section:

1. is not admissible in evidence by any party;

2. shall not be used in a deposition, trial, or other proceeding; and

3. shall not be referred to by any party during the course of the action for any purpose.

(l) 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 (r)(6).

[Subsections (m)-(q) reserved]

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to
an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

(3) [Reserved.]

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).
The 2013 legislative change was occasioned by an anomaly: plaintiff could file its expert report with the petition, and serve both on the defendant, triggering a 21 day objection deadline. Defendants’ deadline to file its Answer, however, might be more than 21 days from the date of service, depending on the calendaring of the Answer date. Accordingly, the anomalous circumstance could arise in which the defendant’s objections to plaintiff’s report would be due before defendant’s Answer. This legislative fix cures that problem, and also cures a parallel problem, which was that some defendants simply failed to answer. Accordingly, plaintiffs had difficulty in calculating the 120-day deadline, and in addition, were occasionally faced with Motions to Dismiss on the basis that the 120-day report had not been timely served despite the absence of an answer. Since service on the defendant triggered the deadline, even an absent or non-findable defendant was entitled to be served with a 120-day report. This legislative fix solves both problems.

Note the 2005 Changes:

Because of ongoing friction, costs, multiplying motions and hearings, and legal gamesmanship, the Legislature amended § 74.351(a) to make it abundantly clear that the 120-day time period begins to run from the filing of the petition, not from any other date. Attempts were being made to start the clock from the date of the notice letter (at least 60 days pre-suit) or, in some egregious instances, from the plaintiff’s request for medical records. This legislative change should have ended those arguments, but, predictably, did not. The Supreme Court has now done so. The date the claim is filed unambiguously is the date the claim is filed in court, and not, as the defendant contended, the date the provider received notice that a claim would be filed. Leland v. Brandal, 257 S.W.3d 204 (Tex. 2008). Further, the date is calculated as to each defendant, so that a new 120-day clock begins for each newly-added defendant. Osonma v. Smith, 2009 WL 1900404 (Tex. App.—San Antonio 2009, pet. denied) (mem. op.)

§ 74.351(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition [claim] was filed, serve on each party of the party’s attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

Section 2. This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Section 3. This Act takes effect September 1, 2005.

Source: HB 2645

a. Significant changes include:
1. Discovery is stayed.
   Discovery is stayed until the plaintiff has filed his expert report, except as specifically permitted in § 74.351.
2. Defendant gets no discovery until the report is filed.
3. Plaintiff is entitled to some discovery.
   A plaintiff is entitled to discover: “information, including medical or hospital records or other documents or tangible things,” related to the patient’s health care through:
a. Written discovery as defined in Rule 192.7 of the Texas Rules of Civil Procedure

“Written discovery” means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories and requests for admission.

b. Depositions on written questions under Rule 200 of the Texas Rules of Civil Procedure

“A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions.”

c. Discovery from nonparties under Rule 205 of the Texas Rules of Civil Procedure

“A party may compel discovery from a non-party – that is, a person who is not a party or subject to a party’s control…by court order….or subpoena.”

d. Section (u) discovery:

“Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by subsection (a).” Thus, plaintiffs have an array of discovery tools available to them, while defendants have none, until the report has been filed.

2. Rule 202 Depositions

The political battle over whether 202 depositions are permitted in Chapter 74 cases has been resolved, with the Supreme Court siding with health care defendants. The Supreme Court has ruled that Rule 202 depositions are not permitted in Chapter 74 cases. In re Jorden, 249 S.W.3d 416 (Tex. 2008). “Because the statute here specifically applies to ‘a cause of action against a health care provider,’ it applies both before and after such a cause of action is filed. To the extent a presuit deposition is intended to investigate a potential claim against a health care provider, it is necessarily a ‘health care liability claim’ and falls within the coverage of Section 74.351(s).” Jorden, 249 S.W.3d at 422.

3. Deadline is 120 Days

The deadline for filing the report has been changed. The former scheme permitting filing at either 90 or 180 days, at the plaintiff’s option (depending on whether or not the plaintiff wanted to avail itself of a cost bond or cash in escrow deposit) has been eliminated and a report must now be filed by the 120th day. Per Justice Taft of the First Court of Appeals in Houston, however, a plaintiff who served her report before filing suit was dismissed for not complying with Chapter 74’s requirement that the report be filed after filing suit. St. Luke’s Episcopal Hosp. v. Poland, 288 S.W.3d 38 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

4. Defense Deadline is 21 Days

The defense must object to the inadequacy of the expert report within twenty-one (21) days from its filing. However, this objection period is “not implicated until the defendant [is obligated] to take part in the proceedings,” i.e., until the defendant is served with process. Zanchi v. Lane, 408 S.W.3d 373, 379 (Tex. 2013) (citations omitted). If the defendant fails to object, the objections are waived. This change was implemented to eliminate the practice of waiting until the plaintiff’s statutory filing window was closed, then objecting in hopes of persuading a trial court to dismiss the plaintiff’s case on a technical “gotcha”—an all too-common practice. For example, in Uduma, the Houston court of appeals made clear that a defendant cannot
seek dismissal under chapter 74 after a full first trial on the merits has concluded. *Uduma v. Wagner*, 2014 WL 4259886, at *7 (Tex. App.—Houston [1st Dist.], pet denied) (mem. op., not designated for publication) (emphasizing holding in *Jernigan v. Langley*, 111 S.W.3d 153 (Tex. 2003), stating “defendant may still waive its right to a dismissal under Chapter 74 if the defendant's conduct is ‘inconsistent with the intent to rely upon the right to dismissal’”). Section 74.351 means what it says.

If the defense does not file an objection to the inadequacy of a report within 21 days, it waives any objection. This is true even if the plaintiff’s counsel states to defense counsel that an additional report would “hopefully” be available soon. Waiting past the 21 days waives objections. *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007). If a plaintiff amends a report, the defense must timely object to the amended report as well or it will waive those objections. *Lucas v. Clearlake Senior Living*, 349 S.W.3d 657 (Tex. App.—Houston [14th Dist.] 2011, no pet.). However, in an instance where the expert report and CV were not timely filed, the defendant did not have a 21-day deadline to complain about the lack of timeliness. That 21-day deadline applies only to adequacy of the report. *Poland v. Grigore*, 249 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2008, no pet.).


Further, the objection must be specific. An objection that “[the] report is not a fair summary of [the] expert opinion regarding the causal relationship between the deviation in the standard of care and the injury allegedly suffered” was insufficient to complain later in a motion to dismiss of the lack of qualification of plaintiff’s experts. *Tamtam v. Waiters*, 2008 WL 1882784, at *2 (Tex. App.—San Antonio 2008, no pet.) (mem. op.). Observing that the defendant’s 21-day objection went only to the causation element and did not address any qualification complaints about the expert, the San Antonio court of appeals affirmed the trial court’s denial of the defendant’s motion to dismiss. *Id.* (“The generic complaint that the expert report fails to meet the requirements of ‘[section] 74.351 et seq.,” followed by argument relating exclusively to lack of causation, fails to set forth a complaint concerning qualifications with sufficient specificity to preserve error.”). A defendant who objected only to a plaintiff’s expert’s use of the language “could have” to describe a causal connection between negligence and damages was later held to have waived all other objections not made within the 21-day period. *Williams v. Mora*, 264 S.W.3d 888 (Tex. App.—Waco 2008, no pet.). Lastly, a defendant’s objection was timely if filed more than 21 days after the defendant received the report because the report was served by certified mail. The defendant was thus entitled to an additional three days to respond under Rule 21a. *Eikenhorst v. Wellbrock*, 2008 WL 2339735 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (mem. op.). A defendants’ attorney’s inclusion of a “leftover” objection from a prior case, however, resulted in waiver of their objections to the plaintiff’s expert report. *RGV Healthcare Assocs., Inc. v. Estevis*, 294 S.W.3d 264 (Tex. App.—Corpus Christi 2009, pet. denied).

If the defendant fails to object to the report within the statutorily-prescribed 21-day period, the trial court cannot sua sponte determine that the report is inadequate. *In re Rivera*, 281 S.W.3d 510 (Tex. App.—El Paso 2008, orig. proceeding).

Even a report by a non-physician may “implicate” standards of practice such that the physician is on notice that a report, however defective, has been filed and that he must timely object or waive his objection to the sufficiency of the report. *Beckwith v.*
White, 285 S.W.3d 56 (Tex. App.—Houston [1st Dist.] 2009, no pet.).


5. Timing of Motion to Dismiss

A plaintiff may set a Defendant’s objections to its report, obtain a ruling, and have the Motion to Dismiss overruled all before the 120 day deadline. Since the trial court cannot grant the Motion to Dismiss before 120 days, plaintiff, by filing its report early and moving immediately to set any objections for hearing, can obtain a Denial of the Motion to Dismiss before it could be granted. Christus Santa Rosa Health Care Corp. v. Vasquez, 427 S.W.3d 451 (Tex. App.—San Antonio 2014, no pet.).

6. Effect of Challenge

Furthermore, the requirement for timely objection applies not only to adequacy of content but to objection as to the expert’s qualifications. Failure to object to an expert’s qualifications for seven months after service of the report waived objections in that regard as well. Beckwith v. White, 285 S.W.3d 56 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

7. Parties May Agree to Extend

The parties may still agree to extend the time for filing the report.

8. Court May Grant 30-Day Extension

Either the trial court or the appeals court may grant a 30-Day extension. Leland v. Brandal, 257 S.W.3d 204 (Tex. 2008). A court may grant one 30-day extension to allow a plaintiff to cure a deficient report. It is unclear whether a court, in its discretion, may grant multiple extensions. The issue was recently before the Supreme Court, but since it was not necessary to the court’s decision, the court declined to resolve the issue. TTHR Ltd. P’ship v. Moreno, 401 S.W.3d 41 (Tex. 2013). There is no discretion to grant extensions in the case of failure to file the report. Note the importance of distinguishing at the trial court level between a motion to dismiss for failure to file a report at all and a motion to dismiss for filing an inadequate report. Even if a report is filed, if the argument can be made that it is so deficient that it is “not a report at all,” then no extension under § 74.351(3) can be granted. See Watkins v. Jones, 192 S.W.3d 672 (Tex. App.—Corpus Christi 2006, orig. proceeding); Montgomery Cnty. v. Fuqua, 22 S.W.3d 662 (Tex. App.—Beaumont 2000, pet. denied). The court’s decision to grant a thirty-day extension is discretionary, not mandatory. The Legislature’s use of the word “may” does not require that the trial court grant an extension to cure a deficient report under § 74.351(3). Hardy v. Marsh, 170 S.W.3d 865 (Tex. App.—Texarkana 2005, no pet.). The trial court should err on the side of granting the additional time and must grant it if the deficiencies are curable. Scoresby v. Santillan, 346 S.W.3d 546 (Tex. 2011).

A court intending to grant an extension under § 74.351(e) errs in granting only a 7-day extension. If the court determines that it will grant an extension, it must grant a 30-day extension. Further, the date runs from the 120-day deadline, not from the date of the hearing or order. Constancio v. Bray, 266 S.W.3d 149 (Tex. App.—Austin 2008, no pet.). The Austin court of appeals admonished the trial court for ignoring the plain language of the statute, noting that:

[B]y only granting [plaintiff] a 30-day extension from the date of the hearing, which was some 23 days before the end of the period for serving a complying report, the district court did not actually grant [plaintiff] a 30-day extension of the 120-day period as required by section 74.351(c). The
practical effect of the district court's order was to extend the 120-day filing period by only 7 days. According to the terms of subsection (c), the one-time extension of the 120-day filing deadline must be a 30-day extension. The statute does not give trial courts discretion as to how long the extension will be. Either the claimant gets “one 30-day extension” of the deadline or no extension at all.

*Constancio,* 266 S.W.3d at 162.

9. Interlocutory Appeal

Most significantly, the Legislature, in Article I of HB4, allowed for interlocutory appeal of orders denying dismissals based on deficiencies in claimants’ reports. Tex. Civ. Prac. & Rem. Code § 51.014(a)(9)–(10):

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; or

(10) grants relief sought by a motion under Section 74.351.

10. Is the Deposition of the Defendant Physician Precluded Prior to the Filing of the 120-day Report?

Yes, according to the Beaumont court of appeals in *In re Miller,* 133 S.W.3d 816 (Tex. App.—Beaumont 2004, orig. proceeding). This case, relying on a strained interpretation of § 74.351(s) and (u) that is inconsistent with the legislative intent behind the section, ruled that the plaintiff was estopped from taking the defendant’s deposition until the plaintiff’s report was filed. Moreover, a Houston court of appeals agreed with the *Miller* court’s analysis. See *In re Huag,* 175 S.W.3d 449 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

Note the dissenting opinion in *In re Huag,* however, in which Justice Hanks disagrees with the majority’s preclusion of the defendant’s deposition, noting that the majority’s interpretation “renders the phrase ‘notwithstanding any other provision of the section’ meaningless.” *Huag,* 175 S.W.3d at 457 (Hanks, J., dissenting). Nothing in the legislative history indicates an intent to preclude the depositions of the parties from being among those permitted to plaintiffs under § 74.351. Nonetheless, courts have held that plaintiffs have many vehicles for discovery other than oral depositions available to them during the discovery moratorium, thus the preclusion against deposing the defendant is not overly burdensome. *Bogar v. Esparza,* 257 S.W.3d 354 (Tex. App.—Austin 2008, no pet.).

11. What is “Service” Under Chapter 74?

a. Follow Rule 21a

Note that one of the significant changes of Chapter 74 is that the language pertaining to service of the report was changed. Whereas Article 4590i spoke in terms of “filing” of the report, Chapter 74 requires that the plaintiff “serve on each party” one or more qualifying reports. This has already resulted in dismissal of lawsuits. *Quint v. Alexander,* No. 03-04-00819-CV, 2005 WL 2805576 (Tex. App.—Austin Oct. 28, 2005, pet. denied) (mem. op.). Because the statute requires service, mere filing will not meet that requirement. See also *Thoyakulathu v. Brennan,* 192 S.W.3d 849 (Tex. App.—Texarkana 2006, no pet.); *Herrera v. Seton Nw. Hosp.,* 212 S.W.3d 452 (Tex. App.—Austin 2006, no pet.) (resulting in dismissal).
However, in a confusing opinion, the First Court of Appeals in Houston seemed to indicate the possibility of a different result. Francis v. Select Specialty Hosp., 2005 WL 2989489 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.). Therein, the plaintiff raised an argument that had been raised in Quint, which was that the defendant had constructive knowledge of everything in the court’s file under long-standing rules of civil procedure. Addressing—and then rejecting the plaintiff’s argument, the Houston court of appeals observed that not only was it undisputed that the report had not been served on the defendant, there was nothing in the record to show that the report had ever been filed with the trial court. Clearly, if filing with the trial court is irrelevant in terms of a saving measure where a plaintiff fails to serve the defendant, then it should also be irrelevant whether or not the court’s record reflected such a filing. Accordingly, the Houston First Court of Appeals has perhaps left a small opening for plaintiffs who inadvertently fail to serve their reports.

There has since been much litigation on this subject. Service to the physician’s “last known address” as registered with the State Board of Medical Examiners is inadequate. A defendant, who had closed his practice and moved to Turkey, left a last known address with the Secretary of State at which he only selectively received mail. He had not been served with process prior to the attempted “service” of the report and, thus, was not a “party” under § 74.351. Thus, the attempted service using the last known address of a “party” was ineffective. Yilmaz v. McGregor, 265 S.W.3d 631 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013). Plaintiffs must serve their expert reports regardless of whether the health care provider has been served with the petition and citation. Bohannon v. Winston, 238 S.W.3d 535 (Tex. App.—Beaumont 2007, no pet.). The “potential for gamesmanship” engendered by such a rule apparently does not vitiate its mechanistic application.

In Spiegel, the plaintiff delivered his expert report to defendant’s office and separately served defendant’s attorney during discovery. The plaintiff had a private process server serve “the person behind the window” at the doctor’s office. The doctor was out of town that day. The doctor argued that this delivery was not adequate service because the report was not delivered to him in person and because the documents were not delivered to an agent authorized by the doctor to accept “service.” Additionally, the plaintiff faxed disclosure responses to the defendant’s attorney and then mailed the report and CV by priority mail. The defendant argued that because the report was neither faxed nor sent by certified or registered mail, the mailing did not constitute “service” under Rule 21a. Defendant’s attorney acknowledged that both he and the defendant had the report within the 120-day deadline. Invoking Rule 1 of the Rules of Civil Procedure that “the proper objective of Rules of Civil Procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants,” the Beaumont court of appeals held that the plaintiff’s service was adequate and that “[d]ismissal of the health care liability claim under the circumstances in this case would be contrary to the objectives of the rules of civil procedure.” Spiegel v. Strother, 262 S.W.3d 481, 486 (Tex. App.—Beaumont 2008, no pet.).

The Spiegel court noted that numerous cases had now addressed the “service” requirement of Chapter 74 and addressed these cases in its analysis. For example, the Spiegel court cited to other cases in which the appellate court found there was no compliance with the service requirement of § 74.351(a). See, e.g., St. Luke’s Episcopal Hosp. v. Poland, 288 S.W.3d 38 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); Poland v. Ott, 278 S.W.3d 39 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Acosta v. Chheda, No. 01-07-00398-CV, 2007 WL 3227650 (Tex.
In the St. Luke's Hospital and Poland v. Ott cases, the plaintiffs provided the defendants’ attorneys with the report on the 123rd day after filing suit, but argued that the report was not untimely because they had originally served the report prior to filing the lawsuit against the defendants at all. In other words, the plaintiffs in each case relied on their having “served” the expert report before they ever filed suit. St. Luke's Episcopal Hosp. v. Poland, 288 S.W.3d 38, 40 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); Poland v. Ott, 278 S.W.3d 39, 42 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). In Acosta, the plaintiff did not serve the expert’s curriculum vitae within the 120-day time frame. Acosta, 2007 WL 3227650, at *3. In Bohannon, the plaintiffs filed the report and curriculum vitae with the trial court but did not serve the doctor until after the 120th day deadline and failed to establish that defendant had been attempting to avoid service of the report. Bohannon, 238 S.W.3d at 536–38. In Smith, the plaintiffs filed the report with the court clerk but did not serve the report on the defendant. Smith, 2007 WL 1793754, at *4–5. In Herrera, the plaintiff argued that the delivery of the report by regular mail was constructive delivery that complied with § 74.351(a). Herrera, 212 S.W.3d at 456, 458. The court of appeals held that mailing by regular mail does not meet the requirements of § 74.351(a). Id. at 459–60. In that case, the defendant's attorney maintained he did not receive copies of the report and curriculum vitae until after the 120-day deadline. Id. at 456.

In Thoyakulathu and Soberon, the plaintiffs served their expert reports after the 120-day deadline. Thoyakulathu, 192 S.W.3d at 852-53; Soberon, 2006 WL 1781623, at *1. In Quint, the plaintiff filed the report with the district clerk but did not timely serve it on the defendant. Quint, 2005 WL 2805576, at *1–2. In Kendrick, the plaintiff alleged she placed a copy of the report in a box that was located in the district clerk's office and assigned to the law firm that represented the defendant doctor. Kendrick, 171 S.W.3d at 701. She mailed a copy of the report to the hospital's attorney by regular mail. Id. The defendants' attorneys denied receiving the documents at any time prior to the expiration of the 120-day deadline. Id. In none of the cases cited by Spiegel was it undisputed that the attorney and his client actually received the report and curriculum vitae from the plaintiff within 120 days of the filing of the petition through attempted service pursuant to Rule 21a. Spiegel, 262 S.W.3d at 485.

In an identical case, the Texarkana court of appeals held that, where the reports were mailed to defense counsel and were undisputedly received prior to the 120-day deadline, “because [defendants] received the expert reports and CVs within the 120-day deadline, and because the purposes of Section 74.351 and Rule 21a [were] met . . . , the documents were timely served within the meaning of Section 74.351.” Goforth v. Bradshaw, 296 S.W.3d 849, 851 (Tex. App.—Texarkana 2009, no pet.). The court noted the identical result reached in Spiegel and held that the purpose of the statute is met when a defendant undisputedly receives a regular mail copy of an adequate report within the 120-day deadline. Id. at 854.

Further, service by certified mail where the green card is signed by an
allegedly unauthorized individual is not fatally defective for purposes of effectuating service under Chapter 74. Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013).

Nor, is it required that the Defendant be served with process to become a “party” for purposes of serving the expert report. Until recently, most appellate courts that considered the meaning of the word “party” as used in 74.351(a) held that a health care provider is not a “party” until they have been both (1) named in a health care liability suit and (2) served with citation and the petition, accepted or waived such service, or made an appearance. Key v. Muse, 352 S.W.3d 857, 862 (Tex. App.—Dallas 2011, no pet.), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013); Carroll v. Humsi, 342 S.W.3d 693, 698–99 (Tex. App.—Austin 2011, no pet.), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013); Dingler v. Tucker, 301 S.W.3d 761, 767 (Tex. App.—Fort Worth 2009, pet. denied), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013); Carreras v. Zamora, 294 S.W.3d 348, 350 (Tex. App.—Corpus Christi 2009, no pet.), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013); Yilmaz v. McGregor, 265 S.W.3d 631, 640 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), abrogated by Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013).

This definition of “party” must be reconsidered. Zanchi, 408 S.W.3d at 378. Although lower courts had been relying on it, the Supreme Court’s previous opinion in Mapco did not address “party status;” As the Court pointed out in Zanchi, the concept of personal jurisdiction is distinct from that of party status – rendering judgment against a person without notification, for example, “raises due process concerns that are not implicated when serving a defendant with an expert report.” Id. (discussing reliance on Mapco Inc. v. Carter, 817 S.W.2d 686 (Tex.1991) (per curiam)). Instead of relying upon service as a triggering event, the Court declared that a health care provider, or physician, is a “party” to an HCLC once named in the lawsuit. Id. at 377. As such, the Defendant may be served with an expert report “regardless of whether he [or she] has been served with process.” Id. at 381.

Still, it is important to know which parties to serve. For example, “when a plaintiff files a lawsuit against both a state entity and its employee, they are to be treated as separate defendants, and . . . must each be served with an expert report.” Matthews v. Lenoir, 439 S.W.3d 489, 495 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d) (citation omitted). As such, service of process on the attorney general for a government agency defendant does not also constitute service on that government agency’s employee. Id. at 497.

b. Method of Service

In Regent Care Ctr. of Laredo v. Abrego, No. 04-06-00518-CV, 2006 WL 3613190 (Tex. App.—San Antonio Dec. 13, 2006, pet. denied) (mem. op.), the plaintiff served the requisite expert report by attaching it to his first supplemental response to the defendant’s requests for disclosure. The defendant filed a motion to dismiss asserting that the filing did not meet the requirements of § 74.351 because it was served as attachments to a response to a discovery request and not under a separate letter identifying them as expert reports under § 74.351. The trial court denied the motion and the court of appeals affirmed. In a concurring opinion, Justice Speedlin stated:

I have closely followed the development of the law with regard to the requirement of expert reports. I have also closely followed the gamesmanship that has rapidly spawned in this area of law. This gamesmanship is directly at odds with the ethical concept that the law’s procedures should be used ‘only for legitimate purposes.’ Regent Care admits that it was served
with a copy of the response to the requests for disclosure by the deadline for filing the expert report. Regent Care’s effort to dismiss the underlying cause under these circumstances illustrates the manner in which Section 74.351 is being used for unintended purposes.

Abrego, 2006 WL 3613190, at *1 (Speedlin, J., concurring) (internal citations omitted).

c. There Must Be Evidence of a Failure to Serve

In an Eastland court of appeals case, the defendant contended that the plaintiff was late in mailing his expert report. The defendant, however, failed to produce any evidence in the trial court rebutting the certificate of service, which showed timely mailing. Since Rule 21(a) applies, service by certified mail, mailed on the due date, is permissible. Because the defendant failed to rebut the presumption, dismissal was improper. Patel v. Williams, No. 11-06-00254-CV, 2007 WL 632989 (Tex. App.—Eastland Mar. 1, 2007, no pet.) (mem. op.).

d. Report Must be “Served” Even if Defendant Has a Copy

Even if the defendant has a copy of the report, it must be served on the defendant by plaintiff or plaintiff is subject to dismissal. Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez, 237 S.W.3d 869 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Serving the wrong attorney (the attorney who had previously represented defendant but did not in the case at bar) required dismissal. Fulp v. Miller, 286 S.W.3d 501 (Tex. App.—Corpus Christi 2009, no pet.) (op. on reh’g). However, some sanity may be returning to this rule. In a situation where the green card showed an incorrect zip code, thus indicating that perhaps service had not been technically correctly accomplished, yet defendant acknowledged having a copy of the report, 74.351 was deemed satisfied, and the Trial Court’s dismissal of Plaintiff’s claim was overturned. Owens v. Handyside 478 S.W.3d 172 (Tex. App.—Houston [1st], 2015 pet. denied).

e. Timing of Service

Service of the report BEFORE suit is filed is permissible. “The purpose of the pre-suit notice letter is “to encourage the parties to negotiate and settle disputes prior to suit.” Williams, 371 S.W.3d at 189 (emphasis added). Pre-suit service of an expert report, though not required, can only further the statute’s objective of encouraging and enabling parties to settle healthcare-liability claims without resorting to the lengthy and expensive litigation process.” Further, although the use of the word “party” has caused some confusion, there is no requirement that service wait until a ‘party’ is formally joined. “But we did not mandate that physicians or health-care providers on the receiving end of a healthcare-liability claim must be a “party” to a lawsuit before they could be properly served with an expert report. Nor does the statute’s plain language impose any such requirement. The statute requires a claimant to serve an expert report on a “party” not later than 120 days after filing the original petition. It does not prohibit the plaintiff from serving a report on a party before filing the petition, and we will not write such a requirement into the statute’s language. No one disputes Hebner served Reddy with a qualifying expert report on the same day Reddy received notice of Hebner’s impending lawsuit.” Note that the Defense sought to dismiss the Plaintiff’s case because, after having correctly served the report pre-suit, Plaintiff inadvertently sent a different report (from another case) after suit was initiated. The Court found that the purpose of the statute was met by the pre-suit service. Note for Defendants: the 21 day objection period in such cases is to be calculated as follows: “We now adapt that rule to these circumstances: the 21-day objection period will not begin to run for a defendant upon whom an expert report was
served before suit was filed until the defendant has actually been sued and served with process.” Chapter 74 currently requires “[e]ach defendant physician or health care provider whose conduct is implicated in a report” to “file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant’s answer is filed.” TEX. CIV. PRAC. & REM. CODE § 74.351(a) (current) (emphasis added). Thus, future defendants served with expert reports pre-suit will have 21 days following the filing of their answer in which to object.” Hebner v Reddy, 498 S. W.3d 37, (Tex. 2016) [no citations available at press time]. Ransom v. Eaton, 503 S.W.3d 411 (Tex., 2016) reaffirms Hebner: pre-suit service of an expert report furthers the statute’s objective of encouraging health-care-liability suits to be settled without resorting to the lengthy and expensive litigation process.

Service by plaintiff with the petition (i.e., before defendant answers) is valid service and serves to start the 21-day clock for objections to that report. Salinas v. Dimas, 310 S.W.3d 106 (Tex. App.—Corpus Christi 2010, pet. denied).

Such timing is acceptable under the statute because a defendant becomes a “party” when named in the petition filed with the district clerk. Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013).

f. Service must comply with Rule 21(a).


However, to serve an expert report, a plaintiff need not comply with the formal requirements of TEX. R. CIV. P. 106. Zanchi, 408 S.W.3d at 380.

g. Weekend and Holiday Due Dates.

Reports due on a weekends or holidays are (probably) automatically due on the next business day. See Eikenhorst v. Wellbrock, 2008 WL 2339735 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (mem. op.) (holding that defendant’s 21-day objection was timely when filed on a Monday following the Saturday on which the deadline would have run).

h. Defendant Who Cannot Be Found

There is some possibility that a due diligence exception for failure to serve a report within 120 days may exist in the future, but it does not now. In Stockton v. Offenbach, the plaintiff was unable to serve the defendant and obtained an order from the trial court granting permission to use substituted service, but did not obtain that order until after the 120-day statutory deadline for service of the report had passed. The Supreme Court held that there were insufficient facts presented to create a due diligence exception to the 120-day service requirement and that the plaintiff’s factual support for her open courts challenge failed for the same reasons. Stockton v. Offenbach, 336 S.W.3d 610 (Tex. 2011).

i. One Service is Enough

In Ripley, the plaintiff had filed suit in federal court and timely filed an expert report. The defendant did not object to the expert report in federal court. After the case was dismissed in federal court and refiled in state court, the defendant ultimately objected to the plaintiff’s report. The objection, however, was not deemed timely because it was not filed within the original 21-day objection period provided by § 74.351. Univ. of Tex. Health Sci. Ctr. v. Ripley, 230 S.W.3d 419 (Tex. App.—San Antonio 2007, no pet.).

12. CVs

a. The CV may be incorporated in the report.

There is no requirement in the statute that the CV be a separate document and courts will not engraft such a requirement. Harris
Note, however, that dangerous precedent has been established to the effect that terms that the court does not understand must be explained in the report. For example, the initials “F.A.C.O.G.,” which stand for “Fellow of the American College of Obstetrics and Gynecology,” were not known to the court and, since it could not understand the initials, the inclusion of F.A.C.O.G. in the report did not substitute for a CV, where the plaintiff forgot to attach the CV and argued that the credentials were included in the report. Miranda v. Martinez, 2007 WL 687001 (Tex. App.—Corpus Christi 2007, pet. denied) (mem. op).

b. A CV is Required to Trigger the Deadline for Objections

Where the plaintiff failed to file a CV with his report and a defendant did not object for some time, the defendant did not waive its right to object under the 21-day rule because CVs were not sent with the reports. Thus, the deadline for objections was not “triggered.” Pena v. Methodist Healthcare Sys. of San Antonio, Ltd., 220 S.W.3d 52 (Tex. App.—San Antonio 2006, no pet.).

13. Are “Magic Words” Required Regarding Causation?

Not only are “magic words” such as “reasonable medical probability” not required, See Estate of Birdwell v. Texarkana Mem’l Hosp., 122 S.W.3d 473 (Tex. App.—Texarkana 2003, pet. denied), they may, in fact, not “save” an otherwise conclusory and deficient report. Hardy v. Marsh, 170 S.W.3d 865 (Tex. App.—Texarkana 2005, no pet.); Hutchinson v. Montemayor, 144 S.W.3d 614 (Tex. App.—San Antonio 2004, no pet.); Costello v. Christus Santa Rosa Health Care Corp., 141 S.W.3d 245 (Tex. App.—San Antonio 2004, no pet.). It is emphatically clear that conclusory causation statements, whether supported by the buzz phrase “reasonable medical probability” or not, will not suffice to meet the requirements of Chapter 74 as delineated by Am. Transitional Care Ctrs. of Tex., Inc., v. Palacios, 46 S.W.3d 873 (Tex. 2001). However, even though magic words are not required, but there must be some indicia of probability:

Accordingly, “without some indication of probability, however expressed,” an expert report fails to show that the claimant’s claims have merit on the essential element of causation…..“A description of only a possibility of causation is not sufficient to satisfy [the] requirements concerning the necessary content of an expert report.” Covey v. Lucero, 2016 WL 7163835 (Dallas, 2017, nph) (not designated for publication).

Thus, a statement in the report that: “In my opinion and based on a reasonable medical probability, had such treatment been administered the overall outcome of [A.R.G.L.’s] medical condition would have potentially improved” was inadequate causation proof.

A good summary of the requirement was articulated by the Corpus Christi Court:

“Plaintiffs in medical negligence cases are required to prove by a preponderance of the evidence that the allegedly negligent act or omission was a proximate cause of the harm alleged. See Kramer v. Lewisville Mem’l Hosp., 858 S.W.2d 397, 400 (Tex. 1993). To establish proximate cause, the plaintiff must prove (1) foreseeability and (2) cause-in-fact. The ultimate standard of proof on the causation issue “is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.” Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995); See also Arguelles v. U.T. Family Med. Ctr., 941 S.W.2d 255, 258 (Tex. App.—Corpus Christi 1996, no writ). The precise words of “reasonable medical probability”
are not essential, but evidence of causation must still rise above mere conjecture or possibility. See Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988); Brownsville Pediatric Ass'n v. Reyes, 68 S.W.3d 184, 189 (Tex. App.-Corpus Christi 2002, no pet.). The trier of fact may decide the issue of proximate cause in medical malpractice cases based upon: (1) general experience and common sense from which reasonable persons can determine causation; (2) scientific principles provided by expert testimony allowing the fact finder to establish a traceable chain of causation from the condition back to the event; or (3) a probable causal relationship as articulated by expert testimony. Columbia Med. Ctr. of Las Colinas v. Bush, 122 S.W.3d 835, 852-853 (Tex. App.-Fort Worth 2003, pet. denied); Marvelli v. Alston 100 S.W.3d 460, 470 (Tex. App.-Fort Worth 2003, pet. denied).” Christus Spohn Health System, v. De La Fuente, Appellees, --- S.W.3d ----, 2007 WL 2325927 (Tex.App.-Corpus Christi, 2007, review granted, judgment was vacated and case remanded by agreement).


*Baylor Medical Center* does not cite any legal authority that requires the expert report to specifically address every possible cause for Richard Wallace's condition. Section 74.351(4)(6) requires the medical expert's report to provide a fair summary of the medical expert's opinions regarding the causal relationship between the failure of the physician or health care provider to provide care in accord with the pertinent standard of care and the injury, harm, or damages claimed. See Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6); Garrett, 232 S.W.3d at 180. Nothing in § 74.351 suggests the preliminary report is required to rule out every possible cause of the injury, harm, or damages claimed, especially given that § 74.351(s) limits discovery before a medical expert's report is filed. Further, the Wallaces were not required to present evidence in the medical expert's report as if they were actually litigating the merits of their claim....See Palacios, 46 S.W.3d at 879. The report is not required to meet the same evidentiary requirements as in a summary judgment proceeding or at trial.

*Wallace, 278 S.W.3d at 562.*

Further, an expert report which adequately demonstrates an expert opinion that the claim has merit, implicates the appellant’s conduct, and constitutes a fair summary of his report on causation is adequate, whether or not it addresses every causation issue that a defendant may raise in a challenge. *Whitfield v. Henson*, 385 S.W.3d 708 (Tex. App.—Dallas 2012, no pet.).


Inconsistent statements within the body of the expert’s report may support dismissal. *Gray v. CHCA Bayshore, L.P.*, 189 S.W.3d 855 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
15. If the Court Can Determine the Basis of Plaintiff’s Complaint, the Report is Adequate.

If a court can determine the basis of the plaintiff’s complaint, the report is adequate. The Court notes “[w]hile [Defendants] may disagree with [Plaintiff’s expert’s] opinions concerning the standard of care applicable to each of those individual defendants, the report contains a fair summary of his opinions and adequately informs them of the specific conduct called into question.” This is all that is required. In re Stacy K. Boone, 223 S.W.3d 398, 406 (Tex. App.—Amarillo 2006, orig. proceeding).

In fact, even if additional theories of liability are pled, an expert report that adequately addresses at least one pled theory of liability is sufficient to meet statutory requirements and defeat dismissal. Rodriguez-Salinas v. Cano, 2013 WL 5170993 (Tex. App.—Corpus Christi 2013, no pet.) (mem. op.); See also Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 630–31 (Tex. 2013), reh’g denied (Mar. 29, 2013) (noting that report on one claim is all that is needed—“if the trial court decides that a liability theory is supported, then the claim is not frivolous, and the suit may proceed.”) (emphasis added).

16. How Many Reports Are Required?

For some time, motions were filed in various trial courts seeking to dismiss plaintiffs’ lawsuits despite the timely filing and service of expert reports because each report did not contain all of the statutory requirements. The contention was that each report by each expert had to address both the standard of care and causation. Chapter 74 is explicitly clear that this contention is spurious. The supreme court has clarified the matter. Because the expert report is only a threshold requirement, if there is a valid report on one theory of liability supporting the cause of action, the report is sufficient to support the cause of action in its totality. There does not have to be a report for each theory of liability. Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 630 (Tex. 2013). The standard for adequacy of a report is lenient, and leave to cure any deficiencies in a report must be freely given. Scoresby v. Santillan, 346 S.W.3d 546 (Tex. 2011).

Section 74.351(i) expressly states that:

A Claimant may satisfy any requirement of this section ... by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.


A report cannot be wholly conclusory. However, where the plaintiffs’ expert stated that the defendant’s failure to detect a nodule “resulted in delayed diagnosis of lung cancer, required invasive and aggressive treatment and in all medical probability a significant reduction in the life expectancy of the patient,” the opinion was causally adequate because the statements were supported by factual data. Mosely v. Mundine, 249 S.W.3d 775 (Tex. App.—Dallas 2008, no pet.).

The report must be specific as to the cause of plaintiff’s injury or death. Constancio v. Bray, 266 S.W.3d 149, 157–58 (Tex. App.—Austin 2008, no pet.). In finding the plaintiff’s expert report deficient, the Constancio explained:
The first amended [expert] report's most significant flaw is that it fails to indicate the condition of which [the patient] ultimately died. The first amended report explains that after [the patient] 'coded' on 12/1/03, 'Dr. Chang stated that the findings were consistent with anoxic encephalopathy[.]’

...However, the report does not explain the cause of the anoxic encephalopathy, nor how, or if, anoxic encephalopathy leads to death.....This argument requires us to go outside of the four corners of the amended report and make assumptions to surmise how [patient] died.”

266 S.W.3d at 157–58.

A number of other courts have criticized expert reports for lacking a complete causation analysis. See, e.g., Taylor v. Fossett, 320 S.W.3d 570, 577–78 (Tex. App.—Dallas 2010, no pet.) (report did not provide a factual explanation of how doctor's delay in diagnosis or treatment caused complications); Estorque v. Schafer, 302 S.W.3d 19, 28–29 (Tex. App.—Fort Worth 2009, no pet.) (expert report left "gaps by not explaining how or why the physicians' failure to consult a urologist or gynecologist caused worsening or progression of Shirley's listed conditions" and did not explain how plaintiff would not have been injured had defendants obtained consuls from specialists); Johnson v. Willems, 286 S.W.3d 560, 565 (Tex. App.—Beaumont 2009, pet. denied) (report did not explain what "normal dose" would have been, why prescribed dose was excessive, what patient complained of, or what proper treatment would have been). See also Bowie Mem’l Hosp. v. Wright, 79 S.W.3d 48, 53 (Tex. 2002) (affirming trial court's determination that report was insufficient because it lacked "information linking the expert's conclusion ... to Bowie's alleged breach"); Gray v. CHCA Bayshore L.P., 189 S.W.3d 855, 859–60 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (affirming trial court's finding that report was insufficient because it did not provide any specific information about what defendants should have done or "convincingly tie the alleged departure from the standard of care to specific facts of the case").

18. The Four Corners Rule.


The “four corners” rule in fact almost resulted in sanctions being imposed against a defendant for his challenge of a plaintiff’s expert report. The defendant asserted that the court was required to review the source materials cited in the plaintiff’s expert’s report, thus requiring the court to look beyond the four corners of the report to determine fact issues. “[T]he trial court’s role is not to determine the truth or falsity of the expert’s opinion but to act as a gatekeeper.” Mettauer v. Noble, 326 S.W.3d 685 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing Pedroza v. Toscano, 293 S.W.3d 665 (Tex. App.—San Antonio 2009, no pet.); Schmidt v. Dubose, 259 S.W.3d 213 (Tex. App.—Beaumont 2008, no pet.)). Thus, the defendant, by urging that the court disregard the Palacios “four corners” rule, nearly subjected himself to sanctions for a frivolous appeal. The defendant’s misplaced reliance on an overturned opinion was the only thing that saved him.

Paradoxically, two courts have held that, in order to determine the adequacy of a report, the trial court must look in addition at the plaintiff’s pleading. Lovato v. Austin Nursing Ctr., Inc., 2003 WL 1561203, (Tex. App.—Austin 2003, no pet.) (mem. op.) (“A plaintiff's pleadings state the injury claimed. Thus, to determine whether a report meets the statutory requirements and whether the claims have merit, a trial court need not look at the expert report in isolation. Instead, the trial court must necessarily be permitted to examine a plaintiff's pleadings.”). In Windsor v. Maxwell, 121 S.W.3d 42 (Tex. App.—Fort Worth 2003, pet. denied), the dissent complained that “the majority’s use of Windsors’ pleadings to measure whether Dr. Jones’s report constitutes a good faith effort turns Texas pleading practice on its head.” Id. at 52 (Walker, J., dissenting). Further, in some instances, even though the exact causal link is not specified, it can be obvious enough that the trial court is permitted to make logical connections. In an involuntary commitment case where the Plaintiff alleged that she was wrongfully involuntarily committed in part because the facility based its actions on the opinion of a nurse practitioner rather than, as is required, by a physician, the Dallas court found that the trial court could reasonably have inferred from the expert’s report that, had a physician examined the plaintiff, he would not have made findings that lead to her commitment. The dissent vigorously argues that the report was required to so state, rather than allowing the trial court to make the inference. Hickory Trail Hospital v. Loya, 2016 WL 7376559 (Dallas 2016, n.p.h.) (not designated for publication).

Note that not only must the content of the report be adequate within its four corners, the expert’s qualifications must also be apparent therefrom. Hendrick Med. Ctr. v. Conger, 298 S.W.3d 784 (Tex. App.—Eastland 2009, no pet.).

Moreover, a report fails if its causation opinion is conclusory. “An expert cannot simply opine that the breach caused the injury.” Jelinek v. Casas, 328 S.W.3d 526, 539 (Tex. 2010). “Instead, the expert must go further and explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented.” Id. at 539–40. That is, “the expert must explain the basis of his statements to link his conclusions to the facts.” Bowie, 79 S.W.3d at 52 (quoting Earle v. Ratliff, 998 S.W.2d 882, 890 (Tex. 1999)). Covey v. Lucero, 2016 WL 7163835 (Dallas, 2017, nph) (not designated for publication).

19. The Standard of Review.

Since Am. Transitional Care Ctrs. Of Tex., Inc., v. Palacios, 46 S.W.3d 873 (Tex. 2001), it is clear that the standard of review for judging trial courts’ decisions with regard to expert reports is the abuse of discretion standard. There have been a few cases construing this standard under Chapter
74. Dismissal in the face of a good faith effort is an abuse of discretion. Martin v. Abilene Reg’l Med. Ctr., 2006 WL 241509 (Tex. App.—Eastland 2006, no pet.) (mem. op.). Nonetheless, appellate courts, under the abuse of discretion standard, will grant considerable latitude to trial court decisions that dismiss plaintiffs, even if the appellate court disagrees with the ruling. In Gray v. CHCA Bayshore, L.P., 189 S.W.3d 855 (Tex. App.—Houston [1st Dist.] 2006, no pet.), the appellate court found that the report met the statutory elements, but nonetheless deferred to the trial court’s ruling.

20. No “Good Cause” “Accident” or “Mistake” is Required.

Article 4590i provided that, in order for a plaintiff to obtain an extension of time for filing an expert report, the plaintiff had to demonstrate good cause for the extension and that the failure to produce an adequate report was the result of accident or mistake, rather than conscious indifference or intent. There is no such requirement under Chapter 74. Thus, under Chapter 74, the trial court is authorized to grant a thirty (30) day extension to cure a deficient expert report without such proof by the plaintiff. In re Covenant Health Sys., 223 S.W.3d 423 (Tex. App.—Amarillo 2006, orig. proceeding).

21. In Emergency Room Cases, the Report Need Not Speak to “Willful and Wanton Negligence.”

Section 74.351(r)(6) does not require that a conclusion of “willful and wanton negligence” be included in the breach of “standard of care” portion of a plaintiff’s expert report. Since § 74.351(s) “limits discovery before an expert report is filed, in the absence of a stipulation or admission, any expert report asserting the attending physician’s negligence was willful and wanton could only be based upon speculation or ipse dicta.” Bosch v. Wilbarger Gen. Hosp., 223 S.W.3d 460, 464 (Tex. App.—Amarillo 2006, pet. denied).

Citing Bosch in its analysis, the Fort Worth court of appeals analyzed the distinction between “standard of care” and “standard of proof” at length, observing:

Thus, the statute sets forth the standard of proof at trial that is required in a health care liability claim arising out of the provision of emergency medical care….An expert report, however, is statutorily required to provide only a summary of the expert’s opinions regarding the applicable standards of care, the manner in which the defendant’s conduct did not meet those standards, and the causal relationship between that failure and the injury, harm, or damages claimed…. §74.351(r)(6). Section 74.153’s statutorily created standard of proof and the applicable medical standards of care are not the same thing.

Benish v. Grottie, 281 S.W.3d 184, 190–91 (Tex. App.—Fort Worth 2009, pet. denied). The Dallas court of appeals reached a similar conclusion in Wallace:

The phrases ‘standard of care’ and ‘standard of proof’ are not synonymous in the context of medical malpractice actions.” Bosch, 223 S.W.3d at 464 (Tex. App.—Amarillo 2006, pet. denied). Section 74.351(r)(6) requires the expert’s medical report to provide a fair summary of the applicable standard of care. See TEX. CIV. PRAC. & REM. CODE ANN. §74.351(r)(6); Bosch,
223 S.W.3d at 464. Section 74.153 does not constitute a standard of care as contemplated by Section 74.351(r)(6). Bosch, 223 S.W.3d at 464. Instead, it provides the evidentiary standard of proof required in emergency medical care cases. Id. In the absence of a stipulation or admission, any expert report asserting the attending physician or health care provider’s negligence was willful and wanton could only be based on speculation or ipse dixit because § 74.351(s) limits discovery before an expert report is filed.


Expert reports are required even in a so-called res ipsa case. The res ipsa loquitur doctrine is an evidentiary rule bearing upon the “standard of proof,” while filing an expert report is a threshold requirement for establishing the “standard of care” in a health care liability claim. Even in a res ipsa case, a plaintiff must have proof of causation, which necessitates an expert report. Garcia v. Marichalar, 185 S.W.3d 70 (Tex. App.—San Antonio 2005, no pet.).

23. Non-suit and the 120-Day Clock.

There has been a split in the appellate courts as to whether a non-suit taken by a plaintiff during the pendency of the 120-day period tolls or does not toll the 120-day deadline. Under Mokkala v. Mead, 178 S.W.3d 66 (Tex. App.—Houston [14th Dist.] 2005, pet. denied), the 120-day clock continued to run even during the non-suit period. However, under CHCA Woman’s Hosp., L.P. v. Lidji, 403 S.W.3d 228, 234 (Tex. 2013), the 1st district in Houston held that the 120-clock was tolled during the dismissal period.

The Supreme Court resolved the conflict in June of 2013, ruling in CHCA Woman’s Hosp., L.P. v. Lidji that non-suit tolls the 120-day period. CHCA Woman’s Hosp., L.P. v. Lidji, 403 S.W.3d 228, 234 (Tex. 2013). Justice Lehrmann, opining for the majority, noted “to require service of an expert report in the absence of a pending lawsuit [] would give rise to a host of procedural complications that the statute does not envision and cannot adequately address.” Id. at 233.

Accordingly, a plaintiff who files a suit and dismisses it without having filed an expert report, but with time remaining on the 120-day clock, has whatever days were left at the time of non-suit when he or she refiles in order to get an expert report filed.

24. Nonsuit Does Not Cancel Motions for Sanctions or Interlocutory Appeals

In Villafani v. Trejo, the plaintiff nonsuited his lawsuit after the trial court found his expert report inadequate, but before defendant’s motion for sanctions was granted. On review, the Texas Supreme Court held that the trial court retains jurisdiction over independent affirmative claims for relief despite the nonsuit. 251 S.W.3d 466 (Tex. 2008). Furthermore, a patient’s nonsuit, resulting in dismissal without prejudice, did not preclude a defendant’s appeal of the trial court’s denial of its earlier motion to dismiss. Id.

In Hernandez v. Ebron, the Texas Supreme Court held that the failure to file an interlocutory appeal does not waive the appeal. 289 S.W.3d 316 (Tex. 2009). Noting that the phrase “may appeal” under § 51.014(a)(9) of the Texas Civil Practices and Remedies Code does not mean “must appeal,” the Court stated:

The Legislature authorized health care providers to pursue interlocutory appeals from the trial court denials
of challenges to plaintiffs’ expert reports, but we see no indication that the Legislature effectively mandated interlocutory appeals by providing that if no appeal was taken, then the health care provider waived the right to challenge the report under all circumstances.

Hernandez, 289 S.W.3d at 319. The dissent, authored by Chief Justice Jefferson and joined in by Justices O’Neill and Medina, pointed out that, by allowing a defendant to challenge the expert report after final judgment—in other words, after the plaintiff has survived a challenge to its report at the trial court level and after plaintiff has successfully survived any Daubert challenges at trial and after plaintiff has obtained a verdict from a jury and after the trial court has entered judgment on the verdict—the Court was injecting an element of uncertainty into the case and risked turning the screening mechanism under Chapter 74 into a trump card, in addition to prolonging litigation in other cases in which the expert report is clearly insufficient. Id. at 332 (Jefferson, C.J., dissenting).

25. Qualifications Must Be Shown Within the Body of the Report

The Texas Supreme Court has recently held that “the standard for adequacy of a report is lenient, and that leave to cure any deficiencies in a report must be freely given.” Loaisiga v. Cerda, 2010 WL 3049086 (Tex. App.—Corpus Christi 2010) rev’d 379 S.W.3d 248, 260 (Tex. 2012) (citing Scoresby v. Santillan, 346 S.W.3d 546, 552 (Tex. 2011)). The adequacy of a report is determined by whether it “represent[s] an objective good faith effort to comply” with the statutory definition of a qualified expert. Scoresby, 346 S.W.3d at 555-56 (citing §§ 74.351(r)(5), 74.401-.403). “[A] document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. An individual's lack of relevant qualifications and an opinion's inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so. This lenient standard avoids the expense and delay of multiple interlocutory appeals and assures a claimant a fair opportunity to demonstrate that his claim is not frivolous.” Id. at 549. For a good discussion of what the appeals courts previously required of expert qualifications and standards for reports, See Kelly v. Rendon, 255 S.W.3d 665 (Tex. App.—Houston [14th Dist.] 2008, no pet.). For an example of the attitude of courts towards plaintiffs’ attempts to satisfy the expert report requirement, prior to Scoresby, See Methodist v. Rangel, 2005 WL 3445994 (Tex. App.—San Antonio 2005, pet. denied) (mem. op.).

In a very thorough and detailed opinion, Justice Harvey Brown catalogs the requirements for being an expert witness in a health care liability case in Texas.

“We conclude that the statutory definition of ‘practicing medicine’ provides a non-exclusive list of activities that qualify an expert to testify and further conclude that [the expert’s] work at the time of his testimony qualifies as “practicing medicine.” Benge v. Williams, 472 S.W.3d 684 (Tex. App. —Houston [1st Dist.] pet. filed).” (emphasis added.)

Justice Brown goes on to catalog that section 74.401’s use of the phrase “includes, but is not limited to” requires that the activities that qualify as “practicing medicine” not be restricted to training at an accredited medical school and serving as a consultant to physicians. Further, qualification as an expert is not limited to
physicians who actively are examining and admitting patients into hospitals.

“In conclusion, we construe “practicing medicine,” within the context of section 74.401 to include a physician who is licensed to practice in the United States, has actively practiced medicine by consulting with other physicians and teaching medical residents in Texas, and then move to another country where he continues to consult with that country’s physicians and teach its medical residents, all the while maintaining his affiliation with a Texas medical school, working on NIH grants and teaching – with hands-on involvement – surgical procedures abroad through volunteer service.” Citing: Larson, 197 S.W.3d 304-305 (stating that “expert qualifications should not be too narrowly drawn”). Benge v. Williams, 472 S.W.3d 684 (Tex. App. —Houston [1st Dist.] pet. filed).

26. Distinction Between Defendants Who Are Individuals and Defendants Who Are Not

The expert report requirement for defendants who are individuals requires that the plaintiff’s expert “practice in the same field of care or treatment as the Defendant.” § 74.402(b)(1). This applies only when “the Defendant health care provider is an individual.” Id. For defendants who are entities, the plaintiff’s expert must comply with § 74.402(b)(2) and (3), which require that the experts demonstrate knowledge of the accepted standards of care and that they are qualified on the basis of training or experience to offer expert opinions regarding the standard of care. The requirement as to fields of practice is thus quite different. Ne. Med. Ctr. v. Crooks, 2006 WL 1358361 (Tex. App.—Texarkana May 19, 2006, no pet.) (mem. op.).

27. § 74.351(l), § 74.351(d) and Interlocutory Appeal

a. Defendant Must Request Relief Under the Proper Statutory Section.

A defendant’s motion to strike an expert’s report because the expert is not qualified and because the report did not comply with the statutory requirements of § 74.351(r)(6) was not a request under § 74.351(b) for dismissal with prejudice and attorney’s fees. It did not assert that the report was not timely and, in fact, was filed so early that the motion itself stated “the issue of timeliness is not addressed ... [and] will ripen when the deadline expires[.]” Academy of Oriental Med. v. Andra, 173 S.W.3d 184, 186 (Tex. App.—Austin 2005, no pet.). The Austin court of appeals therefore characterized the defendant’s motion for relief as a request under § 74.351(l), in which interlocutory appeal is permitted only from an order “granting relief sought by a motion under Section 74.351(l).” Id. at 189. Since, the trial court denied the relief sought under 74.351(l), interlocutory appeal was not permitted. The defendant had requested relief under the wrong section, § 74.351(l) instead of § 74.351(b).

b. Jurisdiction Over Interlocutory Appeals

Interlocutory appeals are not available in cases in which the trial court deems an expert report deficient and grants a thirty-day extension, even if coupled with a denial of a motion to dismiss. Ogletree v. Matthews, 262 S.W.3d 316 (Tex. 2007). Holding that “the actions denying the motion to dismiss and granting an extension are inseparable,” the Ogletree Court found that statute plainly prohibits interlocutory appeals of such an order. Id. at 321. The Ogletree holding put to rest long-running disagreement over whether there is jurisdiction over interlocutory appeals from orders denying relief under § 74.351(l).

Several years later, the Supreme Court addressed the “recurring and elusive” issue of whether an expert report can be deemed so deficient as to constitute no report at all and, thus, not entitled to the unreviewable 30-day extension permitted under 74.351(c) in Scoresby v. Santillan, 346 S.W.3d 546, 558 (Tex. 2011). The Scoresby Court sought to resolve the
concern raised by Justice Willett in Ogletree v. Matthews, in which he suggested that, in addition to the nonexistent and deficient report, there was a potential third category of expert report consisting of “a document so utterly lacking that, no matter how charitably viewed, it simply cannot be deemed an ‘expert report’ at all, even a deficient one.” 262 S.W.3d 316, 323 (Tex. 2007). Such a report, Justice Willett urged, “falls outside the section 74.351(c) safe harbor afforded to deficient-but-curable reports” and should compel the conclusion that a report "has not been served" at all for purposes of section 74.351(b). Id. at 324. While allowing for the possibility that an expert report might be “so lacking in substance that it does not qualify as an expert report,” the Scoresby Court advocated a more lenient approach in which “all deficiencies … are subject to being cured before an appeal may be taken from the trial court’s refusal to dismiss the case.” Scoresby, 346 S.W.3d at 557.

Defendants may, however, still bring interlocutory appeals of denials of motions to dismiss when no actual expert report was ever served by the statutory deadline. Lewis v. Funderburk, 253 S.W.3d 204 (Tex. 2008).

The Supreme Court had held that mandamus is appropriate in denial of dismissals under Chapter 74. In re McAllen Med. Ctr., Inc., 275 S.W.3d 458 (Tex. 2008)(orig. proceeding). In an astonishing opinion by Justice Brister, the Court held that “mandamus relief is available when the purposes of the health care statute would otherwise be defeated.” Id. at 462. This magnificently overbroad language arguably permits mandamus review of any trial court action which a defendant contends vitiates the purpose of Chapter 74. Since “[s]itting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded,” mandamus should be granted in cases where “unnecessary costs mount up.” Id. at 466. As argued by the dissent, the holding in In re McAllen is a radical departure from the Court’s seminal mandamus case, Walke v. Packer, 827 S.W.2d 833 (Tex. 1992), in which the Court made it clear in denying mandamus relief to a plaintiff that simply incurring costs in the prosecution of a lawsuit does not justify the availability of mandamus relief. Walker, 827 S.W.2d 833, at 846 (Doggett, dissenting). However, in an odd twist, a Texarkana court of appeals, purporting to follow the McAllen logic, found appeal to be an adequate remedy. See In re Gladewater Healthcare Ctr., 279 S.W.3d 850 (Tex. App.—Texarkana 2009, orig. proceeding). The Gladewater case had been pending since August of 2003 and was set for trial in February of 2009 only to be granted a continuance so that the court of appeals could consider mandamus review of a report objection. Such review would “frustrate legislative intent” in a case in which extensive discovery had already taken place and the legislative goal of avoiding unnecessary expense and delay could not in any event be met.

Further, even though mandamus relief may be available in cases in which dismissal is denied, it is not available where the defendant health care provider complains only that the trial court erred in granting the plaintiffs a 30-day grace period to amend their reports. Thirty days is not an unconscionable delay, whereas “this original proceeding has now delayed the case for four years.” In re Roberts, 255 S.W.3d 640, 642 (Tex. 2008) (per curiam).

The Texas Supreme Court has held that mandamus relief is not proper where a report is timely filed, but is deficient in content. In re Watkins, 279 S.W.3d 633 (Tex. 2009). Because the statute allows for interlocutory review only if no expert report is filed and prohibits such a review if a merely deficient report is filed, granting mandamus jurisdiction would subvert the Legislature’s limit on such review. “Legislative findings balancing the costs and benefits of interlocutory review must work both ways: having treated them with respect
when they encourage interlocutory review, [the Court] must treat them with the same respect when they discourage it. Id. at 634.

However, where no report is filed but the trial court grants an extension of time in which to obtain one, interlocutory appeal is permitted. “A provider may pursue an interlocutory appeal of the denial of a motion to dismiss when no expert report has been timely served, whether or not the trial court grants an extension of time.” Badiga v. Lopez, 274 S.W.3d 681, 685 (Tex. 2009).

c. Effect of Challenge to the Report

When a health care defendant challenges the adequacy of an expert report and seeks appeal on that point, “the report is not adequate and, therefore, not served, until the court of appeals determines that it is adequate. Until the issue of the adequacy of [Plaintiff’s] expert report is resolved in the pending interlocutory appeal, there has been no service of the report as to [Defendant].” In re Lumsden, 291 S.W.3d 456, 460 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). This startling opinion precludes discovery under the discovery moratorium provisions of Chapter 74 as to all defendants based on the interlocutory challenge to the report by one defendant and presumptively makes plaintiff’s report invalid based on the objection of a defendant, even in the absence of a court ruling sustaining the objection.

d. No Appellate Review Based on Factual Determination

When a trial court denies a motion to dismiss because it makes a factual finding that an entity is not a health care provider or that the conduct complained of is not “health care,” interlocutory appeal for abuse of discretion in denying the motion to dismiss is inappropriate. Where the trial court found that a dispute about whether certain conduct was within the course and scope of an independent contractor’s contract with a health care provider, such a ruling was evidentiary and not a matter of law, and, thus, not subject to interlocutory appeal. Orthopedic Res., Inc. v. Swindell, 329 S.W.3d 70, 74 (Tex. App.—Dallas 2010, pet. denied).

28. Defendant’s Failure to Answer or Have a Registered Agent Does Not Vitiate the Duty to Serve a Report But May Result in Tolling of the 120 Day Clock

In Smith v. Hamilton, the Beaumont court of appeals addressed a case in which the defendant was served with process and the plaintiff’s expert report was filed with the court. No. 09-07-128 CV, 2007 WL 1793754 (Tex. App.—Beaumont June 21, 2007, no pet.) (mem. op.). The defendant did not file an answer until after the 120-day deadline had passed. Thereafter, the plaintiff served the defendant with the previously-filed expert report. The defendant objected that he had not been served with the report within 120 days of filing of the original petition and the Beaumont court of appeals, in an opinion by Justice Gaultney, agreed with the defendant, holding that, under such circumstances, a plaintiff’s suit is subject to mandatory dismissal under Chapter 74.351. Smith, 2007 WL 1793754, at *5. The San Antonio court of appeals reached a similar result in PM Mgmt.–Windcrest NC, LLC v. Sanchez, 256 S.W.3d 396 (Tex. App.—San Antonio 2008, no pet.). In Sanchez, a plaintiff sued PM Management-Windcrest NC, LLC, which was doing business as “Trisun Care Center” for nursing negligence. Trisun violated the law by not having a registered agent listed with the Secretary of State. This delayed the plaintiff’s ability to serve the lawsuit and delayed the defendant’s answer. The plaintiff’s expert report, therefore, was not filed within 120 days of the filing of the original petition. Despite defendant’s violation of the law, the San Antonio court of appeals reversed the trial court and ordered dismissal of the lawsuit. Sanchez, 256 S.W.3d at 397–98.

However, the Houston court of appeals, in an instance subsequent to Smith
and Sanchez, held that a defendant’s failure to answer resulted in the tolling of the 120-day deadline to serve an expert report:

We hold that the statutory period for [the plaintiff] to serve her expert report on Dr. Morris was tolled until May 7, 2009, the date Dr. Morris answered. Dr. Morris untimely answered on May 7, 2009. The statutory period for timely serving the expert report was tolled until that date. Umberson had 75 days remaining until July 21, 2009, to serve her expert report on Dr. Morris (120 days less 45 days that had already elapsed from date of filing to date that Dr. Morris’s answer was due). Accordingly, we further hold that [the plaintiff’s] expert report was timely served on Dr. Morris on May 11, 2009.


29. An Expert May Apply the Same Standard of Care to Two Physicians

The Beaumont court of appeals holding in *Agana v. Terrell*, No. 09-07-088 CV, 2007 WL 1793786 (Tex. App.—Beaumont 2007, no pet.) (mem. op.) stands for the proposition that “nothing … explicitly forbids applying the same standard of care to more than one physician if the physicians owe the same duty to the patient.” *Agana*, 2007 WL 1793786, at *5. Further, a report is not rendered inadequate simply because it “lumps” together multiple defendants and applies the same standard of care as to all of them. *Livingston v. Montgomery*, 279 S.W.3d 868 (Tex. App.—Dallas 2009, no pet.). In fact, *Bailey v. Amaya Clinic* holds that it is permissible for a plaintiff’s expert to group all of the defendants in a report in describing their standard of care, as long as the defendants owed the same duty to the plaintiff.

*Bailey v. Amaya Clinic*, 402 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

However, when a plaintiff sues more than one physician, the expert report must set forth the standard of care applicable to each physician and explain the causal relationship between each physician’s individual acts and the injury. If an expert report alleges negligence involving different physicians, then that report must explain why each physician owes a duty of care to the plaintiff and how that duty was breached. *Clapp v. Perez*, 394 S.W.3d 254 (Tex. App.—El Paso 2012, no pet.). The court will look at the report to determine if it refers to the defendant physician or healthcare provider by name or position or explains how the statements in the report apply to that defendant. *Rivenes v. Holden*, 257 S.W.3d 332 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Note, however, that the physician or healthcare provider does not actually need to be mentioned by name if the report “implicates” that defendant’s conduct and is directed solely to that defendant’s care. *Troeger v. Myklebust*, 274 S.W.3d 104 (Tex. App.—Houston [14th Dist.] 2008, pet denied).

30. Docket Control Orders

An agreement intended to extend the 120-day expert report deadline must explicitly state that the agreement is for that purpose and must reference the § 74.351 expert report deadline. Failure to mention the § 74.351 deadline results in dismissal of a plaintiff’s case when the tardy report is filed. *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249 (Tex. 2010). For a scheduling order to reset the Chapter 74 deadlines, there must be some indication that the order is intended to do so, either by citation to Chapter 74 or at least by reference to the fact that the order supersedes all other statutory deadlines. *Id.* at 250. In the absence of such language, a generic scheduling order does not operate to

31. Must a Report During the Grace Period be from the Same Expert?

The Supreme Court had held that, if a plaintiff’s report is found deficient, the plaintiff may cure the deficiency by using a new expert. *Lewis v. Funderburk*, 253 S.W.3d 204 (Tex. 2008). “[I]n section 74.351(i), the statute provides that ‘a claimant may satisfy any requirement of this section ... by serving reports of separate experts.’ Because the statute allows a claimant to cure a deficiency, and that requirement like all others may be satisfied by serving a report from a separate expert, we agree with Funderburk that the statute does not prohibit him from changing experts midstream.” *Lewis*, 253 S.W.3d at 208.

This comports with recent supreme court rulings that apply a lenient standard for curing deficiencies in expert reports, and that allow a single valid expert’s report to support a plaintiff’s entire claim. *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011); *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013).

32. Sanctions and Court Costs

In an instance of dismissal for failure to file an expert report, a defendant apparently sought costs and attorneys’ fees from plaintiff’s counsel rather than from the estate of the deceased plaintiff. The trial court and court of appeals refused to award costs or attorneys’ fees against plaintiff’s counsel and the Supreme Court denied writhe petition for review. Justice Brister noted in his dissent, joined by Justice Hecht, that:

In this case, no expert report was ever filed, so the statute deems it meritless. Yet the courts below refused to shift any costs because the defendant sought recovery from plaintiff’s attorney rather than the plaintiff—who had died without assets. If it was not clear before, it is surely clear now: some courts simply will not enforce this statute. Because the Court declines to enforce it either, I respectfully dissent to the denial of the petition.


A defense attorney’s utterly conclusory statement, unsupported by any evidence or documentation, about what the attorney’s fees for obtaining a dismissal were was adequate to support award of those fees. In *Garcia v. Gomez*, the Texas Supreme Court reversed the Corpus Christi court of appeals, which had held that, in order for a defendant to recover attorney’s fees, there must be appropriate evidence of eight factors: (1) the time and labor required, novelty and difficulty of the question... and the skill required to properly perform the legal service; (2) the likelihood that the acceptance of employment precluded other employment....; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. *Garcia v. Gomez*, 286 S.W.3d 445 (Tex. App.—Corpus Christi 2008), rev’d in part, 319 S.W.3d 638 (Tex. 2010). The Texas Supreme Court ruled that, although Garcia’s attorney’s testimony lacked specifics, it was “some evidence” of reasonable attorney’s fees. *Garcia v. Gomez*, 319 S.W.3d at 641. The dissent pointed out that, in no other area of the law, would such testimony be sufficient. 319 S.W.3d at 645 (Jefferson, C.J., dissenting).
Lastly, the Texas Supreme Court has apparently eviscerated the right of a plaintiff to nonsuit. In *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009), the Court held that a nonsuit did not preclude a defendant’s motion for costs and attorney’s fees under circumstances in which plaintiff had not timely filed an expert report. Thus, the “right” to take a nonsuit and end litigation is meaningless in the context of Chapter 74 cases, unless the nonsuit is taken before the 120-period expires.

Further, it is actually error on the part of the trial court not to award costs and attorneys’ fees if there is malpractice coverage. In *Aviles v. Aguirre*, 292 S.W.3d 648 (Tex. 2009), the court of appeals had denied an award of costs and attorneys’ fees to the defendant based on the analysis that the defendant himself did not incur them, his insurance carrier did. In reversing the lower court, the Supreme Court held that the presence of insurance does not eliminate the requirement that costs and attorneys’ fees be taxed against the plaintiff when dismissing a claim for an inadequate report even though the defendant himself did not personally incur those costs. *Aviles*, 292 S.W.3d at 648.

33. **The Importance of Requesting a Grace Period Extension**

In a case in which the plaintiff’s expert report was found to be deficient, the court of appeals emphasized that, because the plaintiff had requested a 30-day grace period in her response to the motion to dismiss at the trial court level, even though she defended the adequacy of her report as well, she was entitled on remand to the grace period in order to cure the deficiencies. *Valley Baptist Med. Ctr. v. Gonzales*, No. 13-06-371-CV, 2007 WL 416536 (Tex. App.— Corpus Christi Feb. 8, 2007, no pet.) (mem. op.).

34. **The Expert Report and Damages**

Prior to *Potts*, at least one court held that a plaintiff’s expert report must contain a causal link to the plaintiff’s damages, even if those damages have not yet accrued. *Farishta v. Tenet Healthsystem Hosps. Dallas, Inc.*, 224 S.W.3d 448 (Tex. App.—Fort Worth 2007, no pet.). The supreme court decision in *Potts* decisively overruled this notion. The court reiterated that the section 74.351 expert report requirement is a “threshold” requirement that a claimant in a health care liability claim must satisfy to continue the lawsuit. *Potts*, 392 S.W.3d at 631. “The Act requires the expert report to summarize the expert’s opinions ‘as of the date of the report,’ recognizing that those opinions are subject to further refinement...Discovery can reveal facts supporting additional liability theories, and the Act does not prohibit a claimant from amending her petition accordingly.” *Id.* at 632.

35. **Interplay Between “Deficient Report” and “No Report”**

In 2011, the Supreme Court squarely addressed the issue of when an expert report may be considered so deficient that it constitutes no report at all. *Scoresby v. Santillan*, 346 S.W.3d 546 (Tex. 2011). If a report is “so lacking in substance” that it simply cannot qualify as an expert report, then it would be deemed as if no report had been served at all. *Id.* at 555. In such event, there is no opportunity for the claimant to cure and the denial of a motion to dismiss based upon failure to timely serve an expert report is subject to immediate interlocutory appeal. *Id.*

In determining “where to draw the line” between a deficient report and a report that would otherwise “mock the Act’s requirements,” the *Scoresby* Court analyzed the policies underlying the availability of interlocutory appeal and the requirement of an expert report. *Id.* at 556. The Scoresby Court determined that a deficient expert report would be entitled to a thirty-day extension of time to cure those deficiencies “if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has
merit, and if the defendant’s conduct is implicated.” Id. at 557. Acknowledging that this was “a minimal standard,” the Court opined that such a standard was “necessary if multiple interlocutory appeals are to be avoided, and appropriate to give a claimant the opportunity provided by the Act’s thirty-day extension to show that a claim has merit.” Id. Advocating a more lenient approach, the Court opined that “all deficiencies … are subject to being cured before an appeal may be taken from the trial court’s refusal to dismiss the case.” Id. In a concurring opinion, Justice Willett noted that “[u]nder the Court’s admittedly ‘lenient standard,’ the [plaintiff’s] expert report must merely ‘contain a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. The line is forgiving but bright: The ‘report’ must actually allege someone committed malpractice.” Id. at 559 (Willett, J., concurring).

36. Effect of Amending Claims or Adding Parties

An amended complaint adding new claims started a new 180-day clock as to those claims under Article 4590i. Puls v. Columbia Hosp. at Med. City, 92 S.W.3d 613 (Tex. App.—Dallas 2002, pet. denied). In contrast, adding new claims does not restart the 120-day clock under Chapter 74. Toro v. Alaniz, No. 04-06-00814-CV, 2007 WL 1200122 (Tex. App.—San Antonio Apr. 25, 2007, no pet.) (mem. op.). The Dallas court of appeals reached a contrary result whereby the 120-day period to serve the expert report was triggered by the filing of an amended petition that raised allegations regarding cardiology care of the patient, as opposed to being triggered by the filing of the patient’s original petition, which had alleged negligence with regard to pressure sores. Suleman v. Brewster, 269 S.W.3d 297 (Tex. App.—Dallas 2008, no pet.). Therefore, the motion to dismiss the cardiology allegations—which was premised upon defendant’s assertion that he was served with the report more than 120 days after the plaintiff filed his suit—was not improperly denied.

Although the patient was admitted for treatment of shortness of breath and chest pain, and suffered cardiac arrest while he was at the Hospital, the Original Petition does not allege any specific act of negligence by the Doctor or the Hospital which impacted his heart condition. We therefore hold that the Original Petition did not provide fair notice of any cardiac claims and overrule the [plaintiffs’] issue.

Id. The trial court, therefore, properly granted summary judgment against the plaintiffs on their cardiac claims. Id. What is the effect of the addition of new parties after 120 days has elapsed?

A flurry of new motions for dismissal have been filed involving the addition of new defendants after the 120-day
deadline from the original petition. The assertion is that, since the 120-day report was not served on the newly-added defendants—even though they were not parties at that time—within the 120-day filing deadline from the “original petition,” then the deadline has been missed. A bill to clarify the statute’s intent failed in the 2009 legislative session. Multiple courts have now held that the 120 days begins to run from the time of filing of a petition as to each defendant and not as to the filing of the original petition in the lawsuit as a whole.

In examining the requirement under § 74.351(a), the San Antonio court of appeals opined that “[s]ection 74.351(a)’s requirement that a plaintiff serve an expert report explaining each defendant physician’s or health care provider’s liability within 120 days from the filing of the original petition does not necessarily refer to the first-filed petition in the lawsuit; it refers to the first-filed petition naming that defendant physician or health care provider as a party to the lawsuit.” Osonma v. Smith, 2009 WL 1900404, (Tex. App.—San Antonio 2009, pet. denied) (mem. op.) (emphasis added). The “within 120 days after the date the original petition was filed” language of Chapter 74 refers to the original petition as to the objecting defendant. Hayes v. Carroll, 314 S.W.3d 494 (Tex. App.—Austin 2010, no pet.). The Austin court of appeals reasoned that:

If a defendant has not been added to a case, there has yet to be a lawsuit filed against that defendant. Even if the lawsuit against a particular defendant comes in the 10th amended petition filed in a cause number, that petition is the first document in which a lawsuit has been filed against that defendant. Regardless how that document is styled, it is the original or first petition bringing a lawsuit as to that defendant.

Hayes, 314 S.W.3d at 500.

The Hayes court relied on legislative history to determine that the Legislature intended for the 120 days to run from the date the complaint is filed as to any individual defendant, not from the time the original lawsuit is filed. Similarly, in Stroud v. Grubb, 328 S.W.3d 561 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), the Houston court of appeals held “that amending a petition to name a defendant triggers the 120-day time period to serve that defendant with an expert report.” Stroud, 328 S.W.3d at 562. The appellate courts in Padre Behavioral Health Sys. v. Chaney, 310 S.W.3d 78 (Tex. App.—Corpus Christi 2010, no pet.), Daybreak Cmty. Services, Inc. v. Cartrite, 320 S.W.3d 865 (Tex. App.—Amarillo 2010, no pet.), and CHCA W. Houston, L.P. v. Priester, 324 S.W.3d 835 (Tex. App.—Houston [14th Dist.] 2010, no pet.) reached the same conclusion.

37. Threshold Means Threshold

Because the expert report is only a threshold requirement, if there is a valid report on one theory of liability supporting the cause of action, the report is sufficient to support the cause of action in its totality. There does not have to be a report for each theory of liability. Certified EMS, Inc. v. Potts, 392 S.W.3d 625 (Tex. 2013). This relieves the plaintiff of the burden of filing additional reports when discovery leads to amendment of the pleadings; it also relieves the defendant of the burden of continually challenging those additional reports. Other courts had reached the conclusion that a plaintiff may not amend its claims after the 120 day deadline is passed. See Id. at 629 n.7 (collecting cases). In Potts, the supreme court set about fixing problems created by these cases. See Id. (“These courts have engaged in analyses that demonstrate the need to definitively resolve the question of how expert reports treat multiple theories of liability.”). Also presumably fixed by Potts:
Farishta v. Tenet Healthsystem Hosps. Dallas, Inc., 224 S.W.3d 448 (Tex. App.—Fort Worth 2007, no pet.) (Holding a plaintiff's expert report must contain a causal link to the plaintiff's damages, even if those damages have not yet accrued). The section 74.351 expert report requirement establishes a "threshold" requirement that a claimant in a health care liability claim must satisfy to continue the lawsuit. Potts, 392 S.W.3d at 631. "The Act requires the expert report to summarize the expert's opinions 'as of the date of the report,' recognizing that those opinions are subject to further refinement...Discovery can reveal facts supporting additional liability theories, and the Act does not prohibit a claimant from amending her petition accordingly." Id. at 632. This supports the San Antonio court's finding that new allegations supporting the claims of negligence in the original petition are not new "causes of action" and, thus, do not require a new expert report. Pedroza v. Toscano, 293 S.W.3d 665 (Tex. App.—San Antonio 2009, no pet.). "Once the trial court has performed its gatekeeper function under Section 74.351 ... subsequent expert reports are opinions governed by the rules of discovery." Id. at 667.

The supreme court, relying on its prior decision in Potts, recently held that the combined conclusions of three experts were adequate to satisfy the expert report requirement of TMLA. TTHR Ltd. P'ship v. Moreno, 401 S.W.3d 41, (Tex. 2013). It also reiterated that TMLA does not require an expert report as to each liability theory alleged against a hospital. Id. A report that was adequate against an institution if it was a hospice, and not just a nursing home, was sufficient to allow the entire suit to proceed against the nursing home as a nursing home and as a hospice, on the grounds that, under Potts, there was "one valid theory," so the entire case could proceed. Koutsoufis v. Heritage House at Keller Housing and Rehabilitation, 2017 WL 117318, (Fort Worth, 2017, 01/17/2017 n.p.h.) (not reported). Given those holdings, the court did not reach an issue that was raised below: whether a court may grant a plaintiff more than one extension to cure deficiencies in an expert report. Id. at *3.

The Potts decision overruled a significant amount of prior case law on this subject. The court expressly disapproved of: MSHC the Waterton at Cowhorn Creek, LLC v. Miller, 391 S.W.3d 551, 560 (Tex. App.—Texarkana 2012, no pet.) (holding that the claimant's expert reports must address vicarious and direct liability claims separately because the theories were based on two different sets of operative facts, which were "qualitatively different from the facts necessary to establish [the employer's] vicarious liability for the acts or omissions of its staff"); Fung v. Fischer, 365 S.W.3d 507 (Tex. App.—Austin 2012, no pet.) (finding that because the claimant's theories of liability were both vicarious and direct and thus based on different sets of operative facts, the expert report that only addressed the employee's conduct was not sufficient to impose direct liability on the employer); Hendrick Med. Ctr. v. Miller, 2012 WL 314062, at *3 (Tex. App.—Eastland 2012, no pet.) (mem. op.) (holding that direct and vicarious liability claims must be evaluated separately to determine whether each claim was sufficiently supported by an expert report); River Oaks Endoscopy Ctrs., L.L.P. v. Serrano, 2011 WL 303795, at *2 (Tex. App.—Beaumont 2011, no pet.) (mem. op.) (holding that a claimant alleging theories of direct and vicarious liability must provide an expert report that addresses all theories so that the defendant can be made aware of the specific conduct being called into question); Beaumont Bone & Joint, P.A. v. Slaughter, 2010 WL 730152 (Tex. App.—Beaumont 2010, pet. denied) (mem.op.) (holding that although vicarious liability claims were sufficiently addressed in an expert report, direct liability claims were not, and should have been dismissed); Azle Manor, Inc. v. Vaden, 2008 WL 4831408, at *10 (Tex. App.—Fort Worth 2008, no pet.) (mem.op.) (holding that although vicarious liability claims against two doctors were sufficiently addressed in two expert reports, the direct
liability claims were not, and thus the trial court abused its discretion when it denied the defendant doctors' motion to dismiss the direct liability claims).

The Potts court also listed a number of confused analyses by courts that “demonstrate the need to definitively resolve the question of how expert reports treat multiple theories of liability.” Potts, 392 S.W.3d at 629 (citing Marino v. Wilkins, 2012 WL 749997, (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding, under the Potts reasoning, that a health care liability suit may proceed under one liability theory if the defendant does not move to dismiss all theories of liability in his challenge to the expert reports); Petty v. Churner, 310 S.W.3d 131, 138 (Tex. App.—Dallas 2010, no pet.) (concluding that the trial court properly dismissed direct liability claims because the vicarious and direct liability theories were based on two different standards of care, and an expert report that only addressed the vicarious theory did not meet the statutory requirements); Obstetrical and Gynecological Assocs., P.A. v. McCoy, 283 S.W.3d 96, 105–06 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (deciding that a claimant need not provide an expert report addressing an employer's conduct if the claimant only seeks to hold the employer liable under a vicarious liability theory, noting that there is a distinction between allegations of liability made against the employer based on the conduct of employees versus allegations of direct liability based on the conduct of the employer entity itself); Methodist Charlton Med. Ctr. v. Steele, 274 S.W.3d 47, 50–51 (Tex. App.—Dallas 2008, pet. denied) (holding that because the claimant failed to timely serve expert reports related to the direct liability claims against defendants that were added in an amended petition, those particular claims should have been dismissed; but, the vicarious liability claims, based on the conduct of a nurse employee, were addressed in a timely report and could move forward)).

Finally, the court stated: “In sum, an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case. To the extent other cases hold differently, we disapprove of them.” Potts, 392 S.W.3d at 632 (emphasis added). This blanket statement of disapproval impliedly overrules a host of cases, a list that is far too numerous to elaborate here.

If 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. Gardner v. U.S. Imaging, Inc., 274 S.W.3d 669 (Tex. 2008) (per curiam). The Potts court clarified its holding in Gardner to be that:

when a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed.

Potts, 392 S.W.3d at 632.

Additionally, a plaintiff is free to amend her pleadings, either before or after the 120-day deadline, to make clear that the allegations in the report are supported by the pleadings. Sw. Gen. Hosp. v. Gomez, 357 S.W.3d 109 (Tex. App.—San Antonio 2011, no pet.).

38. Constitutionality of the Expert Report Requirement

The expert report requirement of § 74.351 does not violate the open courts provision of the Texas Constitution. This
suit was brought by a prison inmate who also filed an Affidavit of Indigency and whose case was dismissed as frivolous. *Powell v. Clements*, 220 S.W.3d 138 (Tex. App.—Waco 2007, pet. denied). Section 74.351 also does not deny a plaintiff’s due process right to obtain redress for injuries. *EtheredgeMcCarty*, 2006 WL 1738258 (Tex. App.—Dallas 2006, no pet.) (mem. op.). This is true even if the plaintiff’s expert does not rely on medical records to support its opinion. *Lilley v. Home Depot U.S.A., Inc.*, 567 F.Supp.2d 953 (S.D. Tex. 2008). A doctor's expert testimony “should not [be] excluded under Daubert solely on the ground that his causation diagnosis was based only on his patient's self-reported history.” Id. at 957 (quoting *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1021 (7th Cir. 2000)).


In an opinion by Justice Bob Pemberton, former rules attorney for the Supreme Court, and Alan Waldrop, one of the drafters of Chapter 74, the Austin court of appeals found that the expert report requirement of Chapter 74 does not violate the due process clause. *Bogar v. Esparza*, 257 S.W.3d 354 (Tex. App.—Austin 2008, no pet.).


The Oklahoma Supreme Court has held Oklahoma’s expert report requirement unconstitutional. *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006). The requirement violated the Oklahoma constitution’s “Special Law” prohibition, found at Article 5, Section 46, of the Oklahoma constitution. *Id.* at 873–74. That section provides as:

The Legislature shall not except as otherwise provided in this Constitution, pass any local or special law ... regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts.

*Id.* at 865.

Note that Article 3 of the Texas Constitution contains an identical provision:

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law ... regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before the courts.

Tex. Const. art. 3, § 56(a)(16).

It is obviously difficult to draw a distinction between the two constitutional prohibitions since they are verbatim duplicates.

A rash of cases asserting indigency or filed on behalf of pro se plaintiffs seeking relief from the financial burden of § 13.01 reinforced the constitutionality of that section. These cases in all probability apply in a Chapter 74 analysis as well. *Perry v. Stanley*, 83 S.W.3d 819, 825 (Tex. App.—
Plaintiff's Experts May Rely on Talking with the Patient


Chapter 74 Report Cannot be Based on Assumptions

Where a plaintiff's expert assumed that certain notes were contained in the chart, a court may find the expert report deficient because of this assumption. *Cooper v. Arizpe*, 2008 WL 940490 (Tex. App.—San Antonio 2008, pet. denied).

However, § 74.351 does not prevent experts, as opposed to courts, from making inferences based on a patient’s medical history. *Benish v. Grottie*, 281 S.W.3d 184, 195 (Tex. App.—Fort Worth 2009, pet. denied).

Must Plaintiff's Experts be from Texas?

The San Antonio court briefly issued an opinion in 2007 that seemed to imply that Chapter 74 experts must be from Texas. This opinion was withdrawn and the language to that effect was removed, indicating that there is still no requirement that plaintiff's Chapter 74 experts be licensed in Texas. *Cuellar v. Warm Springs Rehab. Found.*, 2007 WL 3355611 (Tex. ...

In *Cook v. Spears*, the Dallas court of appeals held that an orthopedic surgeon who was licensed to practice in California was qualified to author an expert report concerning a physicians’ assistant’s standard of care pertaining to his role as an assistant in an arthroscopic surgery that was performed on the wrong knee, despite defendant’s argument that the expert was not qualified because the expert did not expressly state that he was familiar with the standards of care applicable to a physician’s assistant practicing in Texas and despite defendant’s argument that the standards of care in Texas differed from those in California. *Cook v. Spears*, 275 S.W.3d 577 (Tex. App.—Dallas 2008, no pet.). In reaching this conclusion, the Dallas court of appeals declared:

> [T]he experts in this case demonstrated familiarity with the standards of care applicable to a physician assistant assisting in surgery. Dr. Sicherman’s report states he is an orthopedic surgeon licensed to practice medicine in New Jersey, California, and New York, and is board certified by the American Board of Orthopedic Surgery. . . . We conclude these reports are sufficient to show the experts have the knowledge, experience, and training that qualifies them to opine about a physician assistant’s standard of care when assisting in surgery.

*Cook*, 275 S.W.3d at 583–84.

42. **Must Use Defendant’s Name**

After kidney transplant of a rabies-infected kidney, the estate of the now-deceased transplant recipient brought suit. Two reports filed under Chapter 74 stated that the transplant surgeon should have disclosed the donor’s high-risk status to the patient, thus permitting informed consent about whether or not to accept the kidney. The reports did not however name the surgeon specifically, but merely referred to “the transplant surgeon” or “the receiving surgeon.” The Dallas court of appeals held that “[w]hen an expert opines about the care provided by more than one physician, the report must refer to each physician by name and state the standard of care with regard to that physician.” *Baylor Univ. Med. Ctr. v. Biggs*, 237 S.W.3d 909, 921 (Tex. App.—Dallas 2007, pet. denied). See also *Bogar v. Esparza*, 257 S.W.3d 354 (Tex. App.—Austin 2008, no pet.) (holding that dismissal of a claim for lack of clarity about defendant’s identity appropriate). The Austin court of appeals found the report so deficient as to be “no report” at all and, thus, not eligible for a 30-day extension to cure. *Bogar*, 257 S.W.3d at 364. However, where a plaintiff sues a hospital for its vicarious liability for the conduct of its nurse employees and the expert report does not specifically identify each nurse individually by name, it is permissible for the report to refer to the nurses collectively. *Univ. of Tex. Med. Branch v. Railsback*, 259 S.W.3d 860 (Tex. App.—Houston [1st Dist.] 2008, no pet.). However, a report alleging deviations from the standard of care by more than one individual, such as a physician and physician’s assistant, must specify which deviations apply to each individual. The report must articulate either that the standards of care are the same or exactly which deviations apply to which individual. *Polone v. Shearer*, 287 S.W.3d 229 (Tex. App.—Fort Worth 2009, no pet.).

*When a plaintiff sues more than one physician, the expert report, in order to constitute a good faith effort, must set forth the standard of care applicable to each*
physician and explain the causal relationship between each physician’s individual acts and the injury. If an expert report alleges negligence involving different physicians, then that report must explain why each physician owes a duty of care to the plaintiff and how that duty was breached. Clapp v. Perez, 394 S.W. 3d 254 (Tex. App.—El Paso 2012, no pet.). The court will look at the report to determine if it refers to the defendant physician or healthcare provider by name or position or explain how the statement in the report apply to that defendant. Rivenes v. Holden, 257 S.W. 3d 332 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Note, however, that the physician or healthcare provider does not actually need to be mentioned by name if the report “implicates” that defendant’s conduct and is directed solely to that defendant’s care. Troeger v. Myklebust, 274 S.W. 3d 104 (Tex. App.—Houston [14] 2008, pet denied).

43. Experts from Different Fields Permitted?

A patient choked on food as a result of having been given a regular diet, based on an allegedly negligent physician’s order to that effect. The plaintiff’s expert, though from a different specialty than the defendant, explained that an understanding of swallowing was knowledge found throughout medicine, was not unique to any particular specialty, and was within his purview of expertise. The El Paso court of appeals agreed and the plaintiff’s expert was allowed to opine on the standard of care. Palafox v. Silvey, 247 S.W.3d 310 (Tex. App.—El Paso 2007, no pet.). Similarly, an orthopedist was qualified to write a Chapter 74 expert report against a podiatrist. Grindstaff v. Michie, 242 S.W.3d 536 (Tex. App.—El Paso 2007, no pet.).

Although an expert’s more recent activities and papers, as shown from his CV, indicated that he was practicing forensic psychology, nothing in his CV or report indicated that he was practicing forensic psychology to the exclusion of clinical psychology, thus, he was therefore qualified to testify in both fields. Davison v. Nicholson, 310 S.W.3d 543 (Tex. App.—Fort Worth 2010, no pet.) (op. on reh'g.). However, in the context of a malpractice action against a nurse practitioner, the report of a neurosurgeon was inadequate. Simonson v. Keppard, 225 S.W.3d 868 (Tex. App.—Dallas 2007, no pet.). A physician, however, is qualified to issue an expert report regarding the standard of care for professional nurses in treating bed sores. San Jacinto Methodist Hosp. v. Bennett, 256 S.W.3d 806 (Tex. App.—Houston[14th Dist.] 2008, no pet.).

In a case where plaintiff’s expert testified that his “experience, background, and continuing experience in the very area that is at issue in this case—the acutely injured cervical spine—supports [sic] the opinions stated in the report,” the Houston court of appeals found this was sufficient to qualify him to write a report, even though he practiced in a different area of specialty than the defendant. Eikenhorst v. Wellbrock, 2008 WL 2339735 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (mem. op.). The Beaumont court of appeals has said, however, that the report must demonstrate that the expert is familiar with the standard of care for treating a particular condition:

[Expert] does not practice in the same specialty as does [defendant]. [Expert] says that he is familiar with the standard of care for a neurologist, but [defendant] is an internal medicine physician. A physician expert need not be a specialist in the defendant’s particular area of practice if the subject matter of the claim is common to and equally recognized and developed in more than one field of practice, and the expert is qualified in one of those fields. According to [expert's] report, [patient]
was being treated for pneumonia and acute respiratory deficiency, not a neurological disorder. [Expert] does not state that he is familiar with the standard of care for an internal medicine physician treating intubated patients for pneumonia and acute respiratory deficiency, nor does he state that the treatment of such patients is common to both neurology and internal medicine.

Christus Health Se. Tex. v. Broussard, 267 S.W.3d 531, 534 (Tex. App.—Beaumont 2008, no pet.). The Fort Worth court of appeals determine that the plaintiff’s expert was qualified to write an expert report, even though the plaintiff’s appendectomy was laparoscopic and the report did not indicate that the expert had experience in laparoscopic procedures, because the plaintiff’s complaints did not depend upon standards relating to laparoscopy but rather upon the general execution of the appendectomy surgery. Moore v. Gatica, 269 S.W.3d 134 (Tex. App.—Fort Worth 2008, pet. denied). And a Houston court of appeals found that an orthopedic surgeon with many years of experience was qualified to write an opinion even without having done the exact type of surgery at issue. Baylor Coll. of Med. v. Pokluda, 283 S.W.3d 110 (Tex. App.—Houston [14th Dist.] 2009, no pet.). See also House v. Jones, 275 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied). Finally, locum tenens are not disqualified as long as they meet the other requirements of the statute. Benavides v. Garcia, 278 S.W.3d 794 (Tex. App.—San Antonio 2009, pet. denied).

44. Plaintiff’s Counsel May Write the Chapter 74 Report

It was not grounds for dismissal for plaintiff’s counsel to have actually been the person who physically wrote plaintiff’s Chapter 74 expert report. The opinions were the expert’s, had been told by the expert to plaintiff’s counsel, who recorded them and sent them to the expert for editing before signature. Plaintiff’s counsel did not tell the expert what the opinions were, counsel simply recorded and forwarded them. The Sepharic Sisters, Inc. v. Dillon, 2008 WL 647817 (Tex. App.—San Antonio 2008, no pet.) (mem. op.).

45. Plaintiff Does Not Forfeit the Opportunity to Cure Deficiencies by Responding to the Objections Made by Defendant

If the defendant objects and the plaintiff amends the report, but there is also a later finding that the report is deficient, the plaintiff may be granted a 30-day extension to cure and has not waived his opportunity to cure based on the trial court’s ruling by attempting to cure defects prior to the ruling. Leland v. Brandal, 257 S.W.3d 204, 209 (Tex. 2008) (“[V]oluntary supplementation does not bar [the plaintiff] from obtaining a 30-day extension.”)

46. Reports in Informed Consent and Negligence Per Se Cases

A plaintiff’s expert report in an informed consent case must contain more than simply “the obvious fact that if [the patient] had elected not to have the surgery she would not have been injured.” Greenberg v. Gillen, 257 S.W.3d 281, 283 (Tex. App.—Dallas 2008, pet. dism’d). It must also include whether the undisclosed information would have influenced a reasonable person in deciding whether or not to give or withhold consent. Id.

In informed consent cases, the Dallas court of appeals has further held that the plaintiff must prove through expert testimony and in an expert report that the specific risk that was not warned of is the risk that actually caused the harm. For example, a defendant physician’s failure to advise a potential transplant patient that the donor was in a high-risk category (with respect to which the failure to warn was admitted) was not sufficient to establish the
causal nexus to the plaintiff’s injuries when, in fact, the defect in the organs was due to the donor’s having rabies. In other words, the fact that he was at high risk for conditions such as HIV and hepatitis C, which he did not have and which might have caused the plaintiff to reject the organs, was not relevant in an informed consent case in which the real problem was that the donor had rabies. Even though the plaintiff would have rejected the kidney had he known of the high-risk status, this did not establish a causal connection to the lack of informed consent as to the rabies. Hightower v. Baylor Univ. Med. Ctr., 348 S.W.3d 512 (Tex. App.—Dallas 2011, pet. denied).

If a negligence per se claim involves standard of care, even if those standards are statutory, then expert testimony will be required and will implicate standards of medical care. This makes a negligence per se claim subject to the expert report requirement. Buchanan v. O’Donnell, 340 S.W.3d 805 (Tex. App.—San Antonio 2011, no pet.).

47. The Chapter 74 Report in Federal Court


For example, the district court in Garza identified four ways in which the expert report requirement is in direct collision with the federal rules: (1) the mandatory sanction schemes imposed by § 74.351 completely remove the court’s discretion with respect to the imposition of Rule 11 sanctions for filing frivolous claims; (2) although former Article 4590i, § 13.01, made expert reports unavailable for use at trial, depositions, or other proceedings, § 74.351 removes these restrictions as soon as the plaintiff makes an affirmative use of the report; (3) the stay of discovery until the filing of the plaintiff’s expert reports is in “direct and unambiguous conflict with the federal rules, which plainly tie the opening of discovery to the timing of the Rule 26(f) conference;” and (4) one of the purposes of
§ 74.351—namely the provision of notice to defendants—invades the province of Rule 26, which is also designed to provide notice to defendants. 234 F.R.D. at 623. Other district courts have similarly held that the expert report requirement of disclosure and sanctions must yield to the disclosure and sanction schemes provided by Rules 26 and 37 of the Federal Rules of Procedure. Saucedo, 2007 U.S. Dist. LEXIS 1600, at *5–8; Beam, 2006 WL 2844907, at *3–9.

48. Daubert Striking of Expert Does Not Invalidate the Report

If a plaintiff’s report expert is later stricken on a Daubert challenge prior to trial, this does not retroactively invalidate the § 74.351 report. Maris v. Hendricks, 262 S.W.3d 379 (Tex. App.—Fort Worth 2008, pet. denied).

49. Plaintiff Must Have a Specialized Expert to Maintain a Negligent Credentialing Claim

The Texas Supreme Court has held that a plaintiff must have a specialized expert to maintain a negligent credentialing claim. In addressing this issue, the Court held that the plaintiffs had not established [their expert’s] qualifications:

The standard of care for a hospital is what an ordinarily prudent hospital would do under the same or similar circumstances. Nothing in the record here shows how [plaintiff’s expert] is qualified to address this standard. Nor can we infer that she may have some knowledge or expertise that is not included in the record. Moreover, “a negligent credentialing claim involves a specialized standard of care” and “the health care industry has developed various guidelines to govern a hospital's credentialing process.” [Plaintiff’s expert’s] reports contain no reference to any of those guidelines, or any indication that she has special knowledge, training, or experience regarding this process. Nor was [Plaintiff’s expert] qualified merely because she is a physician; “given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question.”


The Beaumont court of appeals went even further, opining that “[t]he fact that [the plaintiff’s expert] is on staff at a hospital and serves on that hospital's credentials committee does not establish that he possesses specialized knowledge of the protocols, policies, or procedures a hospital of ordinary prudence would have had in place in determining when a facility should disregard a discharge order.” Christus Health Se. Tex. v. Broussard, 267 S.W.3d 531, 536 (Tex. App.—Beaumont 2008, no pet.).

50. The Report Requirement When Defendant Defaults

What happens to the 120-day deadline when the plaintiff obtains a default judgment against the defendant? The Texas Supreme Court held that the 120-day deadline is tolled as a result of the default:

The statute does not specify the effect of a default judgment on the 120-day period. But the effect of
default on a plaintiff's claim for unliquidated damages is clear: once a default judgment is taken, all factual allegations contained in the petition, except the amount of damages, are deemed admitted. See Holt Atherton Indus. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992). In light of the expert-report requirement's dual purpose to inform the served party of the conduct called into question and to provide a basis for the trial court to conclude that the plaintiff's claims have merit, it makes little sense to require service of an expert report on a party who by default has admitted the plaintiff's allegations. Moreover, our jurisprudence requires that, for a default judgment to be set aside, the plaintiff must be placed "in no worse position than he would have been had an answer been filed...." Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 125 (Tex. 1939). Accordingly, when SADI failed to timely answer the Gardners' suit by the Monday following the expiration of twenty days after it was served, See TEX. R. CIV. P. 99(b), the statutory period for serving it with an expert report was tolled until such time as SADI made an appearance. Once the default judgment was set aside and SADI filed an answer, tolling ended and the Gardners had 100 days remaining in which to serve SADI with an expert report. SADI filed an answer in the original suit on February 12, and the Gardners served it with an expert report on March 20, well within the remaining statutory period.


Plaintiff alleged that the clock began to run when the default was set aside, whereas defendant argued that the clock began to run when it eventually filed its answer (after having been subject to the default judgment). The court holds that the 120 day deadline does not begin to run until the default has been set aside. Garza v. Carlson, 398 S.W.3d 848 (Tex. App.—Corpus Christi 2012, pet. denied).

51. Vicarious Liability Claims Do Not Require Separate Expert Reports

In cases of pure vicarious liability, such as implied agency, agency by estoppel, respondeat superior, and so on, must a plaintiff produce a separate report under Article 4590i, § 13.01 or § 74.351? And, if so, what type of expert would the plaintiff use? A lawyer on the legal issue of agency liability? Lawyers do not qualify as experts under the statutory definitions embodied in § 13.01 or § 74.351; only physicians do. But physicians are not qualified on the legal ramifications of agency law. This has been a conundrum that has bedeviled parties since the enactment of § 13.01. The Beaumont court of appeals, in In re CHCA Conroe, L.P., 2004 WL 2671863, (Tex. App.—Beaumont 2004, orig. proceeding) (mem. op.) addressed the issue and, in a per curiam opinion, held as follows:

[T]he conduct by the hospital on which the agency relationship depends is not measured by a medical standard of care. These are principles of agency law on which no expert report is required. Plaintiffs have abandoned
all claims against the relators except an ostensible agency claim on which a separate report is not required.

The Dallas court of appeals also took up these issues in Univ. of Tex. Sw. Med. Ctr. v. Dale, 188 S.W.3d 877 (Tex. App.—Dallas 2006, no pet.). UT Southwestern was sued as a defendant on the basis that its residents had negligently treated a patient. The plaintiffs did not allege that UT Southwestern was directly negligent, but alleged that it was liable for the negligence of its residents. The plaintiffs served a report on UT Southwestern that named the applicable residents, stated the applicable standard of care, stated how each resident breached the standard of care, and stated how the breach proximately caused the injury. Thus, the plaintiffs satisfied Chapter 74’s requirements and the requirements under Am. Transitional Care Ctrs. of Tex., Inc., v. Palacios, 46 S.W.3d 873 (Tex. 2001). UT Southwestern’s complaint was that the report did not name “UT Southwestern.” The Dallas court of appeals held that “because Appellants were not alleging UT Southwestern was directly negligent, the expert report was not required to mention UT Southwestern by name.” Dale, 188 S.W.3d at 879. Importantly, the Dale court noted in a footnote that “presumably, all that UT Southwestern asserts the expert should have included was a statement that the residents were acting in the course and scope of their employment with UT Southwestern. However, we fail to see how a medical expert would be qualified to provide an opinion on this issue.” Id. at 879 n.1.

In Gardner, the Texas Supreme Court weighed in on the issue of whether a separate expert report addressing the entity’s conduct was required under § 74.351 to support a plaintiff’s allegations against it for purely vicarious liability for the acts of its agents. The Court said that a separate report was not required. Gardner v. U.S. Imaging, Inc., 274 S.W.3d 669, 671–72 (Tex. 2008) (per curiam) (“When 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.”).

Even a claim alleging that an entity is directly liable for health care liability claims and that the agents were vice-principals for purposes of imputing gross negligence did not constitute a direct liability claim so as to require the production of a separate expert report. Obstetrical and Gynecological Assocs., P.A. v. McCoy, 283 S.W.3d 96 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). See also Casados v. Harris Methodist HEB, 2006 WL 2034230, (Tex. App.—Fort Worth 2006, no pet.) (mem. Op.) (holding that plaintiff satisfied expert report requirements with respect to vicarious liability claims by filing expert report detailing negligence of doctors for whose actions hospital was liable).

Some court previously held that if there was no expert report as to a vicarious entity, the plaintiff could not later amend a claim to add direct negligence claims against that entity. See Austin Reg’l Clinic, P.A. v. Power, 2012 WL 2476785 (Tex. App.—Austin 2012, no pet.); RGV Healthcare Assocs., Inc. v. Estevis, 294 S.W.3d 264 (Tex. App.—Corpus Christi 2009, pet. denied). However, the Supreme Court spoke to this issue in Potts, and determined that: “when a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed.” Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 632 (Tex. 2013), reh'g denied (Mar. 29, 2013)

A non-physician corporate lawyer was allowed to “connect the dots” between the entities and individuals responsible for training programs and management of emergency rooms so that plaintiff’s physician experts could prepare a sufficient

Thus, the case law has been clear that no expert report is required in a purely vicarious liability circumstance as to causation or “standard of care” violations by the parent entity.

52. Court Must Rule

The trial court abuses its discretion by refusing to rule on a motion to dismiss until after the parties take the defendant doctor's deposition. *In re Pollet*, 281 S.W.3d 532 (Tex. App.—El Paso 2008, orig. proceeding).

53. Alleged Bias of Expert Not Relevant at Report Stage


54. Procedure for Curing a Defective Report

In *Samlowski v. Wooten*, the Texas Supreme Court held that, if a trial court finds a report deficient, the plaintiff must be prepared to cure the deficiency. If a court denies a “motion to cure,” then the plaintiff must promptly move “for reconsideration” and fix any problems with the report. *Samlowski v. Wooten*, 332 S.W.3d 404, 411 (Tex. 2011) This odd plurality opinion seemingly created yet another layer of procedure to be followed and drew the objection from several justices that it is cumbersome and inefficient. See Id. at 416–17. Subsequent to *Samlowski*, the Supreme Court remanded a case to the trial court for it to consider the plaintiff’s request for additional time to cure a deficiency in his report, in effect holding that the procedure set out in Samlowski gives the trial court direction on how to proceed. *Mitchell v. Methodist Hosp.*, 335 S.W.3d 610 (Tex. 2011).

It remains unclear whether a court, in its discretion, may grant multiple extensions to cure deficiencies in an expert report. The issue was recently before the supreme court, but the court found it unnecessary to reach the issue. *THHR Ltd. P’ship v. Moreno*, 11-0630, 2013 WL 1366028 (Tex. Apr. 5, 2013).

55. Effect of Abatement

Two cases have construed the effect of abatement on § 13.01’s 90 and 180-day report filing requirements. It is probable that the same analysis applies under Chapter 74.

First, in *Campbell v. Kosarek*, 44 S.W.3d 647 (Tex. App.—Dallas 2001, pet. denied), the defense sought and obtained a 60-day abatement. The plaintiff thereafter filed a § 13.01 report “timely” if the 60-day abatement was added to the 180 days of § 13.01, but outside of the initial 180-day period. The Campbell court held that the abatement essentially “tolled” the 180-day deadline, making the plaintiff’s filing timely. (Note that the abatement was sought under the state insurance code, not under Article 4590i’s notice requirement.)

Subsequently, the Amarillo court of appeals declined to “toll” the plaintiff’s § 13.01 deadlines during a defense-requested abatement. In *Hagedorn v. Tisdale*, 73 S.W.3d 341 (Tex. App.—Amarillo 2002, no pet.), the plaintiff’s filing was held not to be timely even though the case was abated at the request of the defense during the filing period.

An agreement to abate a lawsuit to allow plaintiffs to comply with the 60-day notice requirement does not constitute an agreement to extend the date for serving the 120-day report, and does not in and of itself function to create such an extension. An agreement that simply states “this case is abated,” without showing any intent to extend the 120-day deadline, does not extend that deadline. *Emeritus Corp. v.*
56. Effect of Bankruptcy on § 13.01 Requirements

In *Tibbetts v. Gagliardi*, 2 S.W.3d 659 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), the Houston court of appeals addressed the issue of the effect of an insurance code receivership stay on § 13.01’s requirements. The *Tibbetts* court held that the trial court erred in dismissing the plaintiff’s case due to failure to file the 13.01 report when the deadline for same occurred during the receivership stay.

*Tibbetts*, however, does not stand for the proposition that there is an absolute right to an extension to file reports until the stay is lifted. Rather, under the facts of that case, the court held that the plaintiff’s failure to file during the stay was not intentional or the result of conscious indifference and, therefore, the plaintiff should have been given additional time in which to file:

> Because the Insurance Code stays “all [judicial] proceedings” during the pendency of a stay order, Appellant was not required to file expert reports during such period of abeyance.

*Tibbetts*, 2 S.W.3d at 664.

However, the *Tibbetts* court did make several discomfiting statements. For example, the “stay” was incurred as a result of the receivership of the insurance company of one of the defendants. Meanwhile, another defendant was apparently insured by a different carrier. Although the stay automatically stays action in the entire case, the court of appeals nerve-wrackingly stated that, because issue was not squarely before it, it had not reached the question of whether the stay specifically applied to the plaintiff’s action against the other defendant whose carrier was not in receivership as well. *Id.* at 664. Thus, litigants have shaky guidance from *Tibbetts* about the need to file during such stays.

The *Tibbetts* court observed that the plaintiff should have had extra time to file her report because the failure to file was not due to accident or indifference, but stopped short of clearly holding that receivership stays absolutely excuse a plaintiff’s § 13.01 requirements. A better logical holding, one not relying on the “conscious indifference” language, would have been that receivership stays toll the running of the 180-day period until they are lifted. It is unlikely that litigants can safely rely on *Tibbetts* in Chapter 74 cases.

57. Mistaken Filing in Federal Court Does Not Toll the Statute

Section 16.064 of the Texas Civil Practice & Remedies Code provides that, if a case is dismissed in federal court for want of jurisdiction, the statute of limitations is considered tolled between the date of filing in federal court and the date of refiling in state court—provided that the refiling is accomplished within sixty (60) days of the federal court dismissal. However, under Chapter 74, a plaintiff who filed a § 1983 and state malpractice action in federal court that was dismissed for want of jurisdiction had not tolled the statute by this filing. *Mena v. Lenz*, 349 S.W.3d 650 (Tex. App.—Corpus Christi 2011, no pet.). Following the logic of the San Antonio court of appeals in *Kimbrell v. Molinet*, 288 S.W.3d 464 (Tex. App.—San Antonio 2008), aff’d, 356 S.W.3d 407 (Tex. 2011), wherein the San Antonio court of appeals held, under then existing law, that the tolling provision, which allowed for joinder of a designated responsible third party even if the statute of limitations as to that third party had run, did not apply under Chapter 74, the *Mena* court found that Chapter 74’s “notwithstanding any other law” language precluded the application of § 16.064’s sixty (60) day tolling provision after dismissal from federal court for want of jurisdiction.
58. The 120 Day Report in Tort Claims Cases

In a tort claims case involving medical negligence, the 120 day time period for serving an expert report on a governmental unit that is substituted for an employee begins on the date that the plaintiff files the petition naming the governmental unit as a defendant. In other words, the time for serving the governmental unit does not begin to run until that unit is added to the suit. It is not triggered by filing against the individual employee. *Univ. of Tex. Health Sci. Ctr. v. Cheatham*, 357 S.W. 3d 747 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

59. Trial level scrutiny does not apply to the report

Robinson, Daubert, and Texas Rules of Evidence 702 and 703 do not apply to scrutiny of the 120 day report. Those tests will eventually apply to expert testimony at trial, but cannot fairly be applied at the pre-discovery stage. *Tenet Hospitals v. Garcia*, 462 S.W.3d 299 (Tex. App.—El Paso 2015 n.p.h).

60. There Must Not Be an Analytical Gap in Plaintiff’s expert’s reasoning


Enough time has elapsed for the overwhelming bulk of Article 4590i cases to have been concluded.

C. Chapter 74.352 - Discovery Procedures

Inexplicably, the 2003 Legislature re-enacted § 13.02 of Article 4590i. This section, originally enacted in 1993, directed the Supreme Court to appoint a panel of lawyers to draft “standard” written discovery for use in health care liability suits in Texas. The panel was duly appointed, met, drafted, and submitted its work to the Court, which never thereafter acted on or promulgated the discovery. Practitioners have thus ignored this section of the Act since 1993. Nonetheless, despite the repeal of Article 4590i, the Legislature re-enacted § 13.02 of Article 4590i essentially verbatim as § 74.352. Whether or not the Court will this time honor the Legislature’s instruction is an open question but the discovery does exist and this section makes its use mandatory.

D. Chapter 74 , Subchapter I- Expert Witnesses

i. Chapter 74 and Expert Witnesses

§ 74.401. Qualifications of Expert Witness in Suit Against Physician

a. In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

i. is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;

iii. has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

iv. is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

b. For the purpose of this section, “practicing medicine" or "medical practice" includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.
c. In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is board certified or has other substantial training or experience in an area of medical practice relevant to the claim; and

(2) is actively practicing medicine in rendering medical care services relevant to the claim.

d. The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the physician departed from accepted standards of medical care, but may depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

e. A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

f. This section does not prevent a physician who is a defendant from qualifying as an expert.

g. In this subchapter, "physician" means a person who is:

(1) licensed to practice medicine in one or more states in the United States; or

(2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association only if testifying as a defendant and that testimony relates to that defendant's standard of care, the alleged departure from that standard of care, or the causal relationship between the alleged departure from that standard of care and the injury, harm, or damages claimed.

§ 74.402 Qualifications of Expert Witness in Suit Against Health Care Provider

(a) For purposes of this section, "practicing health care" includes:

(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or

(2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.

(b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:

(1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given...
or was practicing that type of health care at
the time the claim arose;

(2) has knowledge of accepted
standards of care for health care providers
for the diagnosis, care, or treatment of the
illness, injury, or condition involved in the
claim; and

(3) is qualified on the basis of
training or experience to offer an expert
opinion regarding those accepted standards
of health care.

(c) In determining whether a witness is
qualified on the basis of training or
experience, the court shall consider
whether, at the time the claim arose or at the
time the testimony is given, the witness:

(1) is certified by a licensing
agency of one or more states of the United
States or a national professional certifying
agency, or has other substantial training or
experience, in the area of health care
relevant to the claim; and

(2) is actively practicing health
care in rendering health care services
relevant to the claim.

(d) The court shall apply the criteria
specified in Subsections (a), (b), and (c) in
determining whether an expert is qualified
to offer expert testimony on the issue of
whether the defendant health care provider
departed from accepted standards of health
care but may depart from those criteria if,
under the circumstances, the court
determines that there is good reason to
admit the expert's testimony. The court shall
state on the record the reason for admitting
the testimony if the court departs from the
criteria.

(e) This section does not prevent a
health care provider who is a defendant, or
an employee of the defendant health care
provider, from qualifying as an expert.

(f) A pretrial objection to the
qualifications of a witness under this section
must be made not later than the later of the
21st day after the date the objecting party
receives a copy of the witness's curriculum
vitae or the 21st day after the date of the
witness's deposition. If circumstances arise
after the date on which the objection must be
made that could not have been reasonably
anticipated by a party before that date and
that the party believes in good faith provide
a basis for an objection to a witness's
qualifications, and if an objection was not
made previously, this subsection does not
prevent the party from making an objection
as soon as practicable under the
circumstances. The court shall conduct a
hearing to determine whether the witness is
qualified as soon as practicable after the
filing of an objection and, if possible, before
trial. If the objecting party is unable to
object in time for the hearing to be
conducted before the trial, the hearing shall
be conducted outside the presence of the
jury. This subsection does not prevent a
party from examining or cross-examining a
witness at trial about the witness's
qualifications.

In an opinion that harmonizes
evidentiary principles under Chapter 74 with
long-standing Texas precedent and Article
4590i history, the Houston court of appeals
has held that a plaintiffs' expert need not be
in the same exact specialty as a defendant
health care provider as long as the expert has
knowledge of the accepted standards of care
for the areas of practice in question. Thus,
an anesthesiologist specializing in pain
management satisfied the statutory
requirements of sufficient knowledge of the
standard of care for testifying against a
chiropractor engaged in similar pain
management. Group v. Vicento, 164 S.W.3d
724 (Tex. App.—Houston [14th Dist.] 2005,
pet. denied).

§ 74.403. Qualifications of Expert Witness
on Causation in Health Care Liability Claim

(a) Except as provided by
Subsections (b) and (c), in a suit involving a
health care liability claim against a
physician or health care provider, a person
may qualify as an expert witness on the issue
of the causal relationship between the

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alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(b) In a suit involving a health care liability claim against a dentist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a dentist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(c) In a suit involving a health care liability claim against a podiatrist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a podiatrist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(d) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness’s qualifications.

ii. Case Law on Expert Testimony

1. The General Rule

In a very thorough and detailed opinion, Justice Harvey Brown catalogs the requirements for being an expert witness in a health care liability case in Texas.

“We conclude that the statutory definition of ‘practicing medicine’ provides a non-exclusive list of activities that qualify an expert to testify and further conclude that [the expert’s] work at the time of his testimony qualifies as “practicing medicine.” Benge v. Williams, 472 S.W.3d 684 (Tex. App.— Houston [1st Dist.] pet. filed).” (emphasis added.)

Justice Brown goes on to catalog that section 74.401’s use of the phrase “includes, but is not limited to” requires that the activities that qualify as “practicing medicine” not be restricted to training at an accredited medical school and serving as a consultant to physicians. Further, qualification as an expert is not limited to physicians who actively are examining and admitting patients into hospitals.

“In conclusion, we construe “practicing medicine,” within the context of section 74.401 to include a physician who is licensed to practice in the United States, has actively practiced medicine by consulting with other physicians and teaching medical residents in Texas, and then move to another country where he continues to consult with that country’s physicians and teach its medical residents, all the while maintaining his affiliation with a Texas medical school, working on NIH grants and teaching – with hands-on involvement – surgical procedures

Much of the case law generated under Article 4590i concerning expert testimony should continue to inform the application of Chapter 74. Except to the extent that the text of Chapter 74 materially differs from that in Article 4590i, jurisprudence about expert testimony should continue to be relevant.

2. Experts Not From Texas

Under Chapter 74, the San Antonio court of appeals briefly issued an opinion in 2007 that seemed to imply that Chapter 74 experts must be from Texas. This opinion was withdrawn and the language to that effect was removed, indicating that there is still no requirement that plaintiff’s Chapter 74 experts be licensed in Texas. Cuellar v. Warm Springs Rehab. Found., 2007 WL 3355611 (Tex. App.—San Antonio 2007, no pet.) (mem. op.).

3. Case Law

Expert medical testimony is usually necessary to establish a cause of action for medical negligence proximately causing the patient’s injuries or death. Williams v. Bennett, 610 S.W.2d 144 (Tex. 1980); Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977); Bowles v. Bourdon, 219 S.W.2d 779 (Tex. 1949).

Naked, unsupported “belief” on the part of an expert, with no supporting data, will not support the expert’s testimony. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999); Wadewitz v. Montgomery, 951 S.W.2d 464 (Tex. 1997). Some authority exists for the proposition that an expert must support his testimony with some reference to medical literature or peer reviewed studies. Kareh v. Windrum, ___ S.W.3d ___, 2016 WL 1591704 (Tex. App. — Houston [1st] 2016, nph). However, testimony related to the facts of the case and tied to the testimony and medical records is sufficient to raise a fact issue. Hamilton v. Wilson, 249 S.W.3d 425 (Tex. 2008).

a. Standard of Care

The medical standard of care is the threshold question in a medical malpractice action. Coan v. Winters, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.). The standard must be established, usually by expert testimony so that the jury can determine whether the defendant-physician’s conduct departed from the standard so as to constitute negligence. Connor v. Waltrip, 791 S.W.2d 537, 539 (Tex. App.—Dallas 1990, no writ). A jury of lay persons is not qualified to develop a “reasonably prudent physician” standard without being advised of the applicable medical standards of care and other factors involved. Id.; Snow v. Bond, 438 S.W.2d 549 (Tex. 1969). Thus, the applicable medical standard of care must be established to enable the jury as the fact-finder to determine whether the physician’s conduct deviated from the medical standard of care to the extent and degree necessary to constitute negligence or malpractice. Coan v. Winters, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.); Stanton v. Westbrook, 598 S.W.2d 331 (Tex. Civ. App.—Houston [14th Dist] 1980, writ ref’d n.r.e.). In Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977), the Supreme Court discussed the issue of novel or unnecessary surgery and rejected various theories such as the “respectable minority” theory, “reasonable surgeon’s disagree” theory and “any variance” theory. Texas adopted the “reasonable and prudent physician” standard. In so doing, the Court rejected the notion of a “poll” of professionals. Hood, 554 S.W.2d at 165 (“We are of the opinion that the statement of the law most serviceable to this jurisdiction is as follows: A physician who undertakes a mode or form of treatment which a reasonable and prudent member of the medical profession would undertake under the same or similar circumstances shall not be subject to liability for harm caused thereby to the patient.”).
Medical custom or usual practice is admissible, as some, but not conclusively so, evidence of the applicable medical standard of care. *Kissinger v. Turner*, 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.).

b. Physician Negligence

Under some circumstances, the jury may be able to infer negligence from the testimony of the defendant and lay witnesses. *Williams v. Bennett*, 610 S.W.2d 144 (Tex. 1980).

In an old case, the defendant doctor told the patient, in essence, that he had “goofed.” His records were also inaccurate, which he admitted at trial. These statements were testified to by the patient. The Amarillo court of appeals thus concluded that the evidence was both legally and factually sufficient to support the jury’s findings of negligence and causation. *Bronwell v. Williams*, 597 S.W.2d 542 (Tex. Civ. App.—Amarillo 1980, writ ref’d n.r.e.).

Note that both of these cases predate Chapter 74 and its expert report requirement. Though nothing in Chapter 74 specifically requires a plaintiff to call a live expert witness, it seems unlikely to be a safe practice not to do so. Further, as seen below, scrutiny of experts who are called is increasingly rigorous.

In *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996), the Supreme Court determined that the plaintiff’s expert was inappropriately qualified. This was a head-injury case arising out of emergency room treatment, in which the plaintiffs alleged that the decedent’s head injury had been improperly diagnosed, resulting in a lack of timely treatment and, ultimately, in the decedent’s death. The plaintiff’s expert was an emergency room physician, who met the qualifications of the Texas Rule of Evidence 702 for assisting the jury in determining the issues presented to them and who was qualified on the issue of negligence. Nonetheless, the Court held that, in its view, neurosurgical expert testimony was required and that the emergency room physician called to testify (against the defendant emergency room physician) was not competent to testify on issues of causation.

Consistent with *Broders*, an expert physician does not have to practice in the same discipline as the defendant physician to be qualified to comment on the standard of care and the breach of the standard of care as long as the subject of the inquiry is known to both disciplines. Thus, a plaintiff’s expert need not be from the same school of practice as the defendant in order to offer expert opinion testimony. *McKowen v. Ragston*, 263 S.W.3d 157 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Sloman-Moll v. Chavez*, 2007 WL 595134 (Tex. App.—San Antonio 2007, pet. denied) (mem. op.).

It was harmless error for the trial court to admit the testimony of a medical expert who was allegedly not practicing medicine at the time of the plaintiff’s injury. *Medina v. Hart*, 240 S.W.3d 16 (Tex. App.—Corpus Christi 2007, pet. denied).

The Supreme Court is extraordinarily sensitive to trial court discretion in determining an expert’s qualifications. It will not reverse a court’s determination that a plaintiff’s expert is not qualified except for a clear abuse of discretion. *Larson v. Downing*, 197 S.W.3d 303 (Tex. 2006).

A plaintiff’s expert who acknowledges that generally he has no knowledge of the standard of care for either an emergency room physician or a cardiologist, the defendants’ specialties, is not qualified. *Blan v. Ali*, 7 S.W.3d 741 (Tex. App.—Houston [14th Dist.] 1999, no pet.). However, if the subject of inquiry is substantially developed in more than one field, an expert in any of the fields is qualified to testify. *Id.* at 745 (citing *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996):

Despite the fact that we live in a world of niche medical
practices and multilayer specializations, there are certain standards of medical care that apply to multiple schools of practice and any medical doctor. To categorically disqualify a physician from testifying as to the standard of care solely because he is from a different school of practice than the doctors charged with malpractice ignores the criteria set out in section 14.01(a) of the Medical Liability Act and Rule 702 of the Texas Rules of Evidence.

Id.

Where the offering party does not satisfy the Broders standard and clearly establish that the expert has “knowledge, skill, experience, training, or education regarding the specific issue before the court which would qualify the expert to give an opinion on that subject,” the trial court can reject the expert’s testimony. United Blood Services v. Longoria, 938 S.W.2d 29 (Tex. 1997) (plaintiff did not controvert facts conclusively established through discovery that plaintiff’s expert lacked the particular knowledge, skill, training, and education to testify as to the relevant standard of care).

Also applying Broders, the San Antonio court of appeals in Silvas v. Ghiatas, 954 S.W.2d 50 (Tex. App.—San Antonio 1997, writ denied) held that the plaintiff’s expert need not be a specialist in the same area in which the defendant physician practices so long as his affidavit demonstrates that, by virtue of his knowledge, skill, experience, training, or education regarding the specific issue before the court, his testimony would assist the jury in determining causation or damages. Thus, in Silvas, the San Antonio court of appeals held that the expert’s affidavit was competent summary judgment evidence even though it came from a different specialty than that of the defendant.

c. Hospital Negligence

As a general rule, plaintiffs must produce expert testimony of both negligence and proximate cause to sustain a verdict. In Hilzendager v. Methodist Hosp., 596 S.W.2d 284 (Tex. App.—Houston [1st Dist.] 1980, no writ), the plaintiff was injured in a fall from her bed when the protective side rails on the bed were down. The plaintiff introduced testimony in the form of the hospital’s written procedures and regulations relating to side rails. On appeal from a directed verdict for the defendant, the Houston court of appeals held that the hospital rules would be sufficient to raise an issue on the standard of care. However, the Hilzendager court affirmed the directed verdict on the basis that there was no evidence that the plaintiff met any of the requirements as set forth in the rules or policies requiring that rails be raised. See also Thorson v. Rosewood Gen. Hosp., 608 S.W.2d 282 (Tex. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).

d. Testimony of Proximate Cause

1) General Requirement

The ultimate issue of proximate causation will not be sufficiently supported unless the evidence shows a reasonable probability that the plaintiff’s injuries were caused by the defendant’s negligence. In determining that ultimate issue, expert testimony of possible causes of the plaintiff’s condition are relevant and admissible for the jury’s consideration. Gibson v. Avery, 463 S.W.2d 277 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.). “Possible” causes alone, however, are not sufficient evidence to withstand an instructed verdict for the defendant. See Duff v. Yelin, 751 S.W.2d 175 (Tex. 1988).

A medical expert may draw conclusions regarding proximate cause if the expert bases his opinion on reasonable medical probability. Garza v. Keillor, 623 S.W.2d 669 (Tex. Civ. App.—Houston [1st Dist.]
1981, writ ref’d n.r.e). The courts have held that the testimony concerning proximate cause may be in the form of general medical principles. *Emanuel v. Bacon*, 615 S.W.2d 847 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e).


In some medical malpractice suits, the general experience of lay persons may be sufficient to enable the jury to find proximate cause without expert testimony. *Lee v. Andrews*, 545 S.W.2d 238 (Tex. Civ. App.—Amarillo 1976, writ dism’d). The general rule, however, requires that causation in medical malpractice cases be proved by expert testimony. *Kieswetter v. Cir. Pavilion Hosp.*, 662 S.W.2d 24, 27 (Tex. App.—Houston [1st Dist.] 1983, no writ). See also *Roark v. Allen*, 633 S.W.2d 804, 811 (Tex. 1982).

Expert testimony on the issue of causation may take varying forms. If the expert’s testimony establishes general medical principles from which the jury may legitimately infer causation, this may be sufficient. *Emanuel v. Bacon*, 615 S.W.2d 847, 851 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e). The *Bacon* record did not contain a direct statement that the exact complications suffered by the plaintiff were caused by the doctor’s failure to properly diagnose appendicitis. However, by viewing the record as a whole, the Houston court of appeals held that the scientific principles established by the defendant’s testimony constituted some evidence from which the jury could infer causation. It is doubtful that testimony this tenuous would support a verdict today.

When the plaintiff seeks to introduce direct expert testimony on the issue of causation, the substance of the opinion must rise to more than a showing of possibility. *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111, 114 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.). This does not require the plaintiff to establish causation in terms of medical certainty. *King v. Flamm*, 442 S.W.2d 679 (Tex. 1969). The plaintiff is not required to exclude every other reasonable hypothesis. Proof of a reasonable probability of cause is sufficient. *Rose v. Fridell*, 423 S.W.2d 658, 664 (Tex. Civ. App.—Tyler 1967, writ ref’d n.r.e.). This does not mean that the expert must necessarily couch his opinion in terms of “reasonable medical probability.” *Robinson v. Argonaut Ins. Co.*, 534 S.W.2d 953, 957 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.). The determination of whether the expert has given an opinion in terms of sufficient probability is to be based upon the substance of his testimony rather than the use of any particular word or phrase. *Western Cas. & Sur. Co. v. Gonzales*, 518 S.W.2d 524 (Tex. 1975); *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968).

2) Form and Sufficiency of Proximate Cause Evidence

(I) Qualifications

The Texas Supreme Court has emphatically taught that, while qualified to opine on the standard of care, a physician may be inadequately qualified to testify about causation. Plaintiffs must show that
their experts have the requisite “knowledge, skill, experience, training or education” that would “assist the trier of fact” in deciding the issue of cause in fact. While an ER physician may know both that neurosurgeons should be called to treat head injuries and what treatments they could provide, he must also be able to demonstrate, from either experience or study, the effectiveness of those treatments in general or in the underlying case. *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996).

Older Case Law Permitted Looser Causation Proof. In *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.), the Corpus Christi court of appeals had occasion to discuss in detail the type and form of evidence that would be required to raise an issue of proximate cause in a medical malpractice case. After reviewing the evidence, the court of appeals reversed a directed verdict for the defense, noting that the evidence was uncontradicted; that no doctor was called to attend the decedent; and that the plaintiff’s expert had testified that the plaintiff could be alive today had she received proper care and treatment. In *Valdez*, the plaintiff died of a ruptured uterus. The court of appeals noted that such an illness was not necessarily fatal. Moreover, there was sufficient evidence in the record from the plaintiff’s expert to give rise to a fact issue on proximate cause—i.e., had either one of the defendant hospitals called a doctor or stabilized the patient, the plaintiff’s chances of survival would have been infinitely better.

Note, however, that Valdez precedes both *Broders* and *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397 (Tex. 1993), which bar recovery for “loss of a chance.” See discussion at p. 143 and p. 209, infra.

(ii) Substance of Testimony

Without evidence that the injury complained of probably would not have occurred “but for” one or more of the allegedly negligent acts or omissions, recovery on a medical negligence cause of action may not be sustained. Testimony that the defendant’s negligent acts or omissions “caused or contributed to” the plaintiffs’ death, standing alone, is insufficient to meet the “but for” element of causation. *Sisters of St. Joseph of Tex. v. Cheek*, 61 S.W.3d 32 (Tex. App.—Amarillo 2001, pet. denied).

In *Helm v. Swan*, 61 S.W.3d 493 (Tex. App.—San Antonio 2001, pet. denied), the San Antonio court of appeals held that medical testimony in malpractice cases must be held to the requirements of near certainty. In order for a physician to opine about the cause of an injury, he must rule out all other potential causes of that injury, and failure to do so makes the testimony unreliable. In *Brownsville Pediatric Ass’n v. Reyes*, 68 S.W.3d 184 (Tex. App.—Corpus Christi 2002, no pet.), the Corpus Christi court of appeals applied an intensified level of scrutiny to a defense expert’s testimony. Both the *Helm* and *Reyes* cases imposed stringent requirements on, inter alia, defense expert testimony about all other “possible” causes of a plaintiff’s injuries. This approach was followed in *Lette v. Baptist Health Sys.*, 82 S.W.3d 600 (Tex. App.—San Antonio 2002, no pet.) as well.

Unreliable and speculative defense expert testimony may be admissible. In *Taber v. Roush*, the plaintiff contended that the physician defendant’s expert’s testimony that maternal forces of labor may cause some forms of brachial plexus injury, even without external force applied by medical personnel, was speculative and unreliable. The Houston court of appeals held that such testimony was admissible under *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and that the trial court was within its discretion in overruling the motion to exclude the challenged testimony. *Taber v. Roush*, 316 S.W.3d 139 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

There is some authority for the proposition that a plaintiff’s expert must rule out other causes of injury. Certainly, a
plaintiff’s expert must do more than pick one cause out of a series of equally possible causes and must demonstrate through competent testimony why his opinion as to the cause of the injuries is more probable than other competing possible causes. *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010).

Under some circumstances, Plaintiff must prove that each Defendant’s negligence, standing alone, caused Plaintiffs injury, must additionally disprove other possible causes of injury, no matter how unlikely, and must prove almost to a “medical certainty” that damages resulted from the negligent conduct. *Ponte v. Bustamante*, 490 S.W.3d 70 (Tex. App.—Dallas 2015, pet. granted). The Supreme Court has granted Petition and heard argument in *Bustamante v. Ponte*, on the issue of what level of expert testimony is required separating the causative effects of multiple negligent defendants’ errors. The jury found that the Bustamante baby’s blindness was the result of the negligence of two defendants and assessed liability evenly between them. The Court is considering the issue of whether the causation testimony was adequate to support the award.

(iii) Foreseeability

A plaintiff must prove that the injury complained of is a foreseeable consequence of the negligence proven. Certain cases are inherently difficult in this regard such as, for example, suicide cases, in which it is alleged that better care would have prevented the suicide. Suicide may be sufficiently foreseeable to a healthcare provider for liability to attach. *Rio Grande Reg’l Hosp. v. Villarreal*, 392 S.W.3d 594 (Tex. App.—Corpus Christi 2010, pet. granted,judgm’t vacated, w.r.m). But this is not necessarily true in every case. In *Wilson v. Brister*, 982 S.W.2d 42 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), the Houston court of appeals addressed the foreseeability prong of the proximate cause element of a medical malpractice cause of action. In Wilson, the mother of a patient sued the defendant-physician, alleging that the physician negligently caused the daughter’s suicide by failing to diagnose and adequately treat the patient for her suicidal ideation. Two weeks after the visit with the physician, the patient borrowed a friend’s gun and shot herself in the head. The friend apparently knew the patient had intended to commit suicide and later pleaded guilty to aiding and abetting suicide. The defendant moved for summary judgment stating that the illegal borrowing of the gun from the patient’s friend constituted a superseding criminal act that vitiated the physician’s liability.

The Houston court of appeals disagreed, noting that the foreseeability requirement of proximate cause simply means that the tortfeasor should have anticipated the dangers that his negligent act would create. *Id.* at 44. Foreseeability does not mandate that the tortfeasor predict the exact manner in which an injury will occur. *Id.* For instance, in this case, the plaintiff presented evidence that the defendant should have known that the patient had suicidal thoughts and would act on them and that alone would give rise to the defendant physician’s liability. The physician contended that, even if he was negligent, his liability was superseded by the friend’s criminal conduct. As a general rule, the criminal conduct of another is a superseding cause that will abrogate the liability of the original tortfeasor. However, when the criminal conduct is a foreseeable result of the prior negligence, the causative flow is uninterrupted and the original tortfeasor’s liability remains intact. *Id.* at 45. The court of appeals held that granting summary judgment because of the friend’s criminal conduct circumvented the true issue in the case, which was the foreseeability of the suicide and the reasonableness of the defendant’s efforts to prevent it. *Id.*

The Supreme Court

Further analysis of the foreseeability requirement is seen in two negligent
discharge cases. In the first, a Dallas court of appeals case, a patient who was to be involuntarily confined as a danger to himself “or” others was discharged. He subsequently killed three people. The families of those three individuals brought suit and the Dallas court of appeals found “generally, there is no duty to control the conduct of others.” Further, the conduct was “not foreseeable” because, although he threatened suicide and injury to himself or danger to himself “or” others, the application for emergency detention did not specify that he was a danger to himself “and” others. And, accordingly, “the evidence negates foreseeability as a matter of law.” Boren v. Texoma Med. Ctr., Inc., 258 S.W.3d 224, 230 (Tex. App.—Dallas 2008, no pet). In the second case, the Texas Supreme Court found that an emergency room, which had dismissed a mentally-ill patient only to have him commit suicide within two days of discharge, was not liable because causation was “too attenuated” to support liability. Providence Health Ctr. v. Dowell, 262 S.W.3d 324 (Tex. 2008). Twenty-one-year-old Lance Dowell had a history of threatening suicide and took an overdose of Tylenol, along with slashing his wrists. He was taken to the emergency room where he was seen and discharged. The next day, he hung himself. The jury found negligence and proximate cause and awarded damages to the decedent’s parents for their loss. The Supreme Court re-found the facts found by the jury, reassessed the expert testimony presented, redetermined the probable outcome of non-negligent conduct, and, substituting its judgment for that of the jury, concluded “that Lance’s discharge from Providence’s ER did not proximately cause his death.” Dowell, 262 S.W.3d at 330. Despite the constitutional prohibitions against fact-finding by the Supreme Court, Dowell illustrates the difficulty in sustaining a verdict in Texas at this time. A physician's failure to hospitalize a person who later commits suicide is a proximate cause of the suicide only if the suicide probably would not have occurred if the decedent had been hospitalized.

Rodriguez-Escobar v. Goss, 392 S.W.3d 109 (Tex. 2013) (citing Dowell, 262 S.W.3d at 328) (ruling evidence of causation was legally insufficient to support the verdict).

Causation must be reasonably proximate in order to support medical negligence allegations. When a mental hospital patient was discharged on the same day as her roommate, although the patient’s discharge was “early,” such “early” discharge could not support allegations of medical negligence arising from her injuries caused in a vehicular accident when the vehicle was driven by the roommate more than a day after discharge. This causal nexus was held to be too attenuated to support malpractice litigation. IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason, 143 S.W.3d 794 (Tex. 2004). Note that this assumes a duty under the circumstance—an issue the Court did not reach.

(iv) Causation which depends on the testimony of the treating physician

Cases often turn on “what if” a treating physician had been told of a finding (radiologic, laboratory, vital sign, etc). The common scenario is that a negligence allegation is asserted against another health care provider, for example a nurse (Methodist Hosp. v. German, 369 S.W.3d 333 (Tex.App.—Houston [1st Dist.] 2011, pet. denied), radiologist (Coronel v. Providence Imaging Consultants, P.A., 484 S. W. 3d 635 (Tex. App.– El Paso 2016, pet. filed)), supra, or a consulting cardiologist (Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue, 271 S.W.3d 238 (Tex.2008)).

If the treating physician acknowledges that the additional information would have changed his course of conduct, there is no issue. The issue arises when the treating physician says that, even if told, his/her course of conduct would have been the same. Does this testimony conclusively negate Plaintiff’s ability to prove causation? The Hogue Court comes closest to so holding, but does not do so, either in the context of the Defense’s
argument that Plaintiff was contributarily negligent for not providing a correct medical history or based on the treating physician’s testimony that the additional information would not have altered his course of treatment. German, in which nurses were accused of negligently failing to report a falling platelet count, was a case in which the physician testimony was essentially that Plaintiff would have died anyway – thus, the failure to report could not be a proximate cause of his death. Thus, the clearest case on point is Coronel. Therein, the treating physician testified that additional knowledge about the content of Plaintiff’s radiologic exam would not have changed his course of treatment of her. The Court tells us that this evidence is not conclusive on the issue of causation:

Consequently, a fact finder should be allowed to consider the expert evidence and the factual evidence … to determine whether a reasonably well-qualified physician in [the consulting radiologist’s] position would have directly informed [the Defendant] or his designee of his findings and whether [a conflicting lay witness or the Defendant] are telling the truth.

So a Defendant’s testimony that additional information would not have changed his/her conduct is to be weighed against the evidence and the reasonableness standard, as well as for its credibility.

1) Causation Must Be in Terms of Greater Than Fifty Percent (50%) Likelihood.

Since the seminal case of Kramer v. Lewisville Mem’l Hosp., 858 S.W.2d 397 (Tex. 1993), Texas has disallowed recovery for “loss of a chance.” Unless a plaintiff can prove by greater than a 50% likelihood that the damage resulting from the proven negligence would not have occurred, the plaintiff is barred from recovery.

A patient who proved that delay in the diagnosis of her cancer reduced her chances of survival from greater than a 50% chance to less than a 50% chance could prevail, but a loss of a chance instruction would be required. Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851 (Tex. 2009). Conversely, a plaintiff who could not prove a greater than 50% chance of survival was barred from recovery. Arredondo v. Rodriguez, 198 S.W.3d 236 (Tex. App.—San Antonio 2006, no pet.).

In an opinion that eviscerates plaintiffs’ claims for failure to abort a stroke-in-progress with the administration of t-PA, the United States Fifth Court of Appeals set as a standard that the plaintiff must show an absolute benefit of success, statistically, in order to prevail. In Young, the plaintiff showed that his likelihood of a good outcome without t-PA was approximately 42% while his likelihood of success with t-PA was approximately 59%. In the Fifth Circuit’s view, this was an insufficient differential for him to prevail. Additionally, the Young Court set as a standard that there be epidemiological evidence of a greater than 50% likelihood of a benefit to the patient across the board. Thus, a plaintiff, who is young and healthy with no other co-morbidities and who can show through expert testimony a 70% to 80% likelihood of a good outcome with timely t-PA, can still not prevail since the only studies that have been done include “all comers,” including the aged, debilitated, people for whom the drug is administered too late and people who were never having a stroke in the first place. Thus, because of the absence of experimental tests in which patients are deprived of medication in order to demonstrate the absolute benefit of the drugs, American patients cannot prevail on stroke-in-progress/failure to administer t-PA cases in Texas. Young v. Mem’l Hermann Hosp. Sys., 573 F.3d 233 (5th Cir. 2009), cert. denied, 599 U.S. 937, (2010).
Note that, since Young, the United States Supreme Court has established different guidelines: “A lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and an adverse event. As Matrixx itself concedes, medical experts rely on other evidence to establish an inference of causation.... It suffices to note that, as these courts have recognized, ‘medical professionals and researchers do not limit the data they consider to the results of randomized clinical trials or to statistically significant evidence.’” Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1319–20 (2011) (citing Best v. Lowe’s Home Ctrs., Inc., 563 F.3d 171 (6th Cir. 2009), Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999), and Wells v. Ortho Pharm. Corp., 788 F.2d 741 (11th Cir. 1986)).

An innovative approach was recently upheld by the Houston court of appeals. The plaintiff had a recurrence of cancer, which was negligently not timely diagnosed. In her circumstance, a traditional “loss of a chance” pleading would have appropriately fit the facts, but would have been barred as a result of the Supreme Court’s holding in Kramer v. Lewisville. The plaintiff, rather than alleging loss of a chance, alleged that, as a result of the misdiagnosis, she underwent an otherwise unnecessary additional medical procedure, otherwise unnecessary medical expenses, lost her job, lost benefits, suffered physical pain and suffering, loss of consortium, mental anguish and emotional stress, as well as loss of enjoyment of life. Her husband further sued for his loss of consortium, mental anguish and pecuniary loss all during his wife’s [shortened] life. Recovery for these damages was not barred as a claim for “loss of chance,” but rather permitted as a claim for damages that necessarily flowed from the misdiagnosis during the course of her life. Escalante v. Rowan, 251 S.W.3d 720 (Tex App.—Houston [14th Dist.] 2008), rev’d on other grounds, 332 S.W.3d 365 (Tex. 2011). The Texas Supreme Court reversed based on its decision in Franka v. Velasquez, 332 S.W.3d 367 (Tex. 2011), which denies recovery against employees of governmental entities subject to the Texas Tort Claims Act. The Supreme Court, however, made no comment about the loss of a chance aspects of the Escalante opinion.

2) Testimony of Mere “Possibility” is Improper from Either Plaintiff or Defendant.

Statute and case law are both clear: a plaintiff must prove causation based on reasonable medical probability. Testimony cannot be based on “mere conjecture, speculation or possibility.” Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508 (Tex. 1995). This standard applies equally to both defendants’ and plaintiffs’ experts. Gridr v. Naaman, 83 S.W.3d 241 (Tex. App.—Corpus Christi 2002) rev’d on other grounds, 126 S.W.3d 73, 74–75 (Tex. 2003); Tsai v. Wells, 725 S.W.2d 271 (Tex. App.— Corpus Christi 1986, writ ref’d n.r.e.). In the Grider case, the defendant physician had severed the plaintiff’s nerves, resulting in permanent damage to the plaintiff’s hand. One of the defendant’s experts testified that if the plaintiff had an anatomical abnormality, then the injury would not have been the result of negligence. The expert did not testify, however, that in reasonable medical probability the plaintiff had such an abnormality. The Grider court held that:

Even if the defensive theory had been properly based on a body of scientific, technical or other specialized knowledge, it was no evidence in this case because there was no proof Appellant’s anatomy was abnormal in any respect. If an expert opinion is based on facts that are materially different from the facts in evidence, then the opinion is not evidence. Appellee’s expert’s defensive theory is not based on fact, but relies
on mere possibility, speculation and surmise.

83 S.W.3d at 246 (internal citations omitted).

Similar reasoning was followed by the Corpus Christi court of appeals in Tsai, in which the defense sought to introduce testimony that the plaintiff’s pelvic infection might have been contracted as a result of sexual relations with a man with gonorrhea. There was no evidence that the plaintiff had never contracted gonorrhea and the Tsai court held that “the inference that would result from the Appellant’s testimony would be no more than speculation and conjecture. Appellant’s conclusion is not a probable cause because he is unable to say that it is more likely than not that the pelvic inflammatory disease was a result of sexual contact with a person afflicted with gonorrhea.” Tsai, 725 S.W.2d at 274.

e. Defendant-Doctor’s Testimony as Establishing the Medical Standard of Care

It is well-settled in Texas that the medical standard of care in a medical malpractice action may be established with the defendant-physician’s own testimony as to the applicable medical standard of care involved. See Williams v. Bennett, 610 S.W.2d 144 (Tex. 1980); Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967); Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ).

Moreover, the medical record entries and post-treatment statements of the defendant-physician have been held to be admissible evidence to establish the medical standard of care and admissions of departure from that medical standard. Bronwell v. Williams, 597 S.W.2d 542 (Tex. Civ. App.—Amarillo 1980, writ ref’d n.r.e.).

In Williams v. Bennett, 610 S.W.2d 144 (Tex. 1980), the Texas Supreme Court held “that there is some evidence to support the jury finding that [the defendant-physician] violated the medical standards set by his own testimony.” Williams, 610 S.W.2d at 146. The defendant-physician had testified that, to discharge a patient with a severe infection, would be inappropriate medical practice. The plaintiff need not introduce independent expert testimony when the defendant has testified to the appropriate principles and practices.

The San Antonio court of appeals has held that a supervising surgeon’s deviation from the standard of care established by his testimony was a question for the jury. Baker v. Story, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.). The defendant-physician testified “that it would be a deviation from standard medical practice for a surgeon, intending to cut a nerve ganglion, to cut a normal appearing ureter instead.” Id. at 643.

In Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ), a medical malpractice case was brought against a non-medical podiatrist for alleged negligence in surgery, which caused the plaintiff’s pulmonary embolism and foot pain. The Fort Worth court of appeals held that the defendant physician’s testimony sufficiently “established a standard of care in regard to acceptable medical practice in the school of podiatry.” There was no independent expert testimony needed.

In Wynn v. Mid-Cities Clinic, 628 S.W.2d 809 (Tex. Civ. App.—Texarkana 1981, writ ref’d n.r.e), the defendant physician’s testimony established the standard of care for the amount of x-ray radiation needed to kill cancerous cells. The plaintiff supplied the expert testimony concerning the proper use of radiation therapy. The Texarkana court of appeals held that the expert witness’s testimony was adequate to raise a fact issue to be decided by the jury where testimony between the defendant’s and the plaintiff’s expert witnesses conflicted on a fact issue.

4. Instances in Which Expert Testimony May Not Be Required

There are several instances in which expert testimony may not be required at
trial. However, simply because the subject of the trial testimony may be within the common knowledge and experience of the jury does not exempt a claimant from having to produce expert reports pursuant to Article 4590i, § 13.01, or § 74.351. The following cases pre-date the promulgation of the expert report requirement and, therefore, do not address whether expert testimony is needed to comply with Article 4590i’s 90-day and 180-day filing requirements or Chapter 74’s 120-day requirement.

Texas courts have held that expert testimony is usually required to show the medical standard of care unless the medical matters and standards: (1) are a matter of common knowledge and within the experience of a layperson or (2) fall within other recognized exceptions. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Webb v. Jorns*, 488 S.W.2d 407 (Tex. 1972); *Snow v. Bond*, 438 S.W.2d 549 (Tex. 1969); *Coan v. Winters*, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.).

Further, note that, since the passage of Chapter 74, expert testimony from a physician is always required on the issue of causation. It is doubtful that many older cases permitting inference even of negligence are still valid.

a. Dispute as to Facts – not Dispute as to Medical Principles

Under older case law, when only the facts are disputed and not the appropriate medical principles and practices, there may be no need for the plaintiff to supply independent expert affidavits.

In *Davis v. Marshall*, 603 S.W.2d 359 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.), the standard of care was established by the package insert for a plaster cast. The factual dispute concerned the temperature of the dip water used by the physician.

f. Questions of Common Knowledge and Experience

Courts have generally held that presumed negligence must be confirmed by the testimony of expert witnesses. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982); *Williams v. Bennett*, 610 S.W.2d 144, 146 (Tex. 1980). However, an exception to this requirement exists where the negligence is so plain as to be within the common knowledge of laymen, as where the negligence alleged is in the use of mechanical instruments, operating on the wrong portion of the body or leaving surgical instruments or sponges within the body. It is still necessary to prove negligence in these cases.

In *Manax v. Ballew*, 797 S.W.2d 71 (Tex. App.—Waco 1990, writ denied), a patient brought an action against his surgeon alleging that the surgeon operated on the wrong part of the patient’s back in an attempt to remove a lipoma. The Waco court of appeals did not require expert testimony.

In *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.), a nursing home patient ran onto a highway and knocked a motorcyclist to the ground. The Houston court of appeals stated that “the standard of nonmedical, administrative, ministerial or routine care at a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard.” Smith, 674 S.W.2d at 428.

In *Thorson v. Rosewood Gen. Hosp.* 608 S.W.2d 282 (Tex. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.), the Houston court of appeals held the hospital was not negligent since there was no evidence that the hospital had breached its standard for bed rail usage. The patient fell out of bed and injured herself because the bed rails were left down. The reasoning of the Thorson court implied that no expert testimony was necessary.

In *Hilzendager v. Methodist Hosp.*, 596 S.W.2d 284 (Tex. App.—Houston [1st Dist. 1979, writ ref’d n.r.e.), the fact that the patient was a diabetic was not relevant to the negligence issue. The fact that the patient was a diabetic was not relevant to the negligence issue.
Dist.) 1980, no writ), a patient brought an action against a hospital for damages sustained when she fell from her bed. The court held that “whether the hospital was negligent in failing to raise the bed rails” was a fact issue, which could have been decided by a jury. Hilzendager, 596 S.W.2d at 286.

In Harle v. Krchnak, 422 S.W.2d 810 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref’d n.r.e.), a patient brought an action against a physician who had to operate on the patient’s body a second time to remove a sponge. The Houston court of appeals required no expert testimony.

Is use of exercise equipment under the supervision of a physical therapist a health care liability claim for which expert testimony is required? Though the Texarkana court of appeals held that such care did not require expert testimony to establish the appropriate standard of care, the Texas Supreme Court reversed, finding that the negligent supervision of the physical therapist by the physician was an issue which required expert testimony. Rehabilitative Care Sys. of Am. v. Davis, 43 S.W.3d 649 (Tex. App.—Texarkana 2001, pet. denied). Note that, although the petition for review was denied, the Supreme Court disapproved of the court of appeal’s statement that expert testimony was not required. Rehabilitative Care Sys. of Am. v. Davis, 73 S.W.3d 233 (Tex. 2002) (“We disapprove of the court of appeals’ statement that expert testimony was not required to establish the appropriate standard of care in this case, and deny the petition for review.”).

5. Daubert and Its Progeny

a. The Daubert Standard


6. Personal Preference or Opinion

a. Direct Examination

Testimony about an expert witness’s personal preference (how the expert would have handled the case or what he would have done or recommended), standing alone, has been held inadmissible or insufficient to establish the medical standard of care from which a jury could infer negligence. McGrath v. Brown, 622 S.W.2d 647 (Tex. Civ. App.—Fort Worth 1981, writ ref’d n.r.e.); Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ). These cases hold that an expert’s personal preference testimony amounts to his “personal opinion” regarding the questioned care or treatment, which fails to establish a medical standard of care to assist the jury in deciding the negligence issue.

However, all of the cases holding expert personal preference testimony insufficient to establish a medical standard of care involve such expert opinions standing alone and without any predicate on whether the expert was familiar with the applicable medical standard of care involved or whether he followed such standards in his own practice. If, on the other hand, the expert witness testifies to familiarity and compliance with the standards of good medical care in his own practice, then his personal preference or practice may become admissible and sufficient to establish a medical standard of care.

b. Cross-Examination

On cross-examination, however, the expert witness’s personal preference or practice may be admissible. See, e.g., Bellaire Gen. Hosp. v. Campbell, 510 S.W.2d 94, 98 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref’d n.r.e.).
7. Expert Opinion Under Rule 704
Admissible On Ultimate Issues of Mixed Law and Fact

Rule 704 of the Texas Rules of Evidence states:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In the significant case of *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987), the Texas Supreme Court held that medical expert testimony on a mixed question of law and fact is admissible under Rule 704 in medical malpractice actions. Specifically, the Court ruled that medical expert testimony that the defendant hospital’s conduct constituted “negligence,” “gross negligence,” and “heedless and reckless conduct,” and that certain acts were “proximate causes” of the minor plaintiff’s injury was admissible under Rule 704. The Court opined succinctly:

Fairness and efficiency dictate that an expert may state an opinion as a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts.

*Birchfield* 747 S.W.2d at 365. Importantly, the Supreme Court’s ruling in *Birchfield* interprets Rule 704 as abolishing the “ultimate issue” rule, which excluded expert testimony on ultimate issues of medical negligence and proximate causation in malpractice cases. In so doing, *Birchfield* effectively overrules prior Texas court decisions prohibiting medical expert testimony concerning “negligence,” “malpractice,” and “proximate causation” in medical malpractice actions. See *Snow v. Bond*, 438 S.W.2d 549 (Tex. 1969); *Coan v. Winters*, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.).

Moreover, the decision in *Birchfield* is consistent with a modern trend favoring a liberalized approach to Rule 704 by allowing expert opinion couched in terms of a legal standard with appropriate definitions and instructions by the court. See 3 J. WEINSTEIN & M. BURGER, WEINSTEIN’S EVIDENCE SEC. 704 (1987).

Texas courts have held that the terms “medical negligence,” “malpractice,” “gross negligence,” and “proximate cause” are mixed questions of law and fact. Thus, legally-correct definitions and instructions concerning these terms are required by the court for a fair and proper trial. See *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361 (Tex. 1987); *DeLeon v. Louder*, 743 S.W.2d 357 (Tex. App.—Amarillo 1987, writ denied) (partial definition of proximate cause did not fulfill the requirement that an opinion be based upon proper legal concept as required in *Birchfield*); *E-Z Mart Stores v. Terry*, 794 S.W.2d 63 (Tex. App.—Texarkana 1990, writ denied).

A medical expert may also testify as to the comparative responsibility of defendants. *Harvey v. Stanley*, 803 S.W.2d 721 (Tex. App.—Fort Worth 1990, writ denied).

8. Physician Acting as a Specialist
a. General Rule

A physician is only required to possess the degree of skill and learning that is reasonably possessed and exercised by a member of his profession. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977). A general practitioner is not held to the medical standard of care of a specialist. *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969); *Baker v. Story*, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.).

b. Specialists
A specialist is bound to exercise the degree of skill and knowledge that is reasonably possessed by similar specialists, and not merely the degree of skill and knowledge of a general practitioner. *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969); *Baker v. Story*, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.).

Texas courts have held that a physician specialist supervising a non-specialist is held to a higher standard of care and skill in providing supervision than the supervised non-specialist performing the direct care and treatment for the patient. *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969); *Baker v. Story*, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.).

**g. Referrals to Specialists**

Where a case is beyond the skills of a general practitioner, there is a duty to refer the patient to a specialist when medically indicated. *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969); *Costa v. Storm*, 682 S.W.2d 599 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.). The plaintiff must also show that a physician’s failure to consult or refer to a specialist probably resulted in injury or damage to the patient in order to establish a causal relationship between the failure to consult or refer and the end result. *Henson v. Tom*, 473 S.W.2d 258 (Tex. Civ. App.—Texarkana 1971, writ ref’d n.r.e.).

9. **The Physician Must Exercise His Skill With Reasonable Care and Diligence**

Generally, in the absence of a special contract, a physician is not an insurer and does not warrant a cure or favorable result, but impliedly contracts that he possesses a reasonable degree of skill and diligence. *Costa v. Storm*, 682 S.W.2d 599 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

**a. Mistakes in Judgment**


**b. Bad Results**

Texas courts have ruled that juries may properly consider an unexpected or bad result or any other circumstances showing a lack of success in care or treatment if the jury finds that such result or results were proximately caused by the negligence of the defendant-doctor. *Thomas v. Beckering*, 391 S.W.2d 771 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.). However, an unexpected or bad result or any other circumstances showing a lack of success in care and treatment are not, standing alone, evidence of negligence on the part of the defendant-doctor and negligence cannot be inferred solely from such unexpected, bad or unsuccessful results. *See Irick v. Andrew*, 545 S.W.2d 557 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e); *Forney v. Mem’l Hosp.* 543 S.W.2d 705 (Tex. App.—Beaumont 1976, writ ref’d n.r.e.). *See also* Article 4590i, §7.02 (West Supp. 1990) the “bad result” instruction, discussed at II. E., supra.

10. **The “Same School” Rule**

**a. General Rule**

The general rule is that a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner of another school of medicine. *Hart v. Van Zandt*, 399 S.W.2d 791 (Tex. 1965).

**b. Exceptions**

Exceptions to the same school rule abound in Texas law and other jurisdictions. Physicians of one school of medicine are permitted to testify in a malpractice action...
against a physician of another school in the following circumstances: (1) medical experts of a school other than the defendant’s are competent to testify as to the use of the x-rays since proper employment of x-rays is a scientific matter about which the different schools of medicine do not differ, Porter v. Puryear, 262 S.W.2d 933 (Tex. 1953); (2) where the particular subject of inquiry is common and equally recognized and developed in all fields of practice, and the medical expert witness has practical knowledge of what is usually and customarily done by physicians in circumstances similar to those confronting the defendant physician, Id.; McIntyre v. Smith, 24 S.W.3d 911 (Tex. App.—Texarkana 2000, pet. denied); Bilderback v. Priestly, 709 S.W.2d 736, 741 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); Garza v. Keillor, 623 S.W.2d 669 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.); Porter v. Puryear, 262 S.W.2d 933 (Tex. 1953); Drummond v. Hodges, 417 S.W.2d 740 (Tex. Civ. App.—Dallas 1967, no writ). But See Upton v. Baylor Coll. of Med., 811 S.W.2d 168 (Tex. App.—Houston [1st Dist.] 1991, writ denied); (3) where the subject of inquiry relates to the manner of use of electrical or mechanical appliances and common use in both or all fields of practice, Porter v. Puryear, 262 S.W.2d 933 (Tex. 1953); Drummond v. Hodges, 417 S.W.2d 740 (Tex. Civ. App.—Dallas 1967, no writ). But See Upton v. Baylor Coll. of Med., 811 S.W.2d 168 (Tex. App.—Houston [1st Dist.] 1991, writ denied); (4) where the method of treatment in the defendant’s school and the school of the expert witness is the same or similar; Drummond, 417 S.W.2d at 746; or (5) where the testimony of the expert witness is as to matters of common observation and experience, Garza, 623 S.W.2d at 671; Drummond, 417 S.W.2d at 746.

An expert witness need not be a specialist in the particular branch of the medical profession for which his testimony is offered. Trial courts may qualify a medical witness of a different specialty to testify if the witness has practical knowledge of what is usually and customarily done by other practitioners under circumstances similar to those confronting the malpractice defendant. Keo v. Vu, 76 S.W.3d 725 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

c. Application

Cases have allowed testimony of: a retired dental surgeon about the appropriateness of modified neck surgery, Marling v. Maillard, 826 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1992, no writ); a physical therapist (Ph.D.) against an orthopedic specialist, Bilderback v. Priestly, 709 S.W.2d 736 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); a physicist against a radiologist, Wynn v. Mid-Cities Clinic, 628 S.W.2d 809 (Tex. Civ. App.—Texarkana 1981, writ ref’d n.r.e.); an orthopedist against a “non-medical doctor podiatrist,” Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ); a specialist against a general practitioner, Sears v. Cooper, 574 S.W.2d 612 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref’d n.r.e.); a general surgeon in a case involving an obstetrics specialist, Simpson v. Glenn, 537 S.W.2d 114 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.); surgeons and radiologists in a case against a nephrologist regarding the proper way to place a central venous catheter, McIntyre v. Smith, 24 S.W.3d 911 (Tex. App.—Texarkana 2000, pet. denied); psychiatrist rendering an opinion about the neurosurgical standard of care if evidence of familiarity with the standard is introduced. Tomasi v. Liao, 63 S.W.3d 62 (Tex. App.—San Antonio 2001, no pet.).

Physicians who “practice . . . the same type of care or treatment as that delivered [as defendant hospital],” with overlapping areas of expertise, could provide opinions about negligent policies and procedures and EMTALA violations. Christus Health Se. Tex. v. Keegan, 2011 WL 3206851 (Tex. App.—Beaumont 2011, no pet.) (mem. op.).
11. Evidence-Custom Admissible, But Not Conclusive On the Standard of Care in Medical Malpractice Cases

In 1977, the Texas Supreme Court rejected custom as controlling in medical malpractice cases. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977) states the Texas rule that “a physician who undertakes a mode or form of treatment which a reasonable or prudent member of the medical profession would undertake under the same or similar circumstances” shall not be subject to liability for rejecting alternative standards that center around what a given number of physicians might do. Hence, the Court favored a standard based on good medical practice over a standard based on a practice that is customary.

Medical custom and practice are admissible not only to establish the medical standard of care, but also to show the defendant’s departure from the customary practice as some evidence of negligence. *King v. Bauer*, 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied). Texas courts have also held that compliance with a medical custom is not a conclusive absolute test of freedom from medical negligence because the custom itself may be negligent. *Kissinger v. Turner*, 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.); *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.). See also *Brown v. Lundell*, 344 S.W.2d 863, 867 (Tex. 1961).

In a case involving a suit against a nursing home, the defendant argued that it had exercised the degree of care, skill and diligence exercised by such homes in similar communities, thus precluding a finding of negligence. The Houston court of appeals rejected the nursing home’s contention that conformity with custom precludes a finding of negligence. *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).

12. Professional Standards

Texas has recognized that a professional’s standards may be some evidence of the standard of care. *Lunsford v. Bd. of Nurse Examiners*, 648 S.W.2d 391 (Tex. App.—Austin 1983, no writ) (standards of the Board of Nurse Examiners); *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111 (Tex. App.— Corpus Christi 1982, writ ref’d n.r.e.) (standards of the Board of Nurse Examiners). But see *Hicks v. Canessa*, 825 S.W.2d 542, 543 (Tex. App.—El Paso 1992, no writ) (holding that hospital standards are “not evidence” of the standard of medical care). Further, the conduct of a nursing home may be evaluated from the regulations of the Texas Department of Health, which establish a “minimum duty” owed by the nursing home to its patients. *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).


13. Basis for Expert’s Opinion

The testifying expert must support his opinion with facts that are in evidence. Note, however, that the Texas Rules of Evidence have broadened the use of opinion. For example, Rule 704 permits opinion inquiry of an expert as to the ultimate issue by providing that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Under Rule 705, it is no longer necessary for an expert to disclose the underlying facts or data before stating his
opinion unless the court so requires. However, the expert may be required to disclose the underlying facts or data by the opposing party. A primary goal of Rule 705 was to alleviate the necessity of a long hypothetical question before asking for the expert’s opinion. Under Rule 703, it is not necessary that the facts or data upon which the opinion is based be admitted at trial. In fact, the facts or data may be inadmissible. Rule 703 provides that, if the facts or data are of a type reasonably relied upon by experts in the particular field to form opinions or inferences upon the subjects, the facts or data need not be admissible. Therefore, although part of the basis of the expert’s opinion may be in evidence, other portions of the expert’s basis need not be admissible.

In *Stam v. Mack*, 984 S.W.2d 747 (Tex. App.— Texarkana 1999, no pet.), the plaintiff appealed a take-nothing verdict. The plaintiff contended that the trial court erred by admitting into evidence, through the testimony of a testifying expert, the opinion of a consulting expert who was not present at trial. The testifying expert, a pediatrician, relied on the opinion of a radiologist that a CT-scan showed no abnormality, in forming his opinion that there was no breach in the standard of care. The plaintiff objected to this portion of the expert’s testimony on the grounds that the defendant did not disclose the radiologist as a person with knowledge of relevant facts or as a testifying expert.

The Texarkana court of appeals stated that there was no evidence that the consulting expert had any knowledge of relevant facts and the radiologist had not been designated as a testifying expert. Therefore, further disclosure by the defendant was not necessary and the opinion of the radiologist was properly admitted through the opinion of another expert.

The Stam court acknowledged that there is disagreement among authorities concerning the admissibility of expert testimony under Rules 703 and 705 of the Texas Rules of Evidence, yet held that those two rules do allow the admissibility of nondisclosed testimony through a testifying expert.

a. Medical Records

The plaintiff's expert witness may be able to give his opinion of the defendant’s negligence on the basis of the facts presented by hospital records. See *Hart v. Van Zandt*, 399 S.W.2d 791, 798 (Tex. 1965).

In *Cortez v. Fuselier*, 876 S.W.2d 519 (Tex. App.— Texarkana 1994, writ denied), the Texarkana court of appeals held that an expert would be allowed to testify based on information that was not found in the medical records. The plaintiff brought her medical malpractice action against her podiatrist alleging that the podiatrist failed to check the surgical correction of her foot by loading her forefoot at the time of the procedure.

1) Records of Regularly Conducted Activity: Rule 803(6)

Where the medical or hospital records in question were not made by the defendant and would not be admissible as an admission, as a prior inconsistent statement or under some other appropriate theory, it is necessary to show that the records are admissible under the Records of Regularly Conducted Activity exception of Rule 803(6) of the Texas Rules of Evidence. Memoranda or records made in the regular course of business are statutorily defined to be admissible evidence of the truth of the statements therein. TEX. R. EVID. 803(6).

2) Personal Knowledge

Entries in medical records are admissible if they constitute the recordation of events, observations or facts of which the entrant had personal knowledge. *Shuffield v. Taylor*, 83 S.W.2d 955 (Tex. 1935).

i. Examination of Patient

A medical expert may base his opinion on his own observation of the facts

ii. Hypothetical Questions

For a case involving an extensive discussion of the hypothetical question as a basis for the expert’s opinion, see *Cooper v. Bowser*, 610 S.W.2d 825 (Tex. Civ. App.—Tyler 1980, no writ). In that case, the plaintiff’s attorney, in asking the expert witness’s opinion, advised that the answer should be based on reasonable medical probability and only on that basis. The attorney also informed the expert that questions involving medical practice or medical treatment should concern minimum, safe and accepted medical practices prevailing in the area at the given time. The defendant objected to the witness’s testimony on the basis that the opinions were based on a consultation report contained in the hospital records. The *Tyler* court of appeals overruled the objection, and pointed out that the witness did not intimate that opinions were based substantially on this report.

E. Arbitration Agreements, Chapter 74, Subchapter J., and Article 4590i, Subchapter O, § 15.01

1. The Statute

The 2003 Legislature left this section completely undisturbed. It provides that mandatory arbitration agreements between physicians and patients are void without specified statutory language.

2. Case Law

In an extremely significant case *The Fredericksburg Care Company v. Perez*, 461 S.W.3d 513, (Tex. 2015, cert. denied), the Court held that Chapter 74 was a law enacted for the purpose of imposing tort reform to further the Legislative goal of making health care more affordable in Texas. Accordingly, Chapter 74 was not a statute designed to regulate the “business of insurance”, and because the statute only therefore had a “tenuous impact” on the “business of insurance” it did not fall within the exception to the Federal Arbitration Act that would allow the state of Texas to invalidate arbitration agreements under its power to regulate the business of insurance. Thus, arbitration agreements in Texas, in many cases, will be preempted by the Federal Arbitration Act (FAA).

In a case in which a defendant nursing home sought to compel arbitration based on documents signed by the patient’s relative on admission, the Fort Worth court of appeals found that signing a “Medical Power of Attorney” did not amount to signing a “Legal Power of Attorney” or “General Power of Attorney” that would allow her relative to make legal decisions such as binding her to arbitration. The party seeking to compel arbitration has the burden of proof to show a valid, enforceable arbitration agreement. Lack of authority is certainly a defense, and a medical power of attorney did not constitute the legal authority to make binding agreements on non-medical issues. Further, the medical power of attorney did not meet other requirements of the statute, such as that requiring that the witnesses not be employees of the defendant and providing the appropriate disclosure statement. *Tex. Cityview Care Ctr. v. Fryer*, 227 S.W.3d 345 (Tex. App.—Fort Worth 2007, pet. dism’d).

The San Antonio court of appeals held otherwise in its decision in *In re Ledet*, 2004 WL 2945699 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.). In Ledet, a mentally-incapacitated Alzheimer’s patient fell and was injured in the defendant’s nursing home facility. The patient’s family brought suit on her behalf. As a defense, the defendant raised an arbitration agreement signed upon admission by the patient’s adult son, seeking its enforcement. The San Antonio court of appeals held that, under some circumstances, such agreements can be binding in Texas, even on non-signatory family members, and can vitiate the right to trial by jury.
In a mandamus proceeding, the Texas Supreme Court observed that the Federal Arbitration Act (“FAA”) may preempt the Texas Arbitration Act (“TAA”) in cases in which Medicare funds are expended on behalf of the patient. Such use of Medicare funds is “interstate commerce,” thus making the FAA applicable and preempting more stringent TAA requirements, such as the requirement that plaintiff’s counsel sign off on such an agreement before it is enforceable. In reaching this conclusion, the Court provided the following analysis:

[Defendant] argues the FAA preempts the TAA. We agree. The factors that determine whether the FAA preempts the TAA are whether (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement.

Factors (1) and (3) are undisputed, and, because HHC was reimbursed by the Medicare program for services rendered to John, the arbitration agreement involves interstate commerce. The TAA interferes with the enforceability of the arbitration agreement by adding an additional requirement—the signature of a party's counsel—to arbitration agreements in personal injury cases. See TEX. CIV. PRAC. & REM. CODE § 171.002(a)(3), (c). Thus, the TAA is preempted by the FAA in this case, the signature of [patient’s wife’s] counsel was not a prerequisite to enforcement of the arbitration agreement.


Prudent practitioners will also note that the arbitration agreement was not produced by the defendant in response to plaintiff’s request for records under Article 4590i. The Court held that such a arbitration agreement is not “medical records,” and need not be produced in response to a request for same—so plaintiffs must separately request them.

On December 9th, 2016, the Department of Health and Human Services issued the following memorandum to all State Survey Agency Directors:

“On September 28, 2016, the Federal Register posted the notice of the CMS final rule Reform of Requirements for Long-Term Care Facilities. The rule was published in the Federal Register on October 4, 2016, and became effective on November 28, 2016.

The published final rule revises the requirements that LTC facilities must meet to participate in the Medicare and Medicaid programs. One of the new requirements at 42 C.F.R. §483.70(n)(1) prohibits nursing homes receiving Medicare or Medicaid funds from entering into pre-dispute binding arbitration agreements with any resident or resident’s representative nor require that a resident sign an arbitration agreement as a condition of admission to the nursing home. [emphasis added]

On November 7, 2016, the United States District Court for the Northern District of Mississippi, Oxford Division (Civil Action No. 3:16-CV-00233), issued an order preliminarily enjoining CMS from “section 483.70(n)(1).” At this time, CMS will not enforce 483.70(n)(1) until and unless the injunction is lifted. As such,
surveyors must not survey facilities for compliance with this new provision until further notified.”

F. Payments for Future Losses, Chapter 74, Subchapter K, §§ 74.501–74.507

This extensive subchapter provides for mandatory periodic payments of certain future damage awards and permissive periodic payments of others. It is set forth verbatim below because of its complexity.

SUBCHAPTER K. PAYMENT FOR FUTURE LOSSES

§ 74.501. Definitions

In this subchapter:

1. "Future damages" means damages that are incurred after the date of judgment for:

   A. medical, health care, or custodial care services;

   B. physical pain and mental anguish, disfigurement, or physical impairment;

   C. loss of consortium, companionship, or society; or

   D. loss of earnings.

2. "Future loss of earnings" means the following losses incurred after the date of the judgment:

   A. loss of income, wages, or earning capacity and other pecuniary losses; and

   B. loss of inheritance.

3. "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

§ 74.502. Scope of Subchapter

This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000.

§ 74.503. Court Order for Periodic Payments

1. At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

2. At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

3. The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.

4. The court shall specify in its judgment ordering the payment of future damages by periodic payments the:

   A. recipient of the payments;

   B. dollar amount of the payments;

   C. interval between payments; and

   D. number of payments or the period of time over which payments must be made.

§ 74.504. Release

The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the claimant.

§ 74.505. Financial Responsibility

1. As a condition to authorizing periodic payments of future
damages, the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.

2. The judgment must provide for payments to be funded by:
   A. an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;
   B. an obligation of the United States;
   C. applicable and collectible liability insurance from one or more qualified insurers; or
   D. any other satisfactory form of funding approved by the court.

3. On termination of periodic payments of future damages, the court shall order the return of the security, or as much as remains, to the defendant.

§ 74.506. Death of Recipient

1. On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.

2. Periodic payments, other than future loss of earnings, terminate on the death of the recipient.

3. If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.

4. Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant.

§ 74.507. Award of Attorney's Fees

For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall:

1. place a total value on the payments based on the claimant's projected life expectancy; and

2. reduce the amount in Subdivision (1) to present value.

A summary of this statute's key points is provided below:

1. The section makes future payment mandatory for only certain elements: medical, health care or custodial services.

2. Even within these categories, the “mandatory” future payments are for “some or all.” The trial court is not required to order future payments of all future damages in these categories, just “some” of them, and the concept of “some” is not defined.

3. All other damage categories may be ordered to paid out over time, but this is discretionary with the trial court.

4. If the injured plaintiff dies before all payments have been made, then those payments stop and revert to the defense, with the exception of lost future earnings payments, which continue to the heirs of the injured plaintiff.

5. The statute permits attorneys’ fees to be taken in a lump sum at the time of settlement, and provides the method for calculating the
cost of the settlement in order to arrive at the percentage allocable to attorneys’ fees.

6. When a jury awards future damages for pecuniary losses that are not encompassed by the term “custodial services,” the award is governed by subsection (b), which provides that the trial court “may” in its discretion order periodic payments. It is not required to do so, and the matter is one left to the trial court’s discretion. *Christus Health v. Dorriety*, 345 S.W.3d 104 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The Dorriety case also contains a good discussion of damages awarded in a Chapter 74 wrongful death case. A trial court is within its discretion in ordering periodic payments of future medical expenses, while simultaneously ordering that the award for other future damages, such as pain and suffering, disfigurement, physical impairment, household services and lost wages be paid immediately. Deference is given to the trial court’s judgment. *Christus Health Gulf Coast v. Houston*, 2015 WL 9304373 (Tex. App.—Houston [1st], 2015, n.p.h.) (not designated for publication).

G. A Notable Omission

One section of Article 4590i is omitted in its entirety from Chapter 74, without comment at the time of the legislative process and possibly inadvertently:

Article 4590i, Subchapter I, Sections 9.03 and 9.04, “Advance Payments.” This section permitted defendants to make advance payments to aid plaintiffs in dealing with the cost of their injuries with certainty that such payments would not be disclosed to the jury. It is not known why this benign and beneficial statutory provision was deleted.

IV. THE TEXAS TORT CLAIMS ACT

The 2003 Legislature, in enacting HB4, created not only Chapter 74 of the Texas Civil Practice and Remedies Code, but also amended § 101.106 of the Texas Tort Claims Act (“TTCA”).

A. Legal Limitations on Liability of Governmental Entities

The doctrine of governmental immunity limits the liability of publicly-owned hospitals. The effect of this doctrine varies depending upon whether a municipal-owned hospital, a county, the state, or the federal government owns the hospital. This varied treatment exists because both common and statutory law influence the concept of governmental immunity.

1. State and County Hospitals

Texas counties are considered political subdivisions of the state, organized purely for the purposes of government, and are thus liable for torts only by statutory enactment. *Ritch v. Tarrant Cnty. Hosp. Dist.*, 480 S.W.2d 622 (Tex. 1972). County “hospital districts” have also been held to be a “local unit of government” for purposes of the TTCA. *Tarrant Cnty. Hosp. Dist. v. Ray*, 712 S.W.2d 271, 273–74 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).

A plea to the jurisdiction by a governmental entity asserting that there has been no waiver of sovereign immunity in a given case is an appropriate means of raising the issue. *UTMB Galveston v. Wood*, No. 14-02-00497-CV, 2002 WL 31890102 (Tex.
However, although such plea was an appropriate means for the governmental entity to employ, it was inappropriate for its staff members. Snelling v. Mims, 97 S.W.3d 646 (Tex. App.—Waco 2002, no pet.).

2. The Mandatory Election Clause, § 101.106.

The 2003 Legislature abolished the distinction between medical and governmental discretion and has, in essence, barred suit against physicians employed at state or county hospitals. Previously, where physician employees could be held liable for their exercise of medical discretion, they are now included in the definition of “public servant” and, therefore, have conferred upon them governmental liability protection. TEX. CIV. PRAC. & REM. CODE §108.001(3). This limits their liability for damages to no more than $100,000, as long as their conduct was within the course and scope of their employment as physicians. Plaintiffs will also have to come within the tort claims limitations on liability, including the “use” or “misuse” of tangible property discussed below.

In a complicated “election of remedies” section applicable to claims filed after September 1, 2003, the Legislature barred suit against both the governmental employee and the governmental unit. Suit against one is an irrevocable election that forever bars recovery against the other. TEX. CIV. PRAC. & REM. CODE ANN. §101.106(a)–(b).

Further, settlement of any claim under the Tort Claims Act with an employee bars judgment or recovery from the governmental unit. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(d).

If the employee is sued, upon motion requesting dismissal, the trial court “must” grant the dismissal. TEX. CIV. PRAC. & REM. CODE § 101.106(c). A governmental unit cannot use §§ 101.106(b), 101.106(e), and 101.106(f) to dismiss claims against both the governmental unit and its employees, thereby effectively dismissing a claimant’s entire suit. Tex. Tech Univ. Health Sci. Ctr. v. Villafranca, 369 S.W.3d 523 (Tex. App.—Amarillo 2012, pet. denied).

Thus, physician employees of tort claims entities are now provided with very broad new protections.

For a time, from 2003 until January of 2011, the legislative action barring suit against physicians did not apply if the governmental entity could not have been sued. If the claim, for example, did not involve misuse of tangible personal property, then the governmental entity could not have been sued, but the employee still could have been. Phillips v. Dafonte, 187 S.W.3d 669 (Tex. App.—Houston [14th Dist.]), 2006, no pet.); Williams v. Nealon, 199 S.W.3d 462 (Tex. App.—Houston [1st Dist.] 2006), rev’d, 332 S.W.3d 364 (Tex. 2011). In Franka v. Velasquez, 216 S.W.3d 409 (Tex. App.—San Antonio 2006), rev’d, 332 S.W.3d 367 (Tex. 2011), the Court found that the allegations against the individual physicians were essentially allegations of negligence, not negligent use of tangible property per se, and that, accordingly, there was no immunity for them. Similarly, the plaintiff in Walkup v. Borichardt, made allegations that the defendants were negligent in failing to order appropriate tests and in failing to act on her symptoms until she was paralyzed. Because these allegations did not include allegations of use or misuse of tangible property, the plaintiff could not have brought suit against the state entity and suit against the physicians was permitted. Walkup v. Borichardt, No. 07-06-0040-CV, 2006 WL 3455254 (Tex. App.—Amarillo Nov. 30, 2006, no pet.) (mem. op.).

In January of 2011, the Supreme Court abolished this distinction in Franka v. Velasquez, 332 S.W.3d 367 (Tex. 2011). In Franka and a series of per curiam opinions reversing similar holdings, the Court ruled that all cases against state entities and their
employees are brought “under” the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. Justice Hecht, writing for the majority in *Franka*, articulated the Court’s reasoning, in part, as follows:

Requiring a government employee to prove that his employer’s immunity from suit has been waived in order to obtain dismissal forces the parties to take unexpected positions with collateral risks. Ordinarily, one would expect a government employee to support his employer’s assertion of immunity. Only a perverse statute would incentivize conflict between the two, and there is nothing to indicate that the Legislature had any such intent. The plaintiff, too, is forced into an awkward position, arguing that immunity was not waived, and thereby cutting off that path to liability and recovery.

The majority opinion expresses other concerns for the difficulty in decision-making for the plaintiff that the prior interpretation of § 101.106 created.

A harsh dissent by Justice Medina took the Court to task for overruling *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994). The dissent pointed out that the amendment to § 101.106 “does not speak to the official immunity of physicians accused of malpractice and does not require that Kassen be abandoned.” *Franka*, 332 S.W.3d at 385 (Medina, J., dissenting).

In *Villasan v. O’Rourke*, 166 S.W.3d 752 (Tex. App.—Beaumont 2005, pet. denied), the Beaumont court of appeals made it clear that plaintiff has little choice in this area. In *Villasan*, the plaintiffs initially sued both a tort claims hospital and an individual physician employee of that entity. Thereafter, they non-suited the hospital and sought to proceed only against the physician, who filed a motion to dismiss under §§ 101.101 and 101.106(e), which was granted. In the interim, the statute of limitations against the entity had run, so the plaintiffs found themselves out of court. The court of appeals was clear in its interpretation of the statute: the Legislature meant to “encumber” plaintiffs’ ability to pursue the alternative theories that either the governmental employee was acting within the course and scope of his/her duties (and, thus, the entity was responsible for the employee’s actions) or the employee was acting outside the scope of those responsibilities and was, thus, individually liable. In effect, § 101.106 bars this approach and forces the irrevocable election to be made at the time of filing of suit.

Note that, if a suit is dismissed against the governmental entity on summary judgment finding of governmental immunity, that judgment against the entity precludes suit against the employee. *Hathaway v. Wichita Falls State Hosp.*, 2004 WL 1416279 (Tex. App.—Tyler 2004, no pet.) (mem. op.); *Fiske v. Heller*, 2004 WL 1404100 (Tex. App.—Austin 2004, no pet.) (mem. op.). Importantly, in a case in which the physician was dismissed under the mandatory substitution clause and the plaintiff amended his pleadings to add the defendant entity, the amended pleading was allowed. In *Bailey*, the Texas Supreme Court held that the hospital was not misled or disadvantaged by the substitution and the amendment to the pleadings was not based on new, distinct or different transactions. *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395 (Tex. 2011).

It is important to coordinate a reading of § 101.106 with § 312.007 of the Texas Health and Safety Code. This section provides:

A judgment in an action ... against a medical or dental unit, supported medical or
dental school, or coordinating entity under Chapter 101, Civil Practice and Remedies Code, bars any action involving the same subject matter by the Claimant against a ... resident, fellow, faculty member, or other associated health care professional or employee of the unit, school, or entity whose act or omission gave rise to the claim as if the person were an employee of a governmental unit against which the claim was asserted as provided under Section 101.106, Civil Practice and Remedies Code.

Texas Health & Safety Code § 312.007(b) (West 2001).

Under this provision, a resident who does not even provide summary judgment proof that he or she is, in fact, an employee of the tort claims defendant entity is entitled to summary judgment based on a prior judgment in favor of the entity. *Bustillos v. Jacobs*, 190 S.W.3d 728 (Tex. App.—San Antonio 2005, no pet.); *Knizel v. Bozarth*, 2007 WL 1481428 (Tex. App.—San Antonio 2007, no pet.) (mem. op.).

Hospitals must do more than allege governmental status in order to be allowed immunity under § 312.007. A private institution acting in its capacity as a supported medical school is not a “governmental unit” requiring dismissal of a lawsuit against a governmental employee under certain circumstances. *Saade v. Villarreal*, 280 S.W.3d 511 (Tex. App.—Houston [14th Dist.] 2008, pet. dism’d). In *Saade*, the Houston court of appeals examined the intersection of § 312.007 of the Texas Health & Safety Code with § 101.101, et seq. of the Texas Civil Practice & Remedies Code and analyzed the issues as follows:

Appellants contended that section 312.007(a) of the Health and Safety Code “expressly and unequivocally” provides that a supported medical school is a state agency. Section 312.007 states:

1. “A ... supported medical ... school ... is a state agency,”...

2. “a[n] employee of a ... supported medical ... school ... is an employee of a state agency,”...

3. “for purposes of Chapter 104, Civil Practice and Remedies Code,” and...

4. “for purposes of determining the liability, if any, of the person for the person's acts or omissions while engaged in the coordinated or cooperative activities of the ... school...” (b) A judgment in an action or settlement of a claim against a medical and dental unit, supported medical or dental school, or coordinating entity under Chapter 101, Civil Practice and Remedies Code, bars any action involving the same subject matter by the claimant against a director, trustee, officer, intern,
Looking at subsection (a) in its entirety and in the context in which it occurs, it seems unlikely and illogical for the Legislature to have intended by the insertion of clause 1 in subsection (a) to make supported medical schools into state agencies for all purposes. Further still, had the Legislature intended to say in section 312.007 that such entities were state agencies for all purposes, it would have been more logical to put such an important pronouncement in its own separately lettered subsection, or at a minimum, to put it in a separate sentence within subsection (a), most helpfully with an indication that the pronouncement was for all purposes and not just for the purposes enunciated in section 312.007. Coherence requires that clauses 3 and 4 modify not only clause 2 but clause 1 as well. Reading all four clauses together makes it clear that a supported medical school is a state agency and an employee of a supported medical school is an employee of a state agency for purposes of Chapter 104 and for purposes of determining the employee’s liability under certain circumstances. The subsection neither says nor stands for more than that.

280 S.W.3d at 521. Thus, Baylor hospital was not a governmental unit for purposes of immunity.

However, a private medical school resident is to be treated the same as a state employee in some instances. The Texas Supreme Court has held that, under Texas Health and Safety Code§ 312.007(a), a state-supported medical school “is a state agency” for purposes of the Tort Claims Act. Klein v. Hernandez, 315 S.W.3d 1 (Tex. 2010). In Klein, the Court stated that a resident at such a state-supported medical school “is an employee of a state agency” for two purposes: (1) that individual has statutory indemnity based on acts or omissions in the course and scope of employment, and (2) for determinations of liability for acts or omissions while engaged in supported medical school activities. Baylor provided resident services to Ben Taub, an indisputably tort claims hospital in Houston. Had the residents been directly employed by Ben Taub, they would be considered government employees for purposes of the TTCA. Similarly, had the UT public university system provided the residents to the hospital, they would be considered government employees. Because Baylor provided the resident services to Ben Taub, the Court held that there was no difference between Baylor, a private hospital providing the services, and a public hospital doing so.

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Note that the holding is limited to the physician’s ability to bring an interlocutory appeal under the interlocutory appeal statute, which limits such appeals to certain situations and classes of individuals. Under §§ 51.014(a)(5) and (a)(8) of the Texas Civil Practice and Remedies Code, a state employee can bring an interlocutory appeal for the limited purposes of that statute. The Supreme Court’s holding in *Klein* is limited to the issue of whether *Klein* could bring such an appeal, but the language is broad, and implies that tort claims immunities and protections will also apply. *See also Zimmermann v. Anaya*, 315 S.W.3d 523 (Tex. 2010).


Nurses seeking dismissal under § 101.106 of the Texas Civil Practice and Remedies Code must show that the plaintiffs “could have sued” the tort claims hospital for which the defendant nurses worked. Absent proof that a plaintiff could have sued the employer, the nurses were not entitled to dismissal under § 101.106(f). *Lanphier v. Avis*, 244 S.W.3d 596 (Tex. App.—Texarkana 2008, pet. dism’d).

In “old law” cases, the Texas Supreme Court has addressed the issue of whether § 101.106 of the Texas Tort Claims Act bars the simultaneous rendition of a judgment against a governmental unit and its employee. In *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995), the plaintiffs were injured in car accidents by government employees who were driving within the course and scope of their employment. Judgment was rendered against both the city-defendant and the employee-defendant. The employees appealed arguing that, under § 101.106 of the Texas Tort Claims Act, the judgment rendered against the city barred the concurrent judgment rendered against the employee. Section 101.106 provides that “a judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.” The employees argued that this provision barred the rendition of judgment against the employee concurrently with the rendition of judgment against the governmental employer. The Texas Supreme Court agreed.

The Court stated that it is “beyond dispute that a prior judgment against the governmental employer bars continuation of an action against the employee that has not yet proceeded to judgment.” *Thomas*, 895 S.W.2d at 355, *supra*, (citing *Cox v. Klug*, 855 S.W.2d 276, 280 (Tex. App.—Amarillo 1993, no writ)). In holding that § 101.106 also bars a concurrent judgment against the employee, the Court held that the Texas Tort Claims Act does not require that the judgment against the governmental unit precede any judgment against the employee nor does it otherwise impose particular timing requirements. *Id.* The Court stated that, under these circumstances, the bar of § 101.106 applies if the settlement or judgment in the action against the governmental unit occurs at any time before or during the pendency of the action against the employee. *Id.* The plaintiffs argued that this interpretation of the Texas Tort Claims Act violated the open courts provision of the Texas Constitution. The Court overruled the plaintiffs’ point of error by saying that the Texas Tort Claims Act is a legislatively—created cause of action—i.e., permission to sue the sovereign where no such right had existed at common law could not violate the open courts provision. The open courts provision prohibits the Legislature from unreasonably restricting common law causes of action. With the Texas Tort Claims Act, the Legislature had created a cause of
action—albeit a restricted one—and could restrict this right as it chose.

A summary judgment in favor of a governmental clinic bars any action involving the same subject matter against that clinic’s employee under the TTCA. Cox v. Klug, 855 S.W.2d 276 (Tex. App.—Amarillo 1993, no writ).

3. Relation Back After Dismissal Is Not Necessary

A plaintiff who sues an employee of a tort claims entity is required by the elections provision of § 101.106(f), upon motion, to dismiss the employee and proceed against the entity. A plaintiff who filed a motion to have his later-amended petition deemed timely for statute of limitations purposes and requested a partial summary judgment to the effect that his later-amended pleading “related back” for purposes of the statute of limitations did not need to follow that step.

Under Section 101.106(f), [plaintiff(s)] sued against [individual defendant physician] was, in all respects other than name, a suit against the [tort claims entity].

In requiring a government employer to be substituted on the employee’s motion, the statute is silent on whether the employer may complain of prejudice from the delay in being named a party. In this case, [governmental entity] has made no such complaint. When the [governmental entity] was substituted as the defendant in [plaintiffs’] place, there was no change in the real party in interest. Consequently, the [tort claims entity] cannot prevail on its defense of limitations.


Thus, there is no conflict with the “notwithstanding any other law” language of Chapter 74, because the mandatory elections provision of § 101.106 effectively makes suit against the individual a suit against the entity, if the entity files a motion requesting the substitution.

4. The 120 Day Report

In a tort claims case involving medical negligence, the 120 day time period for serving an expert report on a governmental unit that is substituted for an employee begins on the date that the plaintiff files the petition naming the governmental unit as a defendant. In other words, the time for serving the governmental unit does not begin to run until that unit is added to the suit. It is not triggered by filing against the individual employee. Univ. of Tex. Health Sci. Ctr. v. Cheatham, 357 S.W. 3d 747 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

5. Before Government Unit Can Be Liable, Defendant Must be an Employee

In a non-medical malpractice case, the Texas Supreme Court considered whether a governmental unit is liable for the actions of a person who acts on its behalf but is not a paid employee. Harris Cnty. v. Dillard, 883 S.W.2d 166 (Tex. 1994). In holding that a county could not be held liable under the Texas Tort Claims Act for the actions of a volunteer working on the county’s behalf, the Supreme Court relied on the definition of an employee under § 101.021(1) of the Texas Civil Practice and Remedies Code. The Act defines an employee as “a person, including an officer or agent, who is in the paid service of a governmental unit.” TEX. CIV. PRAC. & REM. CODE § 101.001(1). The Court held that, because the volunteer was not in the paid service of Harris County at the time of the incident, he was not an “employee” within the meaning of the Texas Tort Claims
Act. *Dillard*, 883 S.W.2d at 167. Justice Gammage, joined by Justice Doggett, criticized the majority for holding that a volunteer reserve deputy sheriff, who the county appointed to carry out law enforcement duties, who carries all the devices and emblems of a law enforcement officer, and who answers calls in the same manner as any police officer, is not an “employee” for purposes of the Texas Tort Claims Act. *Id.* at 168 (Gammage, J., dissenting). Even though this was not a medical malpractice case, the Court’s reasoning can be applied to a situation where a patient is injured by a volunteer at a government hospital. See *Thomas v. Harris Cnty.*, 30 S.W.3d 51 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

6. Must Have “Use” or “Misuse” of Tangible Property

The entire issue of waiver through the use of tangible property is fraught with inconsistent, almost incoherent, opinions. A very well-written summary of the cases, opinions, and pleas to the Legislature to fix the Tort Claims Act may be found in Justice Nathan Hecht’s concurring opinion in *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001), wherein he concludes his analysis with a judicial throwing-up-of-the-hands with his final comment: “Use, non-use, whatever.” *Miller*, 51 S.W.3d at 591 (Hecht, J., concurring).

The Supreme Court has told us that, as a matter of law, there is no liability for leaving materials in a room with a suicidal patient that the patient later uses to kill himself with because this does not constitute “use” within the meaning of the Texas Tort Claims Act. *Dallas Cnty. v. Posey*, 290 S.W.3d 869 (Tex. 2009). Most recently, we are told that the alleged negligent prescription of a Fentanyl patch does not constitute negligent use of tangible property. *Tex. Tech Univ. Health Scis. Cir. v. Buford*, 334 S.W.3d 334 (Tex App.—Eastland 2010, no pet.). Nor, does an alleged failure to act on information provided by the tangible property. In *Univ. of Tex. Med. Branch at Galveston v. Kai Hui Qi*, the 14th Court of Appeals held that allegations of failure to timely diagnose and treat preeclampsia by inducing delivery of the baby was a negligent treatment claim, for which there was no waiver of sovereign immunity. *Univ. of Texas Med. Branch at Galveston v. Kai Hui Qi*, 402 S.W.3d 374, 389–90 (Tex. App.—Houston [14th Dist.] 2013, no pet.). There were no allegations of negligent use of tangible property.

7. Pleading “Condition or Use of Property”

A plaintiff must specifically plead that a tangible item or its use was a contributing factor to his or her injury. *Ager v. Wichita Gen. Hosp.*, 977 S.W.2d 658 (Tex. App.—Fort Worth 1998, no pet.).

8. What Constitutes “Tangible Property” Sufficient to Invoke Waiver of Immunity?

Dozens of cases discuss this provision, with no clear unifying theme. See Justice Nathan Hecht’s concurring opinion in *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001), for an extensive discussion of this issue.

9. Causal Link Requirement

There is an important nexus between a condition or use of tangible personal property and proximate cause. In *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998), cert. denied, 525 U.S. 1017 (1998), the Texas Supreme Court held that unlocked doors at a mental facility through which a patient escaped did not proximately cause the patient’s suicide and, therefore, the county’s immunity was not waived under the Texas Tort Claims Act.

The use of the doors was too attenuated to proximately cause the patient’s death. Something more than mere involvement of property needed to be established by the claimant in order to prove that the use or condition of the property
proximately caused the injury. “The requirement of causation is more than mere involvement, although exactly how much more has been difficult for courts to define. If only involvement were required, the waiver of immunity would be virtually unlimited, since few injuries do not somehow involve tangible personal or real property.” Bossley, 968 S.W.2d at 343.

10. Interlocutory Appeal

A governmental employee may take an interlocutory appeal from an order denying his motion to dismiss under § 101.106(e). Austin State Hosp. v. Graham, 347 S.W.3d 298 (Tex. 2011).

11. Tort Claims Immunity and The “Patient Bill of Rights”

A flurry of litigation centered around the “Patient’s Bill of Rights” enacted by § 321.001.004 of the Texas Health and Safety Code. The statute provides that any patient receiving voluntary or involuntary in-patient mental health, chemical dependency, or comprehensive medical rehabilitation services may sue for injunctive relief, damages, or both. The statute provides that a “mental health facility” is liable to a person receiving care or treatment in or from the facility who is harmed as a result of the violation.

In 2003, the Supreme Court resolved a split among Texas appellate courts on the issue of whether or not the statute waived sovereign immunity and found that it did not. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692 (Tex. 2003).

12. Notice Under the TTCA

Section 3 of the Texas Tort Claims Act requires that the claimant give notice to the governmental unit within six (6) months from the date of the incident, except where there is “actual notice” on the part of the government unit that the claimant has received some injury. “Actual notice” is that knowledge or information which a county governmental unit hospital received by some means, reasonably describing an injury of the claimant, and the time, manner and place of the incident from which it arose. Actual notice does not require a description of the nature and extent of the injury in full medical detail. Tarrant Cnty. Hosp. Dist. v. Ray, 712 S.W.2d 271 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).

a. Requisites of “Actual Notice”

In Cathey v. Booth, 900 S.W.2d 339 (Tex. 1995), the plaintiffs brought suit against the physician and county hospital where the mother was treated, alleging that the defendants’ negligence resulted in the stillbirth of the plaintiffs’ child. Since the hospital was a government facility, the plaintiffs had to bring their claim under the TTCA. The TTCA has a mandatory notice requirement, which can be averted only by proving that the hospital had “actual notice” of the claim. In Cathey, the Texas Supreme Court defined “actual notice.” Under § 101.101 (c) of the Tort Claims Act, in order to be excused from giving formal notice, the plaintiffs must show that the governmental unit had knowledge of: (1) a death, injury, or property damage; (2) the governmental unit’s alleged fault in producing or contributing to the death, injury or property damage; and (3) the identity of the parties involved.

In order to establish the hospital’s knowledge of its culpability, the plaintiffs submitted an affidavit from their expert, an obstetrician, who reviewed the patient’s medical records and determined that the records themselves contained sufficient information from which it could be concluded that the doctor and the hospital were negligent in their treatment of the patient. The Texas Supreme Court held that this information, contained in the hospital’s own medical records, concerning the delayed Cesarean section operation was not sufficient to constitute actual notice to the hospital of its possible culpability.

Note, however, that in a case in which the governmental defendant did a post-death investigation, resulting in a
finding that there had been a “technical error” in the surgery that “was not necessarily consistent with established standards,” the Court found actual notice on the part of the defendant sufficient to confer jurisdiction. “Fault, as it pertains to actual notice, is not synonymous with liability.” Univ. of Tex. Sw. Med. Ctr. v. Arancibia, 324 S.W.3d 544 (Tex. 2010).

In Reynosa v. Bexar Cnty. Hosp. Dist., 943 S.W.2d 74 (Tex. App.—San Antonio 1997, writ denied), the parents of an infant who suffered brain damage brought a medical malpractice action against the hospital district and the university medical center, alleging that the infant’s injuries resulted from negligence of the defendant’s medical team in failing to properly monitor the infant during delivery. In this case, lack of formal notice to the University of Texas Health Science Center was never in dispute. Rather, the plaintiffs sought to show that the hospital district had actual notice through its medical records and through the knowledge of its agents. Citing Cathey, the San Antonio court of appeals held that hospital records, plus something more, can raise a fact question on notice for purposes of the statute and thereby defeat summary judgment. Further, the Reynosa court held that the key prong of the test under Cathey is the culpability prong. That is, when a health care provider should have known from its records that its negligence was more likely than not the cause of the plaintiff’s injuries, a fact issue will have been raised on the notice issue sufficient to thwart summary judgment.

The Texarkana court of appeals took a much less stringent approach to the actual notice requirement of the Texas Tort Claims Act. In Gaskin v. Titus Cnty. Hosp. Dist., 978 S.W.2d 178 (Tex. App.—Texarkana 1998, pet. denied), the plaintiffs sued the defendant-hospital for injuries the patient received during her labor and delivery. The patient developed a recto-vaginal fistula, which was undiagnosed and untreated.

The plaintiffs failed to give the hospital formal notice of their claims within six months and, therefore, had to rely on the actual notice provision of the Texas Tort Claims Act to prevent their claims from being barred. Here, the Gaskin court found that there was sufficient evidence that the hospital had actual notice of the plaintiffs’ injuries to defeat summary judgment. The court looked to the medical records themselves and determined that they raised a fact issue as to whether the hospital had actual notice of the plaintiffs’ injuries and, with respect to the hospital’s failure to recognize and treat the fistula, found that a fact issue existed.

b. A Telephone Call is Not Notice

A telephone call is not notice. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351 (Tex. 2004). A phone call from a child’s father to someone at the Medical Center was not a “notice of claim” for purposes of the Tort Claims Act and would not operate to permit suit against a governmental entity under the Act.

c. Actual Demonstration of Subjective Awareness of Fault Not Always Required

Where the governmental entity has actual knowledge of an allegation of fault against it, no demonstration of subjective awareness of fault is required. Where a county attorney declined to comply with an open records request, citing anticipation of litigation, notice was evident and proof of proper notice was not required. Concho Cnty. v. Gough, No. 03–11–00164–CV, 2011 WL 6118577 (Tex. App.—Austin Dec. 9, 2011, no pet.) (mem. op.).

13. No Discovery Rule

The discovery rule is not applicable to the notice provisions of the Texas Tort Claims Act. Even if it would have been impossible for the plaintiff to discover a retained object within the six-month notice period, a plaintiff is still bound by the notice language of § 101.101(a). The notice

Later, the San Antonio court of appeals followed Greenhouse and Sanford in holding that the discovery rule did not apply in the plaintiff’s action against a government hospital when a physician and radiologist misdiagnosed his cancer. *Streetman v. UT Health Sci. Ctr.*, 952 S.W.2d 53 (Tex. App.—San Antonio 1997, writ denied). The Streetman court applied the reasoning used in Greenhouse and held that, absent actual knowledge by the defendant, the plaintiff’s cause of action was barred by his failure to give notice. This was true even though the plaintiff had not discovered his injury or his cause of action in time to give the requisite notice.

Also, because the Texas Tort Claims Act is a legislatively-created statute, the open courts provision does not apply. *Greenhouse*, 889 S.W.2d at 431. See also *Putthoff v. Ancrum*, 934 S.W.2d 164 (Tex. App.—Fort Worth 1996, writ denied).

14. No Tolling For Incompetents

In *Dinh v. Harris Cnty. Hosp. Dist.*, 896 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1995, writ dism’d), the plaintiff sued a county hospital for the death of her husband. The issue before the Houston court of appeals was whether the TTCA’s notice provision violated the open courts provision of the Texas Constitution. In holding that the notice provision of the Texas Tort Claims Act did not violate the open courts provision, the court of appeals stated that the Texas Tort Claims Act was a legislatively-created right of recovery. Therefore, it did not fall within the realm of protection of the open courts provision, which protects only common-law causes of action. Id. at 250.

15. Minority Does Not Obviate the Notice Requirement


16. City Hospitals

Malpractice actions against a city or city/county hospital in Texas for damages may require that the claimant give notice of a claim within a specified period of time such as 30, 60, or 90 days after the date of the injury or death in question, as provided in a city’s charter or ordinances. This notice requirement is in addition to the pre-suit notice requirements of § 101.101 of the Texas Tort Claims Act and § 4.01 of Article 4590i.

In *City of Houston v. Torres*, 621 S.W.2d 588 (Tex. 1981), the Texas Supreme Court recognized that, in enacting the Texas Tort Claims Act, the Legislature ratified and approved city charter provisions requiring notice of claim of injury within a stated period. However, Texas cases have held such city notice of claim requirements, without provision for any exceptions, to be unconstitutional. See *Borne v. City of Garland*, 718 S.W.2d 22 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (30-day notice requirement); *Schautteet v. City of San Antonio*, 702 S.W.2d 680 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.) (90-day notice); *Fitts v. City of Beaumont*, 688 S.W.2d 182 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.) (60-day notice).

17. Liability of Health Care Management Contractors

Since the 2003 legislative session, entities that manage, operate or provide services under contract with a municipality
or hospital district now receive the same tort claims protection as the governmental entities for whom they provide such services, in cases filed after September 1, 2003. Texas Health & Safety Code Ann. §§ 261.051-052, 285.071-072 (West 2011).

18. Hospitals Operated by the Federal Government

Where the hospital involved is operated by the federal government, relief must be sought under 28 U.S.C. §§ 1346 and 2671—that is, the Federal Tort Claims Act (“FTCA”). The FTCA itself imposes no monetary damage limit. There is a limitation that the act causing the injury must not involve a discretionary function of the government. See 28 U.S.C. § 2680(a). Therefore, in order to prosecute an FTCA claim against a hospital operated by the federal government, a plaintiff must show that the employee was engaged in a non-discretionary function, which proximately caused the plaintiff’s injuries. See Rise v. United States, 630 F.2d 1068, 2072 (5th Cir. 1980); Hicks v. United States, 368 F.2d 626, 628 (4th Cir. 1966).

The Federal Tort Claims Act declares that the United States shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. The FTCA, however, contains several exclusions that exempt the federal government from liability including: (1) conduct arising from, or the failure to exercise or perform, a “discretionary function”; (2) claims arising out of “assault and battery or misrepresentation”; (3) claims arising from a foreign country; and (4) claims of a member of the armed forces arising from conduct while on active duty or otherwise “incident to service.” See 28 U.S.C. § 2680.

a. Creation of the Feres Doctrine

The United States Supreme Court, in Feres v. United States, 340 U.S. 135 (1950), held that the FTCA does not render the federal government liable to members of the armed forces for injuries that “arise out of or are in the course of activity incident to service.” This is known as the “Feres doctrine.” In reaffirming this holding in Stencel Aero Eng’g Corp. v. United States, 431 U.S. 666 (1977) and again in United States v. Johnson, 481 US 681 (1987), the Court restated the three considerations upon which the Feres doctrine rests: (1) the “distinctly federal” character of the relationship between military personnel and the national government; (2) the availability of a generous alternative compensation scheme under the Veterans’ Benefits Act; and (3) the need to preserve military discipline and the command structure of the armed forces.

The Feres doctrine has been applied by federal courts in malpractice actions against the federal government. See Bolton v. United States, 604 F. Supp. 1219 (S.D. Miss. 1985), aff’d, 779 F.2d 681 (5th Cir. 1985); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); Scales v. United States, 685 F.2d 970 (5th Cir. 1982).

b. The Problem with Feres

The problem with the Feres doctrine is that it is difficult to apply in certain cases. Issues such as the meaning of “incident to service,” who qualifies as a “service member,” what are the rights of dependents, and the doctrine’s applicability to prenatal care cases are left essentially unanswered.

In Scales, the plaintiff was a servicewoman in the Air Force. During her basic training, the Air Force medical personnel administered a rubella shot to the plaintiff while she was pregnant. Consequently, her son was born with congenital rubella syndrome. The mother brought a cause of action on her son’s behalf alleging that the Air Force medical personnel were negligent. The Fifth Circuit held that the child’s claim was barred because of the three considerations in Feres. In reaching its decision, the court of appeals focused on what it thought to be most important rationale—the preservation of military discipline. The Scales court stated
that, if the judicial branch must second-guess the judgment of the military officers in assessing the appropriateness of treatment of a member of the armed services, the claims will have a disruptive effect on military discipline. Also, in Scales, the court of appeals attempted to distinguish between cases in which the negligent activity is directed toward the dependent child from cases in which it is not, stating that because a physician has to treat the mother in order to treat the fetus, the negligent activity is directed towards the mother/servicewoman and is therefore barred by Feres.

Note that the U.S. Supreme Court briefly indicated a potential interest in granting certiorari on the continuing viability of the Feres doctrine, in that it requested additional briefing on a recent petition for certiorari. Although the Court ultimately denied the petition, so that the doctrine is still viable, practitioners are alerted to watch for potential changes in the future. Witt v. United States, 379 F. App’x 559 (9th Cir. 2010), cert. denied, 131 S.Ct. 3058 (June 27, 2011).

The U. S. Supreme Court recently held that The United States has no immunity from a veteran's lawsuit claiming a Navy doctor performed cataract surgery without consent. Steven Alan Levin alleged he became concerned about the operating room equipment and withdrew consent just before the 2003 surgery at the U.S. Naval Hospital in Guam. The U.S. Supreme Court said that the suit is allowed under the federal Gonzalez Act, which governs suits for medical malpractice by medical personnel of the armed forces. Levin v. United States, 133 S. Ct. 1224, 185 L. Ed. 2d 343 (2013).

19. Texas Tort Claims Act Limit On Damages

a. Damages Limitation-Tort Claims Act

The Texas Tort Claims Act limits the liability of the state government to money damages in a maximum amount of $250,000 for “each person,” and $500,000 for “each single occurrence” involving personal injury or death. The liability of a unit of local government is limited to $100,000 for “each person” and $300,000 for “each single occurrence” involving personal injury or death. TEX. CIV. PRAC. & REM. CODE § 101.023.

b. Damages Limit Applies to Separate Damages of “Each Person”

The “each person” or “per person” limitation under the TTCA is a reference to the “person injured” directly by the occurrence involved and to “each person” who has sustained separate and independent damages apart from injuries that are derived from the injury sustained by the person directly injured in the occurrence. City of Denton v. Page, 683 S.W.2d 180, 205–06 (Tex. App.—Fort Worth 1985), rev’d on other grounds, 701 S.W.2d 831 (Tex. 1986). See also City of Austin v. Cooksey, 570 S.W.2d 386, 387–88 (Tex. 1978).

In City of Austin v. Davis, the Austin court of appeals held that a family member (father) had a separate cause of action for negligent infliction of mental anguish and physical injuries sustained as a bystander in finding his deceased son’s body at the base of an air shaft in the defendant-city hospital. City of Austin v. Davis, 693 S.W.2d 31 (Tex. App.—Austin 1985, writ ref’d n.r.e.) The father disclaimed any interest in the wrongful death action brought by other beneficiaries as a result of his son’s death. Id. at 33-34. The court held that the plaintiff father was a “person injured” for purposes of the Tort Claim Act’s limitation of damages and was, thus, entitled to a second “per person” recovery up to $100,000 for his own injury, notwithstanding the recovery of other statutory beneficiaries in settlement of the wrongful death suit for approximately $93,000. Id. (Note that, since 1985, the Texas Supreme Court has abolished the causes of action for both negligent infliction of emotional distress in Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993) and bystander
recovery in medical malpractice cases in \textit{Edinburg Hosp. Auth. v. Trevino}, 941 S.W.2d 76 (Tex. 1997)).

In another case, the Texas Supreme Court found that a family member’s (spouse) “mental anguish” due to the injury to the other spouse was not derivative and constituted a separate recovery over the single “per person” limit. \textit{City of Denton v. Page}, 701 S.W.2d 831 (Tex. 1986).

c. **Damages Limits Are Multiplied “Per Occurrence”**

However, a Houston appellate court held that, where multiple claimants bring two claims against a governmental entity—one for wrongful death and one for survival—the liability of the governmental entity is limited to a total of $100,000 as opposed to $200,000 (for each cause of action) because the actions are derived from one death. \textit{Harris Cnty. Hosp. Dist. v. Estrada}, 872 S.W.2d 759 (Tex. App.—Houston [1st Dist.] 1993, no writ). But note the well-reasoned dissent of Judge Oliver-Parrott in which he states that “appellees are entitled to $200,000 because they brought claims under two different statutes that grant relief for two different injuries suffered by two different parties: (1) the survival claim compensates one plaintiff for her injuries; and (2) the wrongful death claim compensates her children for their injuries.” \textit{Id.} at 768 (Oliver-Parrott, J., dissenting).

d. **Pre-Judgment and Post-Judgment Interest**

The Houston court of appeals held that the state was liable for pre-judgment interest only to the extent that the total award does not exceed the $250,000 limit. \textit{Univ. of Tex. Med. Branch v. York}, 808 S.W.2d 106, 111 (Tex. App.—Houston [1st Dist.] 1991, rev’d on other grounds, 871 S.W.2d 175 (Tex. 1994). However, the \textit{York} court held that the state was liable for all post-judgment interest—even that in excess of the statutory limit. \textit{Id.} at 112.)

e. **Damages Limit Not Expanded By Article 4590i**

Although Article 4590i was enacted after the TTCA, it has been held that §§ 11.01 through 11.04 of Article 4590i do not supplant or expand the Tort Claims Act provisions limiting the liability of a governmental unit in the performance of a governmental function. \textit{City of Houston v. Arney}, 680 S.W.2d 867, 875 (Tex. App.—Houston [1st Dist.] 1984, no writ). This rationale doubtless applies to Chapter 74 suits as well.

f. **Constitutionality of Damage Limit**

The Fort Worth court of appeals, in \textit{Tarrant Cnty. Hosp. Dist. v. Ray}, 712 S.W.2d 271 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.), held that the $100,000 damage limit of the Texas Tort Claims Act was constitutional and not violative of equal protection and due process clauses of the United States Constitution or the Texas Constitution’s due process clause, open courts provision, or right to a jury trial determination of damages. The \textit{Ray} court explained that the doctrine of sovereign immunity has “preceded all of the constitutional provisions” and that no authority holds that these constitutional provisions in any way limit or abolish such immunity. Further, the \textit{Ray} court stated that the relaxations of sovereign immunity doctrine so that the plaintiffs might have a limited recovery rather than none at all does not deprive them of their rights “since it conferred rights and did not take away any rights they otherwise would have had.” \textit{Id.} at 273. The discriminatory features of the Texas Tort Claims Act damage limitations, between smaller and larger claims, were deemed by the \textit{Ray} court to be based on a rational governmental purpose to preserve governmental funds.

g. **Limit on Punitive and Exemplary Damages**

In some circumstances, punitive damages are recoverable in health care liability claims. However, a plaintiff must
prove such claims by clear and convincing evidence. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004), rev’d on other grounds, 271 S.W.3d 238 (Tex. 2008). Punitive or exemplary damages are limited to two times the amount of economic damages, plus an amount equal to any non-economic damages found by the jury, which may not to exceed $750,000; or $200,000, whichever is greater. The Act defines economic damages as compensatory damages for pecuniary loss. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society. TEX. CIV. PRAC. & REM. CODE § 41.008.

In *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), the Supreme Court held that the bifurcation of a trial is required on the motion of any party when the plaintiffs seek punitive damages. Further, courts of appeals must detail relevant evidence when conducting factual sufficiency reviews of punitive damages awards. Subsequent to the Moriel decision, the 1995 Legislature amended § 41.009 of the Texas Civil Practice & Remedies Code to provide that only a defendant may request bifurcation in a case where punitive damages are sought. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (1995).

V. PLEADING AND PROVING THE MEDICAL MALPRACTICE CASE

A. Pleadings of Plaintiff

1. Notice of Claim

A plaintiff is required by § 74.051 to file pleadings which state that he or she has fully complied with the pre-suit notice provision. A failure to comply with the 60-day notice provision requires abatement of the suit for 60 days. *Schepps v. Presbyterian Hosps. of Dallas*, 652 S.W.2d 934 (Tex. 1983); *Permanente Med. Ass’n of Tex. v. Johnson*, 917 S.W.2d 515 (Tex. App.—Waco 1996, orig. proceeding). A defendant must timely request an abatement. To be timely, a request for abatement must accompany the filing of the defendant’s answer or be filed very soon thereafter. *Hines v. Hash*, 843 S.W.2d 464 (Tex. 1992).

In *Johnson*, the Waco court of appeals ordered the trial court to vacate its order permitting the plaintiffs to notice the deposition of the defendant because such notice was issued during the mandatory abatement period. The plaintiff, in filing her medical malpractice claim against the defendant, did not give presuit notice and did not plead that she gave presuit notice. Therefore, the court of appeals held that, because the 60-day abatement period was mandatory as set forth in Article 4590i, the trial judge could not approve any proceedings that were to take place during such mandatory 60-day abatement period. 917 S.W.2d at 517.

In a summary judgment proceeding, the plaintiff’s counsel’s failure to plead and prove the plaintiff’s timely mailing of the pre-suit notice under § 4.01 precluded the court from considering the question of whether the limitations period was tolled for 75 days by timely sending a notice letter. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979). The Texas Supreme Court noted that the plaintiff did not complain on appeal of the trial court’s action in refusing, on motion for rehearing, to consider the tolling effect of the notice. A different result might have been reached if this point had been preserved on appeal. *Id.* at 677.
“in writing” of the total amount of damages claimed. Article 4590i did not specify any sanction or remedy for noncompliance with the ad damnum pleading prohibition of § 5.01. Apparently, if special exceptions are filed and sustained, a plaintiff may inform the court and defendant of the specific amount of the damage claim by amended pleading, letter or other writing as the Act is not specific concerning the “writing” required.

A plaintiff’s petition that seeks judgment against the defendant “in an amount only as a sum in excess of the jurisdictional limits,” in the absence of special exceptions, is a sufficient ad damnum pleading under Article 4590i, § 5.01, and Rule 47(b) of the Texas Rules of Civil Procedure to support a judgment. Nat’l Med. Enters. of Tex. v. Wedman, 676 S.W.2d 712 (Tex. App.—El Paso 1984, no writ).

Section 74.053 mirrors the language or former § 5.01 of Article 4590i: “Pleadings in a suit based on a health care liability claim shall not specify an amount of money claimed as damages.”

B. Pleadings of Defendant

1. Limitations Defense

A defendant is required by Rule 94 of the Texas Rules of Civil Procedure to plead the affirmative defenses listed in the rule and any other matter constituting an avoidance or affirmative defense. This includes pleading a limitations defense under Article 4590i, § 10.01, or § 74.251.

2. Lack of Notice


3. Damages Limitations

A defendant was required to affirmatively plead the damages limitations set forth in §§ 11.02 to 11.04 of Article 4590i to be entitled to assert any of its provisions. Sections 74.301 to 74.303 impose a similar requirement. A failure to do so was a waiver of the limit on damages in health care liability claims governed by Article 4590i and has a similar effect under Chapter 74. The limit of liability in § 11.02 is an affirmative defense that must be pleaded in accordance with Texas Rule of Civil Procedure 94, and nothing is preserved for appellate review if not so pleaded. Webster v. Johnson, 737 S.W.2d 884 (Tex. App.—Houston [1st Dist.] 1987, writ denied). See also Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987); Tsai v. Wells, 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.) (medical malpractice action brought against federal government under the Federal Tort Claims Act).

Note, however, that in Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1987), the Fifth Circuit held that, in an FTCA case, a failure by the defendant government to plead affirmatively the damage limit of Article 4590i did not constitute waiver because the government raised the issue during trial at a “practically significant time.”

4. Contributory Negligence of Plaintiff

The defense of contributory negligence is available to a defendant in medical negligence cases—but only in certain circumstances.

Negligence that is concurrent with the medical care involved is subject to a defense of contributory negligence. Elbaor
Including a jury question on a patient’s contributory negligence, if it is error, is harmless error. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012). Further, error, if any, in submitting a new and independent cause instruction is also harmless. Note that the asserted contributory negligence of plaintiff occurred after the allegedly negligent medical care. It is difficult to distinguish between contributory negligence in the Thota context and failure to mitigate. Note, however, that *Thota* does not address long-standing law that a patient’s negligence, if any, which brings him to medical care cannot be submitted to the jury.

Conversely, negligence by the plaintiff that occurs before the treatment in question may not be used as the basis for an allegation of contributory negligence. *Sendejar v. Alice Physicians and Surgeons Hosp.*, 555 S.W.2d 879, 885 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.). The plaintiff was apparently extremely intoxicated when the car he was driving was involved in a one-car accident. The fact of his negligence in bringing about his injuries was not something the defense could use to form the basis of a contributory negligence defense.

In the instant case, there is nothing to suggest that [the plaintiff] was guilty of any type of negligence occurring simultaneously with or co-operating with alleged fault of the Appellees. Furthermore, there is nothing in the evidence to suggest that, after being admitted to the emergency room of the hospital, [the plaintiff] committed any negligent act which could be construed as a contributory cause to his claim for malpractice asserted against Defendants. Consequently, under the facts here, the defense of contributory negligence was not applicable and should not have been submitted to the jury.

*Sendejar*, 555 S.W.2d at 885.

Note, however, that contributory causation is another issue. The plaintiff in Sendejar was alleged to have caused his own injuries—that is, in effect he rendered himself paralyzed in the accident rather than having been paralyzed by subsequent medical negligence. This causation pleading and proof is permitted under Sendejar.

As a general rule, a patient who is a layman cannot be comparatively negligent for failing to advise a physician of the origin of his or her pain and cannot be contributorily negligent for having taken lax care of his health over the preceding several years. However, a patient who is a physician may have a higher standard of care under the circumstances of his or her case. *Axelrad v. Jackson*, 142 S.W.3d 418 (Tex. App.—Houston [14th Dist.] 2004), rev’d, 221 S.W.3d 650 (Tex. 2007).

Following Axelrad, the Supreme Court further enhanced the likelihood of contributory negligence submissions in health care liability claims. Although finding that, on these facts, a contributory negligence submission was improper, the Court laid out an extensive analysis of the circumstances in which such a submission would be appropriate:

Failure to respond fully and accurately to a doctor's questions could hamper a doctor's diagnosis, could delay appropriate treatment, and in the proper case, might raise a fact issue
concerning a patient's possible contributory negligence. See Elbaor v. Smith, 845 S.W.2d 240, 245 (Tex. 1992) (recognizing a patient's duty of cooperation). See also Jackson v. Axelrad, 221 S.W.3d 650, 654 (Tex. 2007) (discussing the duty of a patient to cooperate in his health care). But here, we need not identify the parameters of such a duty between lay patients and treating physicians. Cf. Jackson, 221 S.W.3d at 655-57 (observing that, for purposes of a contributory negligence inquiry in a medical malpractice case, a physician patient's specialized knowledge may be relevant to the ordinary care standard).... Assuming, without deciding, that Hogue owed and breached a duty to disclose his prior heart murmur diagnosis, Columbia Medical must present some evidence that Hogue's nondisclosure proximately caused his injury.

Columbia Medical's proof of causation to support its contributory negligence submission must rise above mere conjecture or possibility. See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798–99 (Tex. 2004); Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988). Columbia Medical claims that Hogue negligently failed to disclose his heart murmur and that Hogue's omission delayed proper treatment by the physicians. There is no evidence that the diagnosing doctors at Columbia Medical would have acted differently if Hogue had disclosed his heart murmur diagnosis.

Can a spouse be liable for contributory negligence in not aggressively seeking medical care for her sick husband? So argued the defense in Hani v. Jimenez, 264 S.W.3d 881 (Tex. App.—Dallas 2008, pet. denied). The trial court and court of appeals disagreed, refusing to allow the submission of contributory negligence on behalf of decedent’s wife and the Supreme Court denied the petition for review.

C. The Cause Of Action
1. Establishing the Existence of a Duty: The Patient-Physician Relationship

Before the physician may be held liable for his or her acts, it must be established that a patient-physician relationship existed at the time of the incident in question. See, e.g., Salas v. Gamboa, 760 S.W.2d 838 (Tex. App.—San Antonio 1988, no pet.).

a. General Rule

The relation of physician and patient is contractual and wholly voluntary, created by agreement, express or implied. Childs v. Weis, 440 S.W.2d 104, 107 (Tex. Civ. App.—Dallas 1969, no writ). A physician is not liable for arbitrarily refusing to respond to a call of a person, even urgently in need of medical assistance, if the relation of physician and patient does not exist at the time the call is made. Id. at 107. See also Salas v. Gamboa, 760 S.W.2d 838 (Tex. App.—San Antonio 1988, no pet.). This is true even though the physician is “on call” for the hospital in which the patient seeks care. Fought v. Solce, 821 S.W.2d 218, 219 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The courts strictly construe the requirement of an agreement to treat. A physician who is not on-call and indicates this to a hospital nurse calling him for a consult cannot be held to have established a physician-patient relationship and, therefore,
to have responsibility for the patient’s care or liability for a negative outcome, even if during that phone call he receives information about the patient. For a duty to exist, a physician-patient relationship must be created and a phone call to a physician who indicates that he is not on-call and refuses the consult does not create that relationship. *Ortiz v. Glusman*, 334 S.W.3d 812 (Tex. App.—El Paso 2011, pet. denied). In *Wilson v. Winsett*, 828 S.W.2d 231 (Tex. App.—Amarillo 1992, writ denied), the Amarillo court of appeals held that a doctor owed no duty to inform a patient of test results where the examination was performed at the request of the Texas Rehabilitation Commission. The Wilson court reasoned that the patient did not select the doctor, did not submit to examination for the purpose of treatment, and did not request to be informed of the results. Since the doctor had no physician-patient relationship with the plaintiff, he could not be liable for failing to inform the plaintiff of his test results. *Id.*

There is no duty owed to the parent of a child counseled for potential sexual abuse because there is no physician-patient relationship with the parent. *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994).

In order to establish a physician-patient relationship and, thus, duty and liability, a plaintiff must show more than merely the existence of a previous physician-patient relationship, though that may be a factor in support of such a relationship.

In *Gross v. Burt*, the plaintiffs, who were twin premature infants, had been seen while hospitalized at birth by the defendant. Thereafter, the defendant wrote a “Dear Parents” letter to the plaintiffs’ parents, emphasizing the need for follow-up care of their vision impairment. In addition to the letter, appointments were scheduled but canceled for various reasons. The majority in Gross held that these factors alone were insufficient to demonstrate the existence of a physician-patient relationship. “The Dear Parents” letter, along with the plaintiff’s expert’s opinion that a duty on the defendant’s part to ensure follow-up visits had been created, was less than a scintilla of evidence necessary to uphold the jury’s verdict on a vital fact of a continued physician-patient relationship. Without a physician-patient relationship, there can be no duty. *Gross v. Burt*, 149 S.W.3d 213 (Tex. App.—Fort Worth 2004, pet. denied).

The dissent in *Gross*, however, pointed out that the defendant did not negate the existence of a physician-patient relationship as a matter of law:


It is important to remember that termination of the physician-patient relationship is an affirmative defense and that the burden is thus on the defense to establish such termination rather than on the plaintiff to prove the continuation of the relationship.

b. Problem and Questions
When the physician is retained by a third party, such as an employer, the physician “has a limited duty to the patient.” Lotspeich v. Chance Vought Aircraft, 369 S.W.2d 705, 710 (Tex. Civ. App.—Dallas 1963, writ ref’d n.r.e.). While the retention of the doctor by a third party may affect the doctor’s duty, it does not absolve the doctor of all responsibility. In Armstrong v. Morgan, 545 S.W.2d 45 (Tex. Civ. App.—Texarkana 1976, no writ), the plaintiff, upon being promoted, was required to take a physical examination. The defendant-doctor’s report indicated that the plaintiff was in very bad physical condition, which resulted in the plaintiff losing his job and his new position. The plaintiff sued the doctor for damages resulting from this allegedly incorrect diagnosis. The trial court’s summary judgment was reversed on appeal on the grounds that the defendant owed a duty to the plaintiff to perform his examination properly and to give an accurate report of the state of the plaintiff’s health to the employer. The Texarkana court of appeals held that, if the plaintiff was injured as a proximate result of an incorrect report, he could recover. But See Johnston v. Sibley, 558 S.W.2d 135 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.) (holding that a physician’s only duty to a person examined, pursuant to the physician’s contract with the compensation carrier, is not to cause harm to the person being examined). See also Dominguez v. Kelly, 786 S.W.2d 749 (Tex. App.—El Paso 1990, writ denied); Vineyard v. Kraft, 828 S.W.2d 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

A Houston court of appeals case examined whether or not a physician’s contract with a third-party facility to provide health services gave rise to a duty to treat. Day v. Harkins & Munoz, 961 S.W.2d 278 (Tex. App.—Houston [1st Dist.] 1997, no writ). In this case, the parents of a boy who suffered an asthma attack and died while the premises were clear brought a legal malpractice claim after their medical malpractice claim was dismissed. In the legal malpractice case, they alleged that the attorneys were negligent in not negating the existence of a duty on the part of the physicians who contracted with the facility to provide emergency first-aid. The plaintiffs argued that the duty to treat their son arose out of the physicians’ contractual relationship with the facility. In considering whether, absent their attorney’s negligence, they would have prevailed on the merits of the case, the Houston court of appeals held that the physician’s relationship with the facility was akin to an “on call” physician—an agreement that, in and of itself, does not establish a doctor-patient relationship. Fought v. Solce, 821 S.W.2d 218 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Because the third-party contract was not before the court and the plaintiffs failed to provide countervailing evidence of an agreement divesting the physicians of the discretion to choose whether to treat a patient, the court ruled summary judgment was proper.

A health care facility’s own literature and the patient’s medical records can, in some cases, establish the existence of a physician-patient relationship in the face of the physician’s assertion to the contrary.

In Fenley v. Hospice in the Pines, 4 S.W.3d 476 (Tex. App.—Beaumont 1999, pet. denied), the plaintiffs filed suit for medical negligence arising from the death of a hospice patient. The patient had sought treatment for headaches, neck pain and ringing in the ears. His attending physician diagnosed him with terminal brain cancer and told him that he only had a few months to live. Based on that diagnosis and prognosis, the attending physician suggested that the patient be admitted to a hospice for pain management and palliative care. Palliative care is medical intervention that focuses primarily on the reduction of physical symptoms without regard to the side effects of the particular drug therapy. Id. at 483. As a condition of admission into the hospice and to ensure that Medicare and/or Medicaid would pay for the hospice treatment, the patient’s attending physician and the medical director of the hospice both
signed a document that certified that the patient had a terminal condition with a life expectancy of six months or less. *Id.* at 478. The medical director at the hospice certified the terminal condition even though he had not spoken to the patient’s attending physician, reviewed the patient’s medical records or examined the patient himself.

Shortly after admission into the hospice, the patient suffered a ruptured colon as a complication of his palliative drug therapy. He underwent surgery, developed peritonitis and died. *Id.* at 478. While investigating the cause of the brain tumor, the patient’s family discovered that the patient never had a brain tumor or any other form of terminal illness. *Id.* They brought a wrongful death suit against the hospice.

In moving for summary judgment, the medical director of the hospice alleged that he did not have any duty to the patient because he did not have a physician-patient relationship with him. The court of appeals disagreed, holding that there was sufficient evidence that the physician/medical director does indeed have the responsibility of patient care for all of the patients in the hospice program. *Id.* at 484–85. The hospice center’s own manual described the role of the medical director as having “overall responsibility for the medical component of hospice patient care, participates in the establishment of the patient’s care plan and consults with the patient’s attending physician as necessary.” *Id.* at 480. In addition, the defendant medical director stated in his affidavit in support of his motion for summary judgment that, as a hospice physician, he is required to review the attending physician’s diagnosis and verify the diagnosis of the attending physician that the patient has a terminal condition. *Id.* at 484.

As further evidence that the medical director did indeed have responsibility to ensure that the patient was a proper candidate for hospice care, the hospice physician in this particular case signed the hospice certification form which explicitly stated, “as hospice physician, I certify that this patient has a . . . life expectancy of six months or less.” The defendant medical director alleged that his signing this form simply meant that he had certified that the attending physician had determined that the patient had a life expectancy of six months or less. In holding that the certification form was further evidence of the physician-patient relationship, the court of appeals noted that the form does not say, “the hospice physician certifies that the patient’s attending physician has diagnosed the patient as having a life expectancy of six months or less.” *Id.* at 485. Based on this record, there was sufficient evidence to raise a genuine issue of material fact with regard to the existence of a physician-patient relationship, thus, giving rise to a duty owed to the patient by the hospice physician.

c. Implied Consent

When a patient is in extremis, unable to give express consent, consent is implied. *Gravis v. Physicians & Surgeons Hosp.*, 427 S.W.2d 310, 311 (Tex. 1968).

When physicians are retained on the patient’s behalf by the doctors in charge of the case, the patient’s actual consent runs by implication to the auxiliary physicians. *Weiser v. Hampton*, 445 S.W.2d 224 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref’d n.r.e.).

d. Termination


e. Liability Absent a Patient-Physician Relationship

In certain circumstances, liability may exist without a contractual relationship between the patient and physician. In
Lunsford v. Bd. of Nurse Examiners, 648 S.W.2d 391 (Tex. App.—Austin 1983, no writ), a nurse claimed that she owed no duty to a person who was refused admission to a hospital. The Lunsford court held that a duty was created when the State of Texas licensed her as a nurse. The court’s reasoning could also be applied to physicians.

The Houston court of appeals refused to hold that a physician had a duty to a patient merely because he was “on call.” Fought v. Solce, 821 S.W.2d 218, 220 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The doctor was not under a contractual obligation to be on call with the hospital at which the plaintiff presented and was not required to be on call to maintain his staff privileges. The fact that the doctor volunteered to be on call, without more, was insufficient to impose a duty. Therefore, the Fought court held that, the plaintiff had no common law claim for medical malpractice. Id. The court also refused to recognize a negligence per se cause of action based on the alleged violation of § 311.022—the Anti-Patient Dumping Statute. See also St. John v. Pope, 901 S.W.2d 420 (Tex. 1995).

f. Other Areas of Liability
1) Duty to Warn, Disclose or Advise
   (i) Generally

   An area of the law where the duty of doctors or health care providers has evolved in recent years is the duty to warn. This reflects a growing recognition that health care providers have a duty to provide adequate information to patients. For example, the Texas Supreme Court has held that a health care provider has a duty to warn a pregnant woman that she previously suffered rubella because the disease could affect her unborn child. Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

   In a twist on the typical “failure to warn” case, the Corpus Christi court of appeals found that a doctor who is assisting another doctor in carrying out a procedure has a duty to warn the doctor performing the procedure if it appears that the procedure is being done incorrectly. McMillin v. L.D.L.R., 645 S.W.2d 836 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.).

   (ii) Duty to Third Parties

   The duty to disclose information also extends to possible-side effects, including those which might have an impact on third parties. Therefore, a physician has a duty to warn a patient not to drive while taking a prescribed sedative because it is foreseeable that the patient or third parties might be injured if the patient is the driver. Gooden v. Tips, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ). Nonetheless, while physicians have a duty to warn their patients of the side-effects of prescribed medications, they do not have a duty to keep a patient from driving his vehicle while the patient is on the medication and is aware of its side-effects. Helms v. Gonzalez, 885 S.W.2d 535 (Tex. App.—Eastland 1994, no writ).

   The duty to warn does not extend to an emergency room physician who treated a patient for cocaine ingestion. Flynn v. Houston Emergicare, Inc., 869 S.W.2d 403 (Tex. App.—Houston [1st Dist.] 1993, writ denied). In Flynn, the patient was treated in the emergency room but was not admitted to the hospital and subsequently was involved in an auto accident. The Houston court of appeals held that where the physician is not responsible for the drug ingestion, the physician has no duty to warn. The distinction drawn between Flynn and Gooden is that a doctor owes a duty to warn for the sake of the public only if he contributes to the patient’s impairment that causes the accident, (e.g., prescription of Quaaludes), but not if the patient caused the impairment himself (e.g., recreational cocaine ingestion).

   In another case, the Texas Supreme Court reversed a lower court’s decision that a physician owed a duty to a third party to warn of a potentially dangerous condition. Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998). In Praesel, the plaintiffs sued several
doctors and a clinic after the decedent was killed by an epileptic patient who lost control of his car on a public highway when he suffered a grand mal seizure. The sole issue before the court of appeals was whether the physician had a legal duty to the public to warn the patient not to drive. The court of appeals held that three of the defendant physicians owed no legal duty to the motoring public because the foreseeability of the patient’s epileptic seizure was greatly diminished by the fact that the last seizure the defendants knew about occurred four years previous to the accident. The court of appeals held that the fourth defendant’s conduct was similar to the conduct of the defendant in Gooden v. Tips, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ) wherein the court imposed a duty on the physician to warn the patient who was driving under the influence of prescribed Quaaludes.

The Supreme Court reversed the court of appeals’ holding that the fourth physician was liable and concluded that the physician did not owe a duty to third parties to warn the patient not to drive. The Supreme Court balanced the need for and the effectiveness of a warning to a patient who already knows that he or she suffers from seizures against the burden of liability on third parties. Concluding that the benefit of warning an epileptic not to drive is “incremental” but that the consequences of imposing a duty are “great,” the Court declined to impose on physicians a duty to third parties to warn an epileptic patient not to drive. The Court further concluded that the responsibility for safe operation of a vehicle should remain primarily with the driver who is capable of ascertaining whether it is prudent to continue driving once a disorder such as epilepsy has been diagnosed and seizures occur.

The Texas Supreme Court has refused to recognize the duty of a mental health professional to directly warn third parties when patients make threats of harm towards specific persons. Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999). However, there may be other instances in which a physician or other health care provider owes a duty to a third party to warn the patient.

In Thapar, the family of a murder victim brought suit against a psychiatrist for failing to warn the victim, the victim’s family or any law enforcement agency of the patient’s threats against his stepfather. Id. at 636. Within a month of threatening harm to his stepfather and being discharged from a seven-day psychiatric hospitalization, the patient murdered his stepfather. Id. at 636.

In holding that the psychiatrist owed no duty to this identifiable victim, the Supreme Court distinguished this case from other failure-to-warn cases stating that the underlying question was not whether a doctor owes the duty to third parties to warn the patient of risks from treatment which may endanger third parties, but rather whether a mental health professional owes a duty directly to third parties to warn of a patient’s threats. Id. at 638 (distinguishing this case from Gooden v. Tips, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ), which held that doctor owed duty to third party to warn patient not to drive after prescribing Quaalude to patient and Flynn v. Houston Emergicare, Inc., 869 S.W.2d 403 (Tex. App.—Houston [1st Dist.] 1993, writ denied), which held that doctor owed no duty to third party to warn patient not to drive after patient ingested cocaine because doctor did not create the impairment).

In holding that no such duty existed, the Supreme Court referenced a statute enacted by the Legislature that governs the communications of mental health professionals. The statute makes confidential all communications between mental health professionals and patients unless an exception applies. Id. One of the exceptions allows a mental health professional to reveal confidential communications from the patient to medical or law enforcement personnel where the professional determines that there is a probability of imminent physical injury by
the patient to himself or others or where there is a probability of immediate mental or emotional injury to the patient. *Id.* at 639. The Court stated that “imposing a legal duty to warn third parties of a patient’s threats would conflict with the scheme adopted by the legislature by making the disclosure of such threats mandatory.” *Id.* at 639. In declining to adopt this legal duty, the Texas Supreme Court refused to follow the seminal case of *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345–47 (Cal. 1976), concluding that adopting such a duty would be “unwise.” *Id.* at 638.

In *Van Horn v. Chambers*, 970 S.W.2d 542 (Tex. 1998), the Supreme Court held that there is no duty to third parties injured by a mental patient under the circumstances of that case. In *Van Horn*, the patient was allegedly negligently discharged from a high-security to a low-security unit. He broke free, engaged in a physical conflict with health care providers, in which four health care providers were involved in trying to wrestle him down in the hall. All of them crashed through a wall grate, falling down an airway shaft, causing the deaths of two of the health care providers. The families of the two providers sued the physician on the theory that he had negligently allowed the patient to be put on the lower security unit, thereby causing the death of the decedents. The Court held that there is no duty under these circumstances to those third persons.

Another patient who was to be involuntarily confined as a danger to himself “or” others was discharged. He subsequently killed three people. The families of those three individuals brought suit and the Dallas court of appeals found that “generally, there is no duty to control the conduct of others.” Further, the conduct was “not foreseeable” because, although he threatened suicide and presented a risk of injury to himself or others, the application for emergency detention did not specify that he was a danger to himself and others. Accordingly, “the evidence negates foreseeability as a matter of law.” *Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224 (Tex. App.—Dallas 2008, no pet.).

In *Santa Rosa Health Care v. Garcia*, 964 S.W.2d 940 (Tex. 1998), the Supreme Court held that a hospital has no duty to notify the wife of a patient diagnosed with HIV of his status. Even though she was clearly an ascertainable individual at risk for harm due to the patient’s condition, the hospital was not responsible for warning her.

In a case in which the decedent contracted rabies as a result of a kidney transplant from a rabid donor, he was in close contact with family members at the hospital and at home upon his discharge. Those family members were later required to undergo treatment for rabies. The family members brought suit alleging that the defendant was negligent in not protecting them from exposure to the communicable disease of rabies. Since there was no physician-patient relationship with the family members, there was no duty owed to the family members and, therefore, no health care liability claim could be maintained. *Hightower v. Baylor Univ. Med. Ctr.*, 251 S.W.3d 218 (Tex. App.—Dallas 2008, pet. struck).

(iii) Learned Intermediary

The learned intermediary doctrine provides that the manufacturer of a prescription drug has a duty to adequately warn the prescribing physician of the drug’s dangers. When the manufacturer adequately warns the physician of the drug’s hazards, the drug is not defective or unreasonably dangerous. *Cooper v. Bowser*, 610 S.W.2d 825, 830–31 (Tex. Civ. App.—Tyler 1980, no writ); *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863 (Tex. Civ. App.—Corpus Christi 1973, writ. ref’d n.r.e.). The physician then chooses the type and quantity of the drug to be prescribed to each patient. The physician assumes the duty to the patient of the risks associated with the use of the prescription. See *Rolen v. Burroughs*
The Texas Supreme Court first recognized the learned intermediary doctrine in *Alm v. Aluminum Co. of America*, 717 S.W.2d 588 (Tex. 1986). The *Alm* Court noted that “in some situations, courts have recognized that a warning to an intermediary fulfills a supplier’s duty to warn ultimate consumers. For example, when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug.” *Id.* at 591.

The Supreme Court recently held that “in most prescription drug contexts, the learned intermediary doctrine applies and the duty to warn the patient rests solely with the prescribing physician.” *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 167 (Tex. 2012). In fact, the learned intermediary doctrine applies in Texas even when the manufacturer communicates directly with the consumer via direct advertising. *Id.* at 162-64

**Duty to Disclose Medical Negligence**

The patient’s health care provider has a duty to disclose known medical negligence. Failure to disclose medical negligence will estop the non-disclosing party from asserting that the statute of limitations has run. *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983); *Warner v. Sunkavalli*, 795 S.W.2d 326, 328 (Tex. App.—Eastland 1990, no writ).

2) **Duty to Notify**

A nurse who contracted the human immunodeficiency virus (HIV) while treating a patient with acquired immunodeficiency syndrome (AIDS) filed an action against the hospital and physician alleging that their negligence proximately caused his contraction of the HIV virus. In his claim against the physician, the plaintiff alleged specifically that the physician was negligent in failing to warn the plaintiff and others of the dangerous condition of the AIDS patient and the dangers of working with an AIDS patient when not properly protected. The El Paso court of appeals had to decide whether a physician owes a duty to the hospital, its health care workers and other third parties to ensure that a patient with an infectious disease does not transmit the disease to others. Because the physician had followed all hospital protocols regarding the AIDS patient and because the plaintiff knew that he was attending an AIDS patient and was fully aware of the precautions necessary to prevent infection, the court of appeals affirmed the summary judgment granted for the physician by stating that the physician had no further duty to order specific precautions against exposure to HIV. *Casarez v. NME Hosp., Inc.*, 883 S.W.2d 360, 364 (Tex. App.—El Paso 1994, writ dism’d by agr.).

3) **Duty of Physician to Warn Patient With Mental Illness of Drug’s Side Effects**

*Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986) stands for the proposition that a physician has a duty to warn a patient with mental illness of those side effects associated with proposed drug therapy which might influence a reasonable person in deciding whether to accept or reject the treatment. In its holding, the Court announced that a patient suffering from mental illness is guaranteed all legal and constitutional rights, benefits and privileges, including the ability to make one’s own medical decisions.

4) **Assumption of Duty by Health Care Provider**

In *St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995), the Texas Supreme Court held that an on-call physician, consulted by an emergency room physician over the telephone, did not form a physician-patient relationship by expressing his opinion that the patient should be transferred to another facility. This case finally addressed the split opinions from the appellate courts in *Wheeler v. Yettie Kersting Mem’l Hosp.*, 866
S.W.2d 32 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that there was a duty) and Lopez v. Aziz, 852 S.W.2d 303 (Tex. App.—San Antonio 1993, no writ) (holding that no duty had been established).

In a case with a factual twist, the San Antonio court of appeals held that a physician-patient relationship did exist. In Hand v. Tavera, 864 S.W.2d 678 (Tex. App.—San Antonio 1993, no writ), the patient, enrolled in a prepaid medical plan, went to a hospital emergency room and consulted the plan’s designated doctor. The Hand court, in holding a physician-patient relationship did exist, reasoned that the contracts between the patient and the plan and between the plan and the medical group brought the patient and the doctor together “just as surely as though they had met directly and entered the physician-patient relationship.” Id. at 679.

A physician, however, was not liable in a circumstance where, while covering for his partner, he was unaware of the existence of the patient until, in the course of making normal rounds, he came across her the next day. The Houston court of appeals was “reluctant to depart from the rule requiring a contract or an affirmative act on the part of the physician before a legal duty arises.” Wax v. Johnson, 42 S.W.3d 168 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d).

(5) Physician Liability for Delegated Medical Acts

Article 4495b of the Texas Revised Civil Statutes (recodified as Subtitle B, §§ 151.001 to 165.160 of the Texas Occupations Code, effective September 1, 1999), the Medical Practices Act, was amended by the Omnibus Health Care Rescue Act. The amendments provide the following general rule:

[A] person licensed to practice medicine shall have the authority to delegate to any qualified and properly trained person or persons acting under the physician’s supervision any medical act which a reasonable and prudent physician would find is within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician, the act can be properly and safely performed by the person to whom the medical act is delegated and the act is performed in its customary manner, not in violation of any other statute, and the person does not hold himself out to the public as being authorized to practice medicine.

TEX. REV. CIV. STAT. ANN. art. 4495b, § 3.06(d)(1) (West Supp. 1997). The delegating physician remains responsible for the medical acts so delegated. Id. However, the Board of Medical Examiners has the authority to determine whether or not an act constitutes the “practice of medicine,” so as to be prohibited from being delegated, as well as whether or not certain acts may be safely delegated. Included within the acts that may be delegated is the administration or provision of medicine and drugs as ordered by the physician. Id. at § 3.06(d)(2). Under the Act, “administering” means the direct application of a drug by injection, inhalation, ingestion or any other means to the body of the physician’s patient. “Provision” means to “supply one or more unit doses of a drug, medicine or dangerous drug.” Id. at § 3.06(d)(3). Further, an optometrist may also administer “topical ocular pharmaceutical agents” in his or her practice, but not for therapeutic purposes. Id. at § 3.06(d)(6)(A).

2. Liability of Physician for Acts of Hospital Personnel

a. The “Captain of the Ship” Doctrine
Under this doctrine, a surgeon is held to be in complete charge of all those assisting him in the course of an operation and is thus held vicariously liable for the negligent acts of such assistants. The Texas Supreme Court disclaimed the “Captain of the Ship” doctrine and held that operating surgeons in hospitals are subject to the same principles of agency law, which apply to others. 

*Sparger v. Worley Hosp.*, 547 S.W.2d 582 (Tex. 1977). In *Owens v. Litton*, 822 S.W.2d 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied), the Houston court of appeals reversed the defendant’s summary judgment because fact issues existed as to whether the doctor had a “right of control” over the nurse anesthetist. Id. at 797. It is the right of control, not actual control, that gives rise to the duty to make sure an independent contractor performs his work in a safe manner. Id. (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985)). See also *Dougherty v. Gifford*, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ).

b. The “Loaned Servant” Doctrine

Under this doctrine, a servant directed or permitted by his master to perform services for another may become the servant of the other person in performing such services. The rule is applicable in medical malpractice cases. *McKinney v. Tromly*, 386 S.W.2d 564 (Tex. Civ. App.—Tyler 1964, writ ref’d n.r.e.).

3. Liability for Residents

A resident “employed” by a medical foundation, though working at a hospital, might not be an “employee” of the hospital for liability purposes. (This holding is described by Justice Enoch, in his dissenting opinion, as “quite literally nonsense.”) *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 544 (Tex. 2003).

4. Liability of Physician for Acts of Another Physician

a. Negligent Selection

A physician has a duty to exercise reasonable care in the selection of a physician whom he calls in as a substitute. *Moore v. Lee*, 211 S.W. 214 (Tex. 1919). However, in *Johnson v. Whitehurst*, 652 S.W.2d 441 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.), the Houston court of appeals held that a referring physician who did not participate in a surgery could not be liable for the negligence of the surgeon unless the referring doctor was negligent in recommending the second surgeon.

b. Partnership

It has been held that when physicians enter into a partnership for the practice of medicine, all are liable for damages resulting from the professional negligence of one physician when his negligence is committed within the scope of the partnership business. *Simons v. Northern Pac. Ry.*, 22 P.2d 609 (Mont. 1933). A partnership may be liable for the acts of its partners, even if those partners are physicians and the acts complained of constitute medical practice. *Jones v. Found. Surgery Affiliates of Brazoria Cnty.*, 403 S.W.3d 306 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

A limited partnership which owns a hospital, or its general partner, may not be held vicariously liable for the negligence of the doctor who is a limited partner in the partnership. *Doctors Hospital v. Andrade*, 493 S.W.3d 545 (Tex. 2016), overruling *Doctors Hospital v. Andrade*, 2015 WL 3799425 (Tex. App.—Corpus Christi, 2015, reversed by *Doctors Hospital v. Andrade*, 493 S.W.3d 545 (Tex. 2016).

The doctrine of partnership by estoppel was applied in a medical malpractice case against two defendant-physicians, who denied a legal partnership, but who were found liable on a partnership by estoppel theory due to one of the defendant-physician’s representations of
partnership to the plaintiff-patient and her trusting reliance on those representations. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982) (applying Texas law).

c. Negligent Supervision

When a physician specialist delegates a surgery to a physician non-specialist, the specialist may be liable for failing to properly supervise the non-specialist operating surgeon. *Baker v. Story*, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref’d n.r.e.). In such a case, the specialist is held to a higher standard of care and skill than the non-specialist. *Id.* at 642; *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969).

d. Negligent Assistant

A physician assisting in surgery may be liable for failing to supervise properly the physician who is actually performing the surgery. The liability is based on a duty to warn against the use of improper techniques. *McMillin v. L.D.L.R.*, 645 S.W.2d 836 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.).

However, the El Paso court of appeals rejected a plaintiff’s claim that an anesthesiologist was negligent in giving a surgeon permission to proceed with surgery. *Hicks v. Canessa*, 825 S.W.2d 542, 544 (Tex. App.—El Paso 1992, no writ). The anesthesiologist gave the surgeon permission to proceed in the absence of an assistant surgeon. It was a violation of the hospital’s policy to perform surgery without an assistant surgeon. The anesthesiologist’s duty, however, was to make certain that the patient was properly positioned, stabilized, and anesthetized before allowing surgery to proceed and the “permission” granted therefore related to those issues. The El Paso court of appeals held that the anesthesiologist had no duty to serve as a superintendent of surgery and affirmed the summary judgment in favor of the defendant. *Id.*

e. Express Agency

In *McDuff v. Chambers*, 895 S.W.2d 492 (Tex. App.—Waco 1995, writ denied), a child, who was displaying symptoms of meningitis, was sent home from a hospital emergency room without having been diagnosed or treated. The next day, the child’s family doctor told the mother to bring the child to his clinic. However, the doctor did not come to the clinic himself, but relied on a nurse’s report of the child’s condition to advise that the child be taken home and kept on clear liquids. The child was admitted to a hospital a few days later, where she was treated by two other doctors. Due to the delay in diagnosis and treatment, the child suffered from neurological impairment and permanent disfigurement. The petition charged that the family doctor and the clinic were vicariously liable for the negligence of the two other doctors.

The Waco court of appeals reversed the trial court’s granting of a take-nothing judgment in favor of the family doctor. The McDuff court first held that the doctor did not conclusively negate the existence of an express agency relationship among him and the other two doctors. In order to negate vicarious liability on the basis of express agency, the family doctor had to establish not only the details of his professional relationship with the other two doctors in regard to the child’s treatment, but also the extent of his right to control their actions. Instead, the family doctor’s summary judgment evidence addressed the issue of control actually exercised over the other two doctors. The court held that without a recitation of facts relating to the nature of the relationship and the terms of the agreement between all three doctors with respect the child’s treatment, the family doctor’s assertion that the other two doctors acted on their own independent medical judgment was a mere conclusory opinion that was legally insufficient to support a summary judgment.

f. Respondeat Superior

A neurologist who placed his penis in the hand of a patient during the course of
a neurological examination was not acting in the course and scope of his employment, as he was “acting in his own prurient interest” and therefore “ceased to be acting for the employer.” Buck v. Blum, 130 S.W.3d 285 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

5. Breach of Warranty

In 1985, the Texas Supreme Court held that a physician is not liable on a theory of implied warranty of good and workmanlike service for care and treatment of patients. Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985). The Court has subsequently affirmed its holding in Dennis. See, e.g., Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988). See also Wisenbarger v. Gonzales Warm Springs Hosp., 789 S.W.2d 688 (Tex. App.—Corpus Christi 1990, writ denied). The Supreme Court has limited such implied warranties actions to services or repairs of tangible goods or property. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987).

The statute of frauds, contained within the Texas Business and Commerce Code, provides that certain promises or agreements must be in writing, including:

[A]n agreement, promise, contract or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 1.03, Medical Liability and Insurance Improvement Act of Texas.

TEX. BUS. & COM. CODE ANN. § 26.01(b)(8) (West 2002).

For evidence of such “writing,” the plaintiff relied on a note in the defendant’s office notes. This note, however, was deficient under the statute of frauds in that it was not signed by the party to be charged (all the defendant doctors), was not “complete within itself in every material detail,” and did not “contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resort to oral testimony.” Sterrett v. Jacobs, 118 S.W.3d 877 (Tex. App.—Texarkana 2003, pet. denied).

6. Theories of Recovery—Negligence

a. General Rules - Standard of Care

A presumption that the physician has discharged his duty of care exists. Henderson v. Mason, 386 S.W.2d 879, 882 (Tex. Civ. App.—El Paso 1964, no writ). To defeat this presumption, the plaintiff must affirmatively prove a breach of the duty and that the breach resulted in injury. See Cloys v. Turbin, 608 S.W.2d 697 (Tex. Civ. App.—Dallas 1980, no writ). Negligence is never imputed from results alone. However, in Kootsey v. Lewis, 126 S.W.2d 512 (Tex. Civ. App.—San Antonio 1939, no writ), the jury may be instructed that a bad result can be considered in determining negligence. TEX. REV. CIV. STAT. art. 4590i, § 7.02(a).

The plaintiff has the burden of establishing, by expert testimony, the required standard of care. The plaintiff must then show that the defendant departed from that standard of care—i.e., that the defendant performed in a way in which a reasonable and prudent member of the medical profession would not have done under the same or similar circumstances. Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977).

It is not necessary for expert witnesses to use the magic words “reasonable and prudent doctor.” It is sufficient for the expert to describe what doctors commonly do under given circumstances. Estate of Birdwell v. Texarkana Mem’l Hosp., 122 S.W.3d 473 (Tex. App.—Texarkana 2003, pet. denied).

However, in order to ensure that a defendant will not prevail, a plaintiff should establish that the defendant’s conduct deviated from the course of treatment that a reasonable and prudent physician would undertake under the same or similar circumstances. The plaintiff is thus
expected to serve an expert report that gives a fair summary of the expert’s opinions regarding the applicable standard of care, how the defendant breached the standard of care, and the causal connection between the breach and the claimant’s injuries. TEX. CIV. PRAC. & REM. CODE § 74.351 (West 2007).

b. Elements

“It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or a recognized treatment, unless he proves by a doctor of the same school of practice as the defendant: (1) that the diagnosis or treatment complained of was such as to constitute negligence; and (2) that it was the proximate cause of the patient’s injuries.” Bowles v. Bourdon, 219 S.W.2d 779 (Tex. 1949). But note discussion earlier in this paper to the effect that physicians from many specialties can comment on areas common to more than one practice field.

c. Emergency Care

The Good Samaritan Statute states that no person shall be liable in civil damages for administering emergency care in good faith at the scene of an emergency or in a hospital for acts performed during the emergency. TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (West 1997). This section does not apply to care administered: (1) for or in expectation of remuneration; or (2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration. Id. at § 74.051(b). It is very important to note that the Good Samaritan doctrine will not apply to a physician who acts in expectation of remuneration for the care in question, even if he does not in fact receive the remuneration. McIntyre v. Ramirez, 109 S.W.3d 741 (Tex. 2003).

A defendant must conclusively establish the Good Samaritan defense. The Good Samaritan defense is subject to three exceptions: 1) a doctor performing his or her work in an emergency room, 2) a doctor associated by the admitting or attending physician or 3) a doctor who charges for his or her services. An issue of material fact existed in the plaintiff’s case as to whether defendant was “associated by the admitting or attending physician,” thus dismissal was improper. Chau v. Riddle, 254 S.W.3d 453 (Tex. 2008). Since it was part of the anesthesiologist’s job to assist in the delivery room with the intubation of newborns when required, defendant’s Good Samaritan defense failed. The conduct in question was part of the professional’s ordinary duties. Id. The Good Samaritan statute shields emergency medical services personnel from liability. Dunlap v. Young, 187 S.W.3d 828 (Tex. App.—Texarkana 2006, no pet.); Moore v. Trevino, 94 S.W.3d 723 (Tex. App.—San Antonio 2002, pet. denied).

A plaintiff must carefully plead, in suing emergency medical service personnel, that they acted wilfully or with wanton negligence or be subject to dismissal for failing to assert a claim upon which relief can be granted. Pleadings asserting simple negligence will not support a cause of action against emergency medical services personnel. Parker v. Barefield, 202 S.W.3d 211 (Tex. App.—Tyler 2006), rev’d on other grounds, 206 S.W.3d 119 (Tex. 2006). Further, the record must contain evidence that the emergency medical services personnel were wilfully or wantonly negligent. Dunlap v. Young, 187 S.W.3d 828 (Tex. App.—Texarkana 2006, no pet.).

7. Battery

Courts often refer to this tort in medical contexts as a “technical” assault and battery. Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967). The battery in malpractice actions typically involves the physician’s performance of acts on the patient without the consent of the patient or someone legally-authorized to give such consent in the absence of emergency conditions. Moss v. Rishworth, 222 S.W. 225 (Tex. Comm’n App. 1920, judgm’t approved).
a. Implied Consent

Consent will be implied when the patient is unconscious or otherwise unable to give express consent and an immediate operation is necessary to preserve life or health. *Gravis v. Physicians & Surgeons Hosp.*, 427 S.W.2d 310, 311 (Tex. 1968).

b. Problems Re: Consent

Express consent may be found where the doctor is engaged generally to effect a cure or restore the patient’s health by whatever means he or she finds necessary.

When a physician is engaged to perform a particular operation or to operate on a specific organ, and instead performs a different operation or an operation on a different part of the body, the battery theory is applicable. *Moos v. United States*, 225 F.2d 705, 706 (8th Cir. 1955).

When a patient consents only to minor surgery, and the physician proceeds to perform major or radical surgery, the doctor may be held liable for a technical assault and battery. *Wall v. Brim*, 138 F.2d 478, 481 (5th Cir. 1943). For more Texas cases addressing the issue of consent and a claim of battery, *See* subsection m below: “Battery and Informed Consent.”

8. Lack of Informed Consent

a. Under Chapter 74 and Article 4590i

Article 4590i and Chapter 74 both include subsections addressing “Informed Consent.” These subsections redefine the theory of informed consent in Texas. Both establish the Texas Medical Disclosure Panel (“Disclosure Panel”), which is directed to evaluate all medical treatments and surgical procedures to determine the nature and scope of disclosure required for each treatment or procedure. After the Disclosure Panel completes its evaluation, each procedure or treatment is placed on one of two lists: the “disclosure list” (also known as the “A” List) or the “non-disclosure list” (known as the “B” List). The “A” List contains all procedures requiring some disclosure of risks and the “B” List contains all procedures requiring no risk disclosure of any kind. Proper disclosure (or non-disclosure) of risks in compliance with the statute creates a rebuttable presumption that the physician was not negligent. On the other hand, a physician’s failure to disclose risks in procedures located on the disclosure list creates a rebuttable presumption of negligence. The jury is to be instructed on these rebuttable presumptions when they arise. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.07(a)(1) (West Supp. 1997); TEX. CIV. PRAC. & REM. CODE § 74.106 (West 2011). Failure to disclose a listed risk for a list A procedure creates such a rebuttable presumption and so granting a directed verdict under such circumstances and failing to so instruct a jury was reversible error. *Dejean v. Wade*, 44 S.W.3d 141 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Under Article 4590i, the materiality of the risk for the listed treatments and procedures in informed consent cases was determined by the Disclosure Panel. If no determination regarding a duty to disclose had been made by the Disclosure Panel, physicians and health care providers were “under the duty otherwise imposed by law.”

Both Article 4590i, § 6.02 and § 74.106 provide as follows with respect to the informed consent theory of recovery:

In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to
disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (West Supp. 1992); TEX. CIV. PRAC. & REM. CODE § 74.105 (West 2011). Consent to medical care for procedures that appear on the Disclosure Panel’s list is effective if it is given in writing, signed by the patient and a competent witness, and the consent form is specific in its disclosure of the risks and hazards involved in the procedure in the form and degree required by the Panel. See TEX. REV. CIV. STAT. Ann. art. 4590i, § 6.06 (West Supp. 1992); TEX. CIV. PRAC. & REM. CODE § 74.105 (West 2011). Note, however, that a general warning may, in certain instances, satisfy the disclosure requirement. Jones v. Pappy, 782 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (general warning as to “allergic sensitivity reaction” was sufficient disclosure of risk of “allergic sensitivity reaction to injected contrast media” contained in list A for angiography). The “informed consent” provisions of Article 4590i and Chapter 74 raised serious questions about the extent of the Legislature’s changes to the common law regarding expert medical evidence requirements and the causation standard to be applied in informed consent cases. The Texas Supreme Court’s decisions in Peterson v. Shields, 652 S.W.2d 929 (Tex. 1983), Barclay v. Campbell, 704 S.W.2d 8 (Tex. 1986) and McKinley v. Stripling, 763 S.W.2d 407 (Tex. 1989) helped resolve most of those questions.

Even if a patient consents to a particular risk, suit for informed consent may be maintained if the likelihood of that risk is misrepresented by the physician. In Vaughan, a patient who opted for surgery to treat his excessive sweating argued that he would not have opted for the surgery had he known that, contrary to representations of a 90% success rate, the surgery actually only had a 33% chance of success with a 25% chance that he would experience debilitating compensatory sweating. Vaughan v. Nielson, 274 S.W.3d 732, 740 (Tex. App.—San Antonio 2008, no pet.). (“ETS [the surgery at issue] is not a List A procedure….Because ETS is a non-list procedure, [physician’s] duty was to disclose all risks or hazards….The form that [plaintiff] signed does disclose all the risks that [plaintiff] claims occurred as a result of the ETS procedure….[plaintiff] presented expert testimony…that the actual chance that ETS would successfully treat auxiliary hyperhidrosis is 33%, not 90% as represented by [physician]. [Expert] further testified that [physician] downplayed the risk of compensatory sweating, claiming that it ‘may occur in 50% of patients’ when in fact compensatory sweating occurs in 80-100% of patients[.]”).

b. Peterson v. Shields

In Peterson v. Shields, 652 S.W.2d 929 (Tex. 1983), the Supreme Court held that, in non-list cases (i.e., informed consent suits involving procedures that did not appear on either of the Disclosure Panel’s lists at the time of the surgery or treatment), the phrase “under the duty otherwise imposed by law” meant that a physician or health care provider was under the duty imposed by Article 4590i. Accordingly, the Peterson Court held that § 6.02 replaced the common law locality rule with a “reasonable person” rule, focusing on disclosures that would influence a reasonably prudent patient in deciding whether to consent to proposed medical treatment, rather than the common law concept of disclosures that physicians in a certain community deemed material. Consequently, the Peterson Court held that expert medical testimony is “no longer necessary . . . regarding the standard of care in a certain community” in informed consent cases involving medical procedures performed after August 29, 1977, the effective date of Article 4590i. In addition, the Court found that the Disclosure Panel eliminates “the need for expert medical testimony regarding the materiality of the
risk” in cases involving procedures on the disclosure list. Thus, a surgeon’s familiarity with the applicable medical standard of disclosure in the “same or similar community” was no longer necessary to establish a cause of action for lack of informed consent cases under § 6.01. Since Chapter 74 made no changes to this area of the law, Article 4590i case law should still be applicable.

Some of the questions left unanswered by Peterson were resolved in Barclay v. Campbell, 704 S.W.2d 8 (Tex. 1986), a case in which a patient was hospitalized for treatment of mental illness. His physician prescribed certain drugs which sometimes cause a condition called Tardive Dyskinesia; yet, the physician did not warn the patient of this risk. The patient suffered from Tardive Dyskinesia and sued the physician. At trial, testimony was presented that a man of the patient’s age had an extremely low risk for this disease—less than ½ of 1 percent. The court of appeals held that such testimony would not have influenced a reasonable person in consenting to or refusing the treatment and that, therefore, this was not a risk that the Peterson decision required to be disclosed. On review, the Texas Supreme Court stated that the application of an objective standard—as opposed to a subjective one—was required. Accordingly, the plaintiff in an informed consent suit has the burden of establishing that the medical procedure or treatment (in a non-list case) involved an inherent risk, which, if disclosed, could influence a reasonable person’s consent. See Barclay, 704 S.W.2d at 9–10. The fact that the risk is typically small does not excuse “non-disclosure if the risk is inherent in the procedure and if knowledge of the risk could influence a reasonable person’s decision to consent to the medical treatment or surgical procedure.” Id.

c. Application of the “Reasonable Person” Standard

A good example of an application of the Peterson “reasonable person” rule is where a defendant-physician was denied a summary judgment in an informed consent case because the defendant’s unopposed affidavit contained only conclusory proof of what the treating physician would deem material as to risk disclosure without any summary judgment proof of what would influence a reasonable person in deciding whether to consent to a recommended medical procedure. Price v. Hurt, 711 S.W.2d 84 (Tex. App.—Dallas 1986, no writ). The Dallas court of appeals held that “a reasonable person” sets the standards against which the physician’s conduct is to be measured in a malpractice case involving informed risks of non-disclosure list medical procedures and that the defendant failed to negate the first essential element of an action for malpractice—namely, he failed to conform to a certain standard of conduct. Id. at 88–89.

Another example of the Peterson rule appears in a case in which a child had an allergic reaction to the drug, phenobarbital. The defense presented testimony that the reaction, Stevens-Johnson syndrome, was very unusual and that it was not standard medical practice at the time of the treatment to warn a child’s parents that such syndrome, or a similar severe allergic reaction, would occur. Menefee v. Guehring, 665 S.W.2d 811 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.). Although the defendant in Menefee presented his defense in terms of medical custom, Peterson made a custom of non-disclosure irrelevant if in fact the procedure or drug had side effects that could influence a reasonable person’s consent if disclosed. See also Brown v. Armstrong, 713 S.W.2d 725 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).

d. The Proximate Cause Requirement

In McKinley v. Stripling, 763 S.W.2d 407 (Tex. 1989), the Texas Supreme Court held that, despite the statutory language of § 6.02, proximate cause is an element of an Article 4590i suit for lack of informed consent. Accordingly, the plaintiff
bringing an informed consent cause of action under Article 4590i, § 6.01, must prove proximate cause and request a proximate cause issue. Also, the proximate cause issue must be framed objectively, rather than subjectively. McKinley, 763 S.W.2d at 410. This principle remains true under Chapter 74 as well.

The Texarkana court of appeals has held that when there is a finding of lack of informed consent (defined in terms of what would influence a reasonable person) and a finding of proximate cause, the plaintiff does not need to submit an additional question about whether disclosure would have affected a reasonable person. Melissinos v. Phamanivong, 823 S.W.2d 339, 343 (Tex. App.—Texarkana 1991, writ denied).

A plaintiff must prove, however, through expert testimony and in an expert report that the specific risk that was not warned of is the risk that caused the harm. For example, a defendant physician’s failure to advise a potential transplant patient that the donor was in a high risk category (which failure to warn was admitted) was not sufficient to establish the causal nexus to plaintiff’s injuries when, in fact, the defect in the organs was due to the donor’s having rabies. In other words, the fact that he was high risk for conditions such as HIV and hepatitis C, which he did not have, but which might have caused the plaintiff to reject the organs, was not relevant in an informed consent case in which the real problem was that the donor had rabies. Even though the plaintiff would have rejected the kidney had he known of the high-risk status, this did not establish a causal connection to the lack of informed consent as to the rabies. Hightower v. Baylor Univ. Med. Ctr., 348 S.W.3d 512 (Tex. App.—Dallas 2011, pet. denied).

e. Physician’s Duty to Obtain Informed Consent

In Ritter v. Delaney, 790 S.W.2d 29 (Tex. App.—San Antonio 1990, writ denied), it was declared that a hospital had no duty to obtain a patient’s informed consent to a medical procedure performed in the hospital. The court of appeals recognized that the duty of securing the patient’s informed consent rested upon the doctor treating the patient. See also Espalin v. Children’s Med. Ctr. of Dallas, 27 S.W.3d 675 (Tex. App.—Dallas 2000, no pet.); Gibson v. Methodist Hosp., 822 S.W.2d 95 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

In Boney v. Mother Frances Hosp., 880 S.W.2d 140 (Tex. App.—Tyler 1994, writ denied), the plaintiff asserted that the hospital’s own policies and procedures required it to ensure that “the surgeon has disclosed the risks and hazards involved with the procedure.” The hospital in Boney required the plaintiff to sign a form stating that she had been “apprised of all risks.” The Tyler court of appeals held that the fact that the hospital required such a document to be signed did not impose a duty on the hospital to secure the patient’s informed consent nor did it have the duty to oversee the doctor’s listing of every risk that might arise from any surgical procedure. Id. at 143.

f. Under Certain Facts, Hospital May Have Duty

However, in Urban v. Spohn, 869 S.W.2d 450 (Tex. App.—Corpus Christi 1993, writ denied), the Corpus Christi court of appeals held that a hospital is not necessarily completely insulated from liability for suits based on the failure of a health care defendant to obtain informed consent. The hospital’s liability derived from the actions of its nurses, thus it was not completely immune simply because the physician who performed the procedure was ultimately responsible for obtaining the patient’s informed consent.

g. Does the Referring Physician Have a Duty?

In Johnson v. Whitehurst, 652 S.W.2d 441 (Tex. App.—Houston [1st Dist.]
1983, writ ref’d n.r.e.), the Houston court of appeals held that a referring physician who did not participate in the surgery had no duty to inform the patient of the risks of surgery. See also Edwards v. Garcia-Gregory, 866 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

In Marling v. Maillard, 826 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1992, no writ), the Houston court of appeals held that a misdiagnosis and subsequent unnecessary surgery does not also give rise to a cause of action based on lack of informed consent.

h. Risk Must be “Material”

In Galvan v. Downey, 933 S.W.2d 316 (Tex. App.—Houston [14th Dist.] 1996, writ denided), the parents of a deceased infant brought a medical malpractice cause of action against the infant’s physician on the basis that the physician failed to disclose the risk that the infant might suffer a perforation of his umbilical artery from placement of an umbilical catheter. The plaintiffs alleged that the physician failed to obtain an informed consent before placing the catheter and that, had they been informed of the possible risk of perforation of the umbilical artery, they would not have consented to the procedure. The defendant moved for summary judgment on the informed consent issue. The parties agreed that the Texas Medical Disclosure Panel, created by the Legislature when it enacted Article 4590i, had not made any determination concerning the disclosure of any risks associated with an umbilical artery catheterization. Id. at 318. Because no determination concerning disclosure had been made, the plaintiffs were required to prove by expert testimony that the medical condition complained of was a material risk inherent in the procedure to be performed. Id. The court of appeals pointed out that there were two elements that the expert must establish: 1) the risk was inherent to the medical procedure undertaken, and 2) the risk was material, in that it could influence a reasonable person’s decision to consent to the procedure. Id. at 319.

The defendant moved for summary judgment on the informed consent issue. In her affidavit supporting the motion, she stated that the risk of perforation of the umbilical artery from the catheterization is extremely rare and, therefore, not a material risk to the procedures which were performed. Id. The appellate court sustained the granting of the defendant’s summary judgment because, it stated, the expert testimony of the plaintiffs’ expert did not controvert the summary judgment proof that the risk of umbilical perforation was not material. Id. at 320. The plaintiffs’ expert did not offer an opinion on how the perforation would manifest itself, the permanency of the condition caused by the risk, the known cures for the condition, the seriousness of the condition and the overall effect of the condition on the infant. Id. Therefore, the plaintiffs presented no controverting evidence from their expert that the risks of umbilical artery perforation from the placement of an umbilical artery catheter was a material risk. Id.

The court of appeals’ decision seemed to turn on the fact that, in her affidavit in support of her motion for summary judgment, the defendant-physician stated, “the risk of perforation to the umbilical artery from the placement of an umbilical artery catheter is extremely rare. It is my expert opinion that the complication, umbilical artery perforation, which [the infant] experienced was not a material risk to the procedures which were performed.” The court seemed to be establishing an indirect relationship between the rarity of a risk and its materiality; that is, the more rare the risk, the less material it is. However, simply because the physician stated that the risk was “extremely rare” does not mean that the risk is not material. For example, the risk of death as the result of a relatively minor procedure may be extremely rare, but may also be extremely material in that it could influence a
reasonable person’s decision whether to consent to the particular procedure.

i. Constitutionality of the Current Informed Consent Procedure

In *Penick v. Christensen*, 912 S.W.2d 276 (Tex. App.—Houston [14th Dist.] 1995, writ denied), the plaintiff alleged that the informed consent doctrine as it existed under Article 4590i violated his constitutional due process and equal protection rights. The appellate court did not agree. The Houston court of appeals stated that individual rights are not infringed upon by the Disclosure Panel’s imposition of minimum requirements for disclosure. The Panel only imposes a duty to disclose material risks. Not only did the informed consent procedures set forth in Article 4590i not infringe upon a person’s constitutional rights; they, if anything, granted a plaintiff more protection, according to the Penick court. There was no guarantee at common law that a physician would disclose material risks inherent in procedure. The informed consent procedures, however, guarantee that a minimum disclosure will take place. See also *Winkle v. Tullos*, 917 S.W.2d 304 (Tex. App.—Houston [14th Dist.]. 1995, writ denied).

j. Minors’ Rights to Informed Consent

In *Powers v. Floyd*, 904 S.W.2d 713 (Tex. App.—Waco 1995, writ denied), the Waco court of appeals held that a physician who obtained the patient’s mother’s written informed consent prior to performing an abortion on the patient had no duty to obtain the patient’s informed consent since the patient was a minor.

k. No Liability for Failing to Warn of Risks in a Non-List “A” Procedure

There is no liability for failing to warn of risks not specifically enumerated in Article 4590i’s or Chapter 74’s List “A” procedures.

In *Earle v. Ratliff*, the Texas Supreme Court addressed the issue of informed consent and the rebuttable presumption that is raised when a physician provides the requisite warnings for a List “A” procedure. Article 4590i established the Texas Medical Disclosure Panel whose duty was to create a list of treatments and procedures for which risks must be disclosed (List “A”). *Earle v. Ratliff*, 998 S.W.2d 882, 891 (Tex. 1999). The Panel also established a list of procedures for which disclosure of risks is not required (List “B”). For the List “A” cases, the Panel also established with particularity what risks must be disclosed and the form in which disclosure must be made. *Id.* This provision of Article 4590i (section 6.01) also provided that, when a physician complies with the directives of the Panel, the consent shall be considered effective and a rebuttable presumption is raised that the physician was not negligent in disclosing the risks. *Id.*

In Earle, the plaintiff, who had undergone a List “A” procedure, alleged that the defendant was negligent because he should have disclosed other risks that were not enumerated by the Panel in List “A.” The Earle Court held that Article 4590i, § 6.01, does not permit a finding that a physician who made disclosures in compliance with the Act was negligent for not disclosing other risks and hazards not prescribed by the Texas Medical Disclosure Panel. *Id.* To hold otherwise would undermine the purpose of § 6.01 because the Act would provide no protection for a physician who complied with the Act’s provisions. The plaintiff argued that a physician’s compliance with the Panel’s directives raised only a rebuttable presumption that the physician complied with the standard of care, but was not conclusive of it and that evidence that a physician should have disclosed other risks could be considered a breach of the standard of care. The Texas Supreme Court disagreed, stating that the Act permits the assumption of proper disclosure to be rebutted only by attacking the validity of the consent form, such as by proof that the patient’s signature was forged or the patient lacked the capacity to sign the informed consent form.
consent. *Id.* at 891–92. Because the plaintiff produced no evidence that attacked the validity of his informed consent, he raised no issue that the defendant was negligent in failing to appropriately disclose the risks of surgery. *Id.* at 892.

1. Misdiagnosis, and Resultant Medical Error, Will Not Support a Claim for Informed Consent

In a circumstance in which a physician erroneously diagnosed a patient and, based upon that erroneous diagnosis, recommended surgery, which was then undertaken unnecessarily, a cause of action for informed consent will not lie. *Binur v. Jacobo*, 135 S.W.3d 646 (Tex. 2004). In *Binur*, the defendant allegedly negligently misdiagnosed plaintiff’s breast cancer risk. Based on that misdiagnosis, he recommended a prophylactic mastectomy, which the plaintiff consented to have and was later performed. Thereafter, the plaintiff claimed that her informed consent had not been appropriately obtained, because the defendant had “failed to disclose risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.” However, in this case, the erroneous diagnosis was not a risk “inherent to” or “inseparable from” the surgical procedure, but was a general risk in consulting with a physician. Thus, informed consent was an inappropriate cause of action and a negligence cause of action should have been the theory advanced.

m. Battery and Informed Consent

A patient who had an express agreement with her anesthesiologist that he would not use sedatives but only a local anesthetic—an agreement that was subsequently violated by the anesthesiologist—could not maintain her battery cause of action unless she could prove that the battery was provided without her informed consent. Even in that instance, failing to obtain informed consent does not automatically result in liability as “there may be reasons for providing treatment without specific consent that do not breach any applicable standard of care.” Observing that the existence or non-existence of such reasons would necessarily be the subject of expert testimony, the Texas Supreme Court held that the plaintiff was thus required to provide the appropriate expert report in order to support the battery and/or informed consent cause of action. *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005).

n. “No” Does Not Mean “No”

A patient who verbally informed her physician that she did not want a particular procedure done on her was unable to bring an informed consent case. Even though plaintiff had told her doctor that she did not want, and did not consent, to a stellate ganglion block done on her wrist, but instead wanted wrist manipulation, her surgeon, while she was under anesthesia, went ahead and did the stellate ganglion block. In *Schaub v. Sanchez*, the Supreme Court held that this was not an informed consent case. The Schaub Court reasoned that, since the plaintiff had previously consented to the particular risks of stellate ganglion block, she could not maintain an informed consent case, under *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986), in which a lack of informed consent case must be based on not having been informed of the risk inherent in the procedure. Apparently, simply stating “I do not want” a procedure, does not trigger a lack of informed consent cause of action. *Schaub v. Sanchez*, 229 S.W.3d 322 (Tex. 2007). Note, however, that, in *Rush v. Honeycutt*, 2007 WL 1706255 (Tex. App.—Corpus Christi 2007, pet. denied.) (mem. op.), a plaintiff who had her fallopian tubes removed without her consent did have a cause of action under prior Article 4590i.

o. Informed Consent and the Expert Report

Further, under Chapter 74, a plaintiff’s expert report in an informed consent case must contain more than simply “the obvious fact that if the patient had
elected not to have the surgery she would not have been injured,” and must also include whether the undisclosed information would have influenced a reasonable person in deciding whether or not to give or withhold consent. *Greenberg v. Gillen*, 257 S.W.3d 281 (Tex. App.—Dallas 2008, pet. dism’d).

p. Even With Variable Inherent Conditions, A Defendant May Be Liable For Failure To Warn.

In a win for plaintiffs, the Supreme Court holds that a risk is inherent in a procedure, requiring warning. If an underlying physical condition subjects a patient to a risk in the face of medical intervention, then the defendant is bound to warn of that risk. *Felton v. Lovett*, 388 S.W.3d 656 (Tex. 2012).

q. There is no Duty to Obtain Informed Consent to the Use of an Inexperienced Assistant Who Would Actually Perform the Procedure.

A Defendant is not required to inform a patient that an inexperienced assistant would be doing portions of the procedure. As a matter of law, there is no duty to provide such information and no duty to let the patient know that an assistant surgeon who had never done the procedure before would be performing material portions of care. *Benge v. Williams*, 472 S.W.3d 684 (Tex. App.—Houston [1st Dist.] pet. filed).”

9. Abandonment

Abandonment generally means the physician’s unilateral severance of the professional relationship between the physician and patient without reasonable notice at a time when there is still the necessity of a continuing medical attention. *Lee v. Dewbre*, 362 S.W.2d 900, 902 (Tex. Civ. App.—Amarillo 1962, no writ).

To state a cause of action on the theory of abandonment, the plaintiff must prove: (1) the existence of a physician-patient relationship; (2) unilateral severance by the physician without reasonable notice or provision of an adequate medical attendant; (3) the necessity of continuing medical attention; (4) causal connection between the severance of the relationship and the patient’s injuries (proximate cause); and (5) resulting damages. See generally *Lee v. Dewbre*, 362 S.W.2d 900 (Tex. Civ. App.—Amarillo 1962, no writ).

In *King v. Fisher*, 918 S.W.2d 108 (Tex. App.—Fort Worth 1996, writ denied), the court of appeals had a chance to address the differences between negligence and abandonment. The *King* court noted that the two claims against a physician were essentially the same—that is, abandonment was just another way of alleging a breach of duty. In *King*, the court of appeals held that, when the patient and his wife voluntarily terminated the physician-patient relationship with the defendant by going to another medical facility, the defendant owed no further duty to the patient.

10. Fraud

Fraud is the misrepresentation of past or present material facts upon which a plaintiff relies to his detriment. *Jeffcoat v. Phillips*, 534 S.W.2d 168, 171 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.). Prior to the enactment of 4590i, § 6.02, a plaintiff could not recover for both fraud and failure to obtain informed consent. *Gaut v. Quast*, 505 S.W.2d 367 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref’d n.r.e.). However, § 6.02 (informed consent) was limited to actions for the failure to disclose risks. It did not bar independent causes of action for misrepresentations concerning the nature of the surgery. Thus, the common law cause of action for fraud may be submitted along with informed consent. *Melissinos v. Phamanivong*, 823 S.W.2d 339, 344 (Tex. App.—Texarkana 1991, writ denied).

a. Problems
1) Knowledge of Falsity

There appears to be some conflict among authorities as to the necessity of the defendant’s knowledge that the representation was false. Compare *Gaut v. Quast*, 505 S.W.2d 367 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref’d n.r.e.); *Carrell v. Denton*, 157 S.W.2d 878 (1942) (defendant must have knowledge of falsity of statement), with *Graves v. Hartford Accident & Indem. Co.*, 161 S.W.2d 464 (1942) (not essential that defendant—doctor have knowledge of falsity). In a more recent case, the Texas Supreme Court held that there must be evidence that the defendant intended to fraudulently conceal and/or deceive the plaintiff. Absence of such evidence precludes a fraudulent concealment argument. *Shah v. Moss*, 67 S.W.3d 836 (Tex. 2001).

1) Intent on Plaintiff’s Reliance

There is also a split of authority regarding the necessity of proving that the defendant intended for the plaintiff to rely on the false representation. Compare *Carrell v. Denton*, 157 S.W.2d 878 (1942) (requiring fixed purpose to conceal the wrong), with *Associated Employers Lloyds v. Aiken*, 201 S.W.2d 856 (Tex. Civ. App.—Dallas 1947, writ ref’d n.r.e.) (doctor’s false statement actionable even if innocently made). As discussed above, the Texas Supreme Court had held that there must be evidence that the defendant intended to fraudulently conceal and/or deceive the plaintiff. Absence of such evidence precludes a fraudulent concealment argument. *Shah v. Moss*, 67 S.W.3d 836 (Tex. 2001).

2) Fact or Opinion

To have actionable fraud, the misrepresentation complained of must concern a material fact as distinguished from a mere matter of opinion. *Jeffcoat v. Phillips*, 534 S.W.2d 168 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.).

b. Constructive Fraud

In *Jackson v. Julian*, 694 S.W.2d 434 (Tex. App.—Dallas 1985, no writ), the Dallas court of appeals applied the doctrine of constructive fraud because of the doctor’s superior knowledge and the nature of the doctor-patient relationship. This doctrine, which arises whenever there is a breach of a legal or equitable duty, is contrasted with actual fraud in that the misrepresentation may be unintentional. Since the deception misleads others, violates confidences or otherwise injures the public interest, the court of appeals applied the doctrine to a case in which the defendant—doctor told the patient that another surgeon removed her right ovary when a pathologist’s report indicated that the defendant—doctor had removed both of her ovaries. While attorney’s fees are not ordinarily considered as an element of damages, the plaintiff could recover the investigative expenses, which were a proximate result of the defendant’s alleged misrepresentations. Investigative expenses could include attorneys’ fees incurred in determining the truth of the subject of the defendant’s misrepresentation.

11. Contract to Cure

To establish a physician’s liability under the contract theory at common law, a plaintiff must prove an express promise or warranty to achieve a particular result, breach of that promise, and damages. *Weeks v. Heinrich*, 447 S.W.2d 688 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.). See also *Levine v. Carrell*, 68 S.W.2d 259 (Tex. Civ. App.—El Paso 1934, no writ).

Rarely has a contract to cure ever been found by the courts, and when so found, it is usually in the context of a patient’s affirmative defense to a suit by a physician for a failure to pay a bill. *Edinburg Hosp. Auth. v. Trevino*, 215 S.W.2d 356 (Tex. Civ. App.—Fort Worth 1948, writ dism’d). Abrogation of an oral contract of action does not appear to prevent tort claims, such as informed consent and negligent misrepresentation, of matters concerning a physician’s proposed care or

a. Promises Must Be Express

Express promises must be distinguished from therapeutic reassurances and expressions of hope, opinion or predictions that cannot be held to constitute warranties. Weeks v. Heinrich, 447 S.W.2d 688, 692–93 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.). To prove a contract exists, a plaintiff must establish that a promise was made in writing and signed by the physician or someone with authority to sign for him. Zapata v. Rosenfeld, 811 S.W.2d 182, 184 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (citing then § 26.01(a)(8) of the Texas Business & Commerce Code). The plaintiff in Zapata went to the defendant’s clinic to obtain an abortion. She signed a form entitled “Informed Consent to Treatment, Anesthetic and Other Medical Services.” The patient underwent the procedure. However, seven and one-half months later she gave birth to a healthy full-term infant. The plaintiff filed suit against the defendant for negligent breach of contract, alleging that the informed consent form that she had initially signed constituted a contract. In affirming the trial court’s grant of summary judgment in favor of the defendants, the Zapata court held that, “in the absence of a written contract, a physician simply represents that he possesses that reasonable degree of skill that is ordinarily possessed by the profession generally, and that he will exercise that skill with reasonable care and diligence, along with his best judgment.” Zapata, 811 S.W.2d at 184 (citing Dennis v. Allison, 678 S.W.2d 511, 513 (Tex. App.—El Paso), aff’d, 698 S.W.2d 94 (Tex. 1985)). To be successful on a contract to cure cause of action, the plaintiff must show that the defendant expressly promised or warranted a particular result. In Zapata, the informed consent document that the plaintiff signed was not signed by the defendant and the form specifically stated that the abortion procedure was not guaranteed. Thus, the informed consent form did not constitute an express contract to cure.

b. Damages

It should be noted that damages for contract actions serve the purpose of compensating a party by awarding the value of the expected performance. Contract damages, unlike tort damages, do not seek to restore the injured party to his pre-contract condition. This distinction is extremely important in malpractice actions since the patient’s injury is likely to be far in excess of the value of the expected performance.

Moreover, Texas courts will resist efforts by plaintiffs to cast their claims in terms of contractual actions because they view such efforts as attempts to avoid the strictures and requirements of Chapter 74. For example, in Walrath, the plaintiff sought to obtain reimbursement from a nursing home for inadequate services provided by the nursing home to her mother. She did not file an expert report because she was seeking contractual damages for costs of the services not provided only. The Dallas court of appeals dismissed, saying “[plaintiff’s] argument that she could avoid triggering Chapter 74 by omitting any allegation of injury or death and by praying only for contract damages was merely another variation of the artful-pleading tactic that Texas courts have frequently condemned. The legislature did not intend for plaintiffs to be able to avoid the requirements of Chapter 74 so easily.” Victoria Gardens of Frisco v. Walrath, 257 S.W.3d 284, 289 (Tex. App.—Dallas 2008, pet. denied).

c. Oral Warranty

The Statute of Frauds now applies to any agreement, promise, contract or warranty of cure relating to medical care made by a physician or health care provider. TEX. BUS. & COM. CODE ANN. § 26.01(b)(8) (West Supp. 1992).
12. Texas Deceptive Trade Practices Act

The DTPA statute was amended by the Legislature in 1995 to make clear that claims for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill, are not actionable under the DTPA. This amendment prevents patients from filing malpractice actions against their physicians under the DTPA, even when express misrepresentation, warranties or fraud are involved. The amendments to the DTPA also now exclude all personal injury and wrongful death damages unless the defendant acted knowingly. If the defendant acted knowingly, mental anguish damages are recoverable.

13. Malicious Prosecution

a. Elements

To establish a claim for malicious prosecution, a plaintiff must show: (1) the institution or continuation of judicial proceedings; (2) by or at the instance of the defendants; (3) malice in the commencement of the proceedings; (4) lack of proper cause in the proceedings; (5) termination of the proceedings in plaintiff’s favor; and (6) damages. *James v. Brown*, 637 S.W.2d 914 (Tex. 1982).

b. Bad Faith Cause of Action

1) Texas Rule of Civil Procedure 13

There is no bad faith cause of action under Article 4590i or Chapter 74. However, the Supreme Court enacted Rule 13 of the Texas Rules of Civil Procedure to provide claimants with some sort of remedy against frivolous law suits. See Tex. Const. art. V, §31; TEX. GOV. CODE ANN. § 22.004(c) (West 1988). Under the Supreme Court’s guidelines, a “groundless” pleading or motion is one which has “no basis in law of fact and is not warranted by good faith argument for the extension, modification, or reversal of existing law.” *TEX. R. CIV. P. 13.*

2) No Malicious Prosecution

In *Toranto v. Wall & Cain*, 891 S.W.2d 3 (Tex. App.—Texarkana 1994, no writ), the physician sued the plaintiff and her attorney after their suit against him for breach of the physician-patient privilege was dismissed on summary judgment. The defendant sued for civil malicious prosecution. The plaintiff and her attorney then filed their own motion for summary judgment, which was granted. The appellate court held that, to bring a cause of action for malicious prosecution, the plaintiff must show “special damages” which are “an interference with his person or his property.” The special damage rule was initially adopted by our Supreme Court to “assure every potential litigant free and open access to the court system without fear of a countersuit from malicious prosecution.” The defendant was able to show no such damages. He argued that he has suffered damage of significant expenses and attorney’s fees, mental anguish, and diversion of time and effort from his medical practice. But the Toranto court held that “[t]his does not represent an interference with his person or property. Rather, this represents the damage which might be claimed by any party in a lawsuit. Therefore, this does not meet the special damages requirement.” 891 S.W.2d at 5.

3) No Abuse of Process Suits

In *Detenbeck v. Koester*, 886 S.W.2d 477 (Tex. App.—Houston [1st Dist.] 1994, no writ), the physician filed an abuse of process action against his former patient and his former patient’s attorney. The former patient and her attorney filed special exceptions that were sustained, claiming that the physician’s pleadings failed to state a cause of action. The physician did not amend his pleading. The trial court dismissed the case with prejudice and the court of appeals affirmed. In holding that the doctor did not state a cause of action, the Houston court of appeals relied on the elements for a cause of action for abuse of process: “1) that the defendant made an
illegal, improper, or perverted use of the process; 2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of process; and 3) that damage results to the plaintiff from the irregularity.” 886 S.W.2d at 480 (citing J.C. Penney Co., v. Gilford, 422 S.W.2d 25, 31 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref’d n.r.e.). “To constitute an abuse of process, the process must be used to accomplish an end which is beyond the purview of the process, and which compels a party to do a collateral thing which he would not be compelled to do.” Id. (citing Blanton v. Morgan, 681 S.W.2d 876, 878 (Tex. App.—El Paso 1984, writ ref’d n.r.e.). “There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.” Id. at 480 (quoting Blackstock v. Tatam, 396 S.W.2d 463, 468 (Tex. App.—Houston [1st Dist.] 1965, no writ)). In arguing that the plaintiff and her attorney made an illegal, perverted or an improper use of process, the defendant—physician relied heavily on the fact that the plaintiff’s attorney attempted to “coerce” him into a settlement. However, the court of appeals held that, while “evidence of an actual attempt to coerce a settlement would go to proving the element of malice … the mere procurement or issuance of process with a malicious intent, or without probable cause, is not actionable; there must be an improper use of the process after it issuance. Id. at 481 (citing Martin v. Trevino, 578 S.W.2d 763, 679 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.)).

4) Statutory Prohibition to Frivolous Suits

In 1995, the Legislature enacted the Frivolous Pleadings and Claims Act. TEX. CIV. PRAC. & REM. CODE § 9.001 (West 1997). The Act is essentially a codification of Rule 13 of the Texas Rules of Civil Procedure. The changes provide that, when a party or his attorney signs a pleading, the party is representing that the pleading is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or a needless increase in the cost of litigation; that each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; that each allegation or other factual contention in the pleading or motion has evidentiary support, or for a specifically identified allegation or factual contention, is likely to have evidentiary support after reasonable opportunity for further investigation or discovery; and that each denial in the pleading or motion of a factual contention is warranted on the evidence, or for a specifically identified denial, is reasonably based on a lack of information or a belief. If the court finds that a party or his or her attorney has filed suit in violation of this criteria, the court may, on the motion of the opposing party, impose sanctions on the person, or the party represented by the person, or both. The sanction must be limited to what is sufficient to deter the repetition of the conduct and may include a directive to the violator to perform or refrain from performing an act, an order to pay a penalty to the court, and an order to pay the other party the amount of the reasonable expenses incurred by the party because of the filing of the frivolous pleading or motion, including reasonable attorney’s fees.

5) False Imprisonment

In James v. Brown, 637 S.W.2d 914 (Tex. 1982), the Texas Supreme Court held that the plaintiff failed to state a cause of action for false imprisonment. In so doing, the James court declared that the essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. If an arrest or detention is executed under process, which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie.
14. Limitation on Strict Liability

In Chapter 77 of the Texas Civil Practice and Remedies Code, the Legislature limited the concept of strict liability in certain situations (transplantation of tissues, organs, blood, etc.). TEX. CIV. PRAC. & REM. CODE ANN. § 77.00 (West 1986). In these situations, neither strict liability nor breach of warranty will render the health care provider liable; liability may only be established by negligence, gross negligence, or an intentional tort. TEX. CIV. PRAC. & REM. CODE ANN., §77.003 (West Supp. 1992). See, e.g., Gibson v. Methodist Hosp., 822 S.W.2d 95 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

15. Unauthorized Disclosure of Confidential Information

a. Texas Medical Practice Act

The Texas Medical Practice Act creates a cause of action in civil damages for a physician’s unauthorized release of confidential and privileged communications. TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (West Supp. 1997).

A similar cause of action for damages arising from a psychotherapist’s unauthorized disclosure of confidential and privileged information about a patient is also statutorily authorized. TEX. REV. CIV. STAT. ANN. art. 5561h (West Supp. 1992). This prohibition against disclosure has been held to preclude court-ordered disclosure of identities and information about other patients in a malpractice action against a psychologist for alleged sexual contact. See Ex parte Abell, 613 S.W.2d 255 (Tex. 1981).

While not specifically dealing with a health care provider’s potential tort liability for unauthorized disclosure of information concerning patients, the court of appeals in Tarrant Cnty. Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. App.—Fort Worth 1987, orig. proceeding) held that the hospital was required to disclose the identities and locations of blood donors where the plaintiff alleged negligence by the hospital in giving blood transfusions resulting in the patient contracting AIDS and eventually dying. The court of appeals held that a blood donor is not a patient under Texas Rule of Evidence 509. Id. at 677. See also Gulf Coast Reg’l Blood Ctr. v. Houston, 745 S.W.2d 557 (Tex. App.—Fort Worth 1988, orig. proceeding).

In Crocker v. Synpol, 732 S.W.2d 429 (Tex. App.—Beaumont 1987, no writ), the plaintiff brought suit against a physician for wrongful disclosure. The plaintiff complained of injuring his back on the job and went to the defendant-doctor. The doctor, who was paid by the plaintiff’s employer, obtained a urine sample from the plaintiff. The doctor revealed the sample test results to the employer, which were positive for marijuana. After several committee conferences with his employers, the plaintiff resigned. He brought suit against both his employer and the doctor, claiming wrongful disclosure against the latter party. On appeal from a summary judgment in favor of the defendants, the court of appeals held that a fact issue existed regarding a breach of the physician-patient relationship by the doctor. Further, the Crocker court held that the patient-physician privilege did not abrogate a patient’s right to bring suit against his physician for a breach of confidentiality.

Additionally, in Cassingham v. Lutheran Sunburst Health Serv., 748 S.W.2d 589 (Tex. App.—San Antonio 1988, no pet.), the San Antonio court of appeals held that the prohibition against wrongful disclosure applies to hospitals as well as physicians.

b. Expert Witness Immunity

It has been held that any communication by a doctor in the course of a judicial proceeding is absolutely privileged, and the doctor is immune from civil liability for such communication. See Leigh v. Parker, 740 S.W.2d 101 (Tex. App.—Austin 1987, writ denied); Barrett v. Quipu Investments, 738 S.W.2d 16 (Tex. App.—Houston [1st Dist.] 1987, writ denied); Clark v. Grigson,
579 S.W.2d 263 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

c. Chapter 74

Transmission of confidential information is a breach of the duty of confidentiality. This is “an inseparable part of the rendition of health care services” and is “based on a standard of care applicable to health care providers.” Thus, a Chapter 74 expert report is required. Sloan v. Farmer, 217 S.W.3d 763 (Tex. App.—Dallas 2007, pet. denied).

16. Experimental Medicine

Although properly considered as only a hybrid form of medical negligence, experimental medicine is discussed as a separate basis of liability in jurisdictions outside of Texas. Fortner v. Koch, 261 N.W. 762 (Mich. 1935); Brown v. Hughes, 30 P.2d 259 (Colo. 1934). In Karp v. Cooley, 493 F.2d 408 (5th Cir.) cert. denied, 419 U.S. 845 (1974), the Fifth Court of Appeals held that traditional malpractice evidentiary standards were applicable to an experimental procedure that was intended to be therapeutic.

Informed consent is of paramount importance in experimental medicine situations. It is absolutely essential that, in “medical research” or “experimental” settings, the doctor or scientist fully disclose to the patient all known risks involved with the procedure. Often doctors justify nondisclosure of such risks in the interests of technological, scientific and medical advances. See e.g., Mink v. Univ. of Chicago, 460 F. Supp. 713 (N.D. 111. 1978), aff’d, 727 F.2d 1112 (7th Cir. 1984) (pregnant patients were given DES allegedly to prevent miscarriages and were not informed that they were participating in experimental trials of the drug). Consequently, the ethical propriety of experimental medicine is frequently attacked. See e.g., Delgado and Leskovac, Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice, 34 UCLA L. REV. 67 (1986), Schwartz, Informed Consent to Participation in Medical Research Employing Elderly Human Subjects, 1 J. CONTEMP. HEALTH L. & POLICY 115 (1985).

17. Unnecessary Surgery

The issue of unnecessary and novel surgery as a separate and distinct cause of action, while discussed and analyzed by the courts of other jurisdictions, was not considered in Texas prior to Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977). The Beaumont court of appeals had adopted the “respectable minority” rule, which is followed in a number of jurisdictions. On appeal to the Texas Supreme Court, this rule was rejected and the “reasonable and prudent doctor” rule was adopted. 545 S.W.2d at 165.

18. Prenatal Injuries

In 1971, our Supreme Court ruled that a fetus is precluded from asserting a cause of action for prenatal injuries unless it is born alive. Yandell v. Delgado, 471 S.W.2d 569 (Tex. 1971). Thus, a child and his parents have a cause of action where the child is born alive with a defect or deformity that occurred in utero. Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). In Jacobs, the recoverable damages were limited to the reasonably necessary expenses for the care and treatment of the child’s physical impairment. However, no matter how egregiously or negligently prenatal injuries are inflicted upon a fetus in utero, recovery was barred unless the fetus was born alive.

In 1995, the Texas Supreme Court again considered the issue of damages surrounding a stillborn fetus. In Krishnan v. Sepulveda, 916 S.W.2d 478 (Tex. 1995), the Supreme Court considered whether parents may recover damages from the birth of a stillborn fetus resulting from an injury to the mother caused by the allegedly negligent diagnosis and prenatal care that the mother received from the defendant physician. The Texas Supreme Court cited a long history of cases, which have held that there is no
wrongful death or survival cause of action for the death of a fetus not born alive. 916 S.W.2d at 480–81 (citing Pietila v. Crites, 851 S.W.2d 185, 187 (Tex. 1993), Blackman v. Langford, 795 S.W.2d 742, 743 (Tex. 1990), and others). The Supreme Court distinguished those other cases from the underlying case by stating that, while there is no negligence cause of action arising out of the treatment or injury of a fetus not born alive, the plaintiffs had alleged something entirely different as the basis for their claim—namely, that the defendant was negligent in treating the mother, not the fetus. Id. at 479–80. The Court went on to state:

"We see no rational basis for excluding recovery of mental anguish damages in personal injury actions that have as one element the loss of a fetus. Consequently, we hold that [the mother] may recover mental anguish damages suffered as a result of her injury which was proximately caused by [the defendant’s] allegedly negligent diagnosis, prenatal supervision and treatment of [the mother] and which includes the loss of her fetus."

Id. at 481. The Court next considered whether the father could recover mental anguish damages and held that he could not because, since the father had no physician-patient relationship with the defendant, the defendant owed him no duty. Therefore, the father could not recover any damages. Finally, the Court held that the plaintiffs could not recover for the loss of society, companionship, and affection suffered as a result of the loss of the fetus because such damages are derivative. Since, under Texas law, a fetus which is not born alive cannot recover for those damages, the parents could not recover for those damages either. Id. at 482.

In Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76 (Tex. 1997), the Texas Supreme Court reaffirmed its holding in Krishnan. In Edinburg, the plaintiff-mother sued the physician and hospital alleging that their negligent treatment caused the stillbirth of her child. The plaintiff-father intervened claiming that he had suffered mental anguish as a bystander who witnessed the negligence that led to the stillbirth of their child. Id. at 78. The plaintiff-mother sought damages for negligent infliction of mental anguish as a result of the negligence that caused the loss of her fetus. Id. In analogizing the underlying case to Krishnan, the Supreme Court stated that, because the plaintiff pleaded that she suffered a personal injury, including the loss of her fetus, resulting from a breach of a legal duty owed to her, like the plaintiffs in Krishnan, she had stated a valid cause of action. Id. at 79. However, in clarifying its holding in Krishnan, the Court explained that, while a mother can recover for mental anguish due to negligent infliction of an injury which causes the loss of a fetus as part of the mother’s body, a mother cannot recover mental anguish damages for the loss of a fetus as a separate individual. Id. The Supreme Court re-emphasized that there is no cause of action for mental anguish for the wrongful death of a fetus that is not born alive.

In Reese, the plaintiffs argued that the Equal Protection clause of the United States Constitution provided them with a claim for such fetal deaths. The Texas Supreme Court disagreed. Fort Worth Osteopathic Hosp. v. Reese, 148 S.W.3d 94 (Tex. 2004). The Reese Court also reemphasized that the mother has a cause of action for her physical injuries arising from the death and for mental anguish arising from the death, though not as a wrongful death claim.

All of this case law was mooted in 2007 with the enactment of Texas Civil Practice & Remedies Code § 71.003, which creates a cause of action for the wrongful death of an unborn child....for all torts
except health care liability claims. Physicians are the only class of tortfeasors against whom no cause of action may be asserted for the wrongful death of an unborn child. Section 71.003(c) provides a cause of action for negligently causing the death of an unborn child. This section was added by the 2007 Legislature. It provides the following exemption for physicians: “[T]his subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against … [a] physician or other health care provider licensed in the state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.” TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(c)(4) (West 2008).

19. Wrongful Pregnancy or Conception

There is no cause of action for damages to the child’s interest following an unsuccessful sterilization resulting in the birth of a physically healthy, as opposed to a physically deformed child. Zapata v. Rosenfeld, 811 S.W.2d 182, 184 (Tex. App.—Houston [1st Dist.] 1991, writ denied). However, like the majority of states, Texas appears to allow recovery on behalf of the parents for “general and special damages, such as pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages.” Hickman v. Myers, 632 S.W.2d 869, 871 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.).

20. Wrongful Birth

In Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984), the Texas Supreme Court upheld the right of parents to bring a “wrongful birth” suit on their own behalf where the child suffers from a defect, but held that a cause of action of “wrongful life” on behalf of the child could not be brought. The Nelson Court held that the issue of whether it is better not to be born than to be born defective is “a mystery more properly to be left to the philosophers and the theologians.” Nelson, 678 S.W.2d at 925 (quoting Becker v. Schwartz, 413 N.Y.S.2d 895 (N.Y. 1978)). The term “wrongful birth” refers to the added expense of caring for an impaired child where those expenses were proximately caused by negligent prenatal advice. Id.

21. Wrongful Life

As mentioned above, the Texas Supreme Court has held that a child who is born alive with a defect does not have a cause of action for “wrongful life.” Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984).

22. “Wrongful Continued Life”

An emerging subcategory of the wrongful life cause of action is the wrongful continued life cause of action. These cases arise when the claimant sues the health care providers for disregarding instructions not to use heroic efforts or artificial means to prolong the life of the patient. In Stolle v. Baylor Coll. of Med., 981 S.W.2d 709 (Tex. App.—Houston [1st Dist.] 1998, writ denied), the parents sued various health care providers on behalf of their daughter for disregarding their instructions not to unnecessarily prolong their child’s life. The mother gave birth to twins prematurely. One twin died immediately; the other twin lived, but suffered intracranial hemorrhaging, which is a known risk in premature infants. The parents instructed the attending physicians and the hospital not to use any heroic efforts or artificial means to prolong their daughter’s life if the occasion arose. This instruction was recorded in the medical records. The parents also signed a written Directive to Physicians which stated:

If at any time the patient whose name appears above should have an incurable condition caused by injury, disease, or illness certified to be a terminal condition by two physicians, and where the application of life-sustaining procedures would serve only to
artificially prolong the moment of his/her death and where his/her attending physician determines that his/her death is imminent whether or not life-sustaining procedures are utilized, I/we direct that such procedures be withheld or withdrawn, and that he or she be permitted to die naturally.

Approximately a month after the parents issued this directive, the infant suffered an apneic episode with accompanying bradycardia. An unnamed health care worker resuscitated the child in contravention of the parents directive and the child continued to live.

The parents sued the physicians and hospital for failing to effectuate their wishes to withhold care from their daughter because, as a result, the parents would continue to have medical expenses relating to the child’s severe brain damage. The issue before the Court was whether the health care providers were immune from liability under the Texas Natural Death Act, codified as § 672.016(b) of the Texas Health and Safety Code. The Act provides that a physician or other health care professional will not be liable for failing to effectuate a qualified patient’s directive. A “qualified patient” is a patient with a terminal condition that has been diagnosed in writing by the attending physician. A “terminal condition” is an “incurable condition caused by injury, disease, or illness that would produce death regardless of the application of life-sustaining procedures, according to reasonable medical judgment, and in which the application of life-sustaining procedures serves only to postpone the moment of the patient’s death.” TEX. HEALTH & SAFE. CODE ANN. § 672.002(8) (West 1992).

The record contained conflicting information about whether the child’s condition was a terminal condition as defined by the Act. The Court reasoned that whether the condition was terminal or not was irrelevant because, under either scenario, the health care providers would be immune from liability. Id. at 713. If the child’s condition had been terminal, she would have been a “qualified patient” as defined under the Act and, therefore, the health care providers would be immune under the Texas Natural Death Act for failing to withhold life-sustaining procedures. Id. at 714. On the other hand, if the child’s condition was not terminal, then the circumstances for withholding life-sustaining procedures contained in the parents’ written directive were not met. Under either scenario, therefore, the physicians would not be liable. Id. at 714. See also Section 43, “Negligent Disregard of Patient’s Directive,” supra.

In a case in which a child was to be born extremely premature, though the parents had previously issued a directive that “no heroic actions” be taken, medical and hospital personnel proceeded to take resuscitative measures, resulting in the survival of a child who, at the time of trial, was seven years old, legally blind, suffered from severe mental retardation, cerebral palsy, seizures, spastic quadriplegia, could not be toilet-trained, and required a shunt in her brain to drain fluids. Her condition was life-long. The Texas Supreme Court held that the defendants provided life-sustaining treatment under “emergent circumstances” as a matter of law. These circumstances provide an exception to the general rule imposing liability on health care providers for providing treatment to a minor child without first obtaining parental consent. The case was not a battery because of the “emergent circumstances”—despite the fact that the parents, in consultation with their physicians, had anticipated the emergent circumstances and issued a prior directive against emergency care. Miller v. HCA, Inc., 118 S.W.3d 758 (Tex. 2003).

23. Spoliation

Spoliation is the destruction or alteration of evidence without permission of

Texas has refused to recognize the independent tort of spoliation. Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998); Malone v. Foster, 977 S.W.2d 562 (Tex. 1998). In Trevino, the Court stated that because spoliation of evidence causes “no injury independent from the cause of action in which it arises” and held the creation of a new tort is not warranted. Id. at 952-53. Trial courts have various measures with which to punish those who destroy evidence ranging from permitting the submission of an instruction on the spoliation presumption to the jury to awarding “death penalty” sanctions. Id. at 953.

24. Wrongful Death and Survival Actions

When medical malpractice results in death, the cause of action must be brought under the Texas Wrongful Death Act and Texas Survival Statute. See TEX. CIV. PRAC. & REM. CODE ANN. §§71.001 71.011; 71.021 (West 1997). The wrongful death statute is limited to beneficiaries specially named and courts cannot expand the class of beneficiaries beyond those listed in the Act. Taylor v. Parr, 678 S.W.2d 527 (Tex. App.—Houston [14th. Dist.] 1984, writ ref’d n.r.e.). However, illegitimate children who have not been legitimized under the Texas Family Code may recover for the wrongful death of their biological father if they can prove in the wrongful death suit, by clear and convincing evidence, that they are the “child” of the decedent. See Garza v. Maverick Mkt., Inc., 768 S.W.2d 273 (Tex. 1989).

25. Physician - Patient Relationship Requirement for Wrongful Death Action

A wrongful death action does not require the existence of a physician-patient relationship. Anyone specified in the wrongful death statute as a beneficiary may recover damages arising from an injury that caused the decedent’s death. TEX. CIV. PRAC. & REM. CODE ANN. §§71.002(a), 71.004(a) (West 1997). Therefore, the existence of a physician-patient relationship with each claimant is not a prerequisite for bringing a wrongful death action. Zezulka v. Thaper, 961 S.W.2d 506 (Tex. App.—Houston [1st Dist.] 1997), rev’d on other grounds, 994 S.W.2d 635 (Tex. 1999).

26. Liability for Infection

The plaintiff always bears the burden of showing that the negligence of the health care provider caused his or her injury. Proving liability for infection is particularly difficult because medical knowledge is often insufficient to exclude all possible sources of the infection other than the defendant’s negligence. Further, infection may in fact normally occur in a given procedure. Therefore, the traditional rule that the plaintiff has the burden of proving that the defendant’s conduct was the source of the infection is indeed a heavy burden. Mullins v. Bexar Cnty. Hosp. Dist., 535 S.W.2d 44 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.). However, in a later case, the Houston court of appeals held it sufficient for the plaintiff to show that the defendant’s conduct was one of the possible sources of infection and was the probable cause of the

27. Loss of a Chance

In the seminal case of *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397 (Tex. 1993), the Texas Supreme Court refused to follow the decisions of at least 23 of its sister states by holding that Texas does not recognize the cause of action for loss of a chance. See also *Hodgkins v. Bryan*, 99 S.W.3d 669 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that the Wrongful Death Act does not authorize recovery for loss of less than an even chance of avoiding death).

However, the loss of a chance doctrine does not apply in an instance where the defendant causes a new injury. Whereas a terminally ill patient might ultimately have succumbed to his cancer, the defendant’s negligence in allowing him to sustain a fatal fall while hospitalized was still actionable. Plaintiffs were not required to show that their decedent had a greater than 50% chance of surviving his underlying terminal disease in order to prove causation against a defendant who allowed him to fall to death. *Smith v. Christus Saint Michaels Health Sys.*, No. 12–40057, 2012 WL 5489397 (C.A.5 (Tex.)).

28. Civil Rights Violation

In *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857 (Tex. App.—Amarillo 1993, writ denied), the plaintiff brought suit for the wrongful death of her husband. The decedent had been administered anesthesia by a certified registered nurse anesthetist, which resulted in profound brain damage and, ultimately, the death of the patient. The plaintiff, among other causes of action, alleged violation and deprivation of federally-protected rights embodied in 42 U.S.C. § 1983. The trial court granted summary judgment in favor of the defendants on the civil rights allegations. The appellate court affirmed the summary judgment holding that § 1983 recognizes liability for violations of duties arising out of tort law.

29. Sexual Exploitation

Texas has one of the most comprehensive statutes in the country protecting the rights of patients who have been sexually exploited by mental health care providers. See TEX. CIV. PRAC. & REM. CODE ANN. § 81.001 (West Supp. 1994); TEX. PEN. CODE ANN. § 21.14 (West Supp. 1994).

In addition to criminal sanctions, the patient also has a statutory cause of action beyond any common law cause of action. The statute makes sexual contact with a patient by a mental health care provider negligence per se. Consent by the patient is not a defense. Damages recoverable include actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown; exemplary damages and reasonable attorneys’ fees. There is also a three-year statute of limitations in such cases, which can be tolled for up to 15 years if the patient “is unable to bring the action because of the effects of the sexual exploitation, continued emotional dependency on the mental health services provider, or threats, instructions, or statements by the mental health services provider.” TEX. CIV. PRAC. & REM. CODE ANN. § 81.009 (West Supp. 1994).

In addition to this statutory cause of action, a sexually exploited patient can bring a common law action against the therapist or physician for malpractice, breach of fiduciary duty, battery and infliction of emotional distress.

In *Cluett v. Med. Protective Co.*, 829 S.W.2d 822 (Tex. App.—Dallas 1992, writ denied), the Dallas court of appeals held that sexual relations between a pediatrician and a patients’ mother did not involve the
rendition of professional services. The physician’s medical malpractice insurance was not responsible to the father of the child.

The Texas Supreme Court case of *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981) illustrates an obstacle that a plaintiff may encounter in discovery relating to a sexual contact malpractice case. In *Ex parte Abell*, the Court ruled that the identity and other information pertaining to the defendant psychologist’s other patients with whom he had sexual contact was protected from discovery by Article 5561h of the Texas Revised Civil Statutes providing for confidentiality of mental health information of individuals. See also *Lenhard v. Butler*, 745 S.W.2d 101 (Tex. App.—Fort Worth 1988, writ denied).

30. **Negligent Infliction of Emotional Distress**

In the seminal case of *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), the Texas Supreme Court abolished the cause of action of negligent infliction of emotional distress. Although not a medical malpractice case, the *Boyles v. Kerr* opinion eliminates negligent infliction of emotional distress as a separate cause of action altogether.

31. **Bystander Recovery**

Texas courts in non-malpractice cases recognize that a bystander may recover damages for negligent infliction of emotional distress where: (1) the bystander was located near the scene of the incident; (2) the shock resulted from a direct emotional impact on the bystander from the contemporaneous observance of the accident, as distinguished from learning of the incident from others after its occurrence; and (3) the bystander and victim are closely related. See *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924 (Tex. 1988).

In *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76 (Tex. 1997), however, the Texas Supreme Court eliminated bystander causes of action in medical malpractice cases. In so holding, the Court stated:

> [T]he very nature of medical treatment is often traumatic to the layperson. Even when a medical procedure proves to be beneficial to the patient, it may shock the senses of the ordinary bystander who witnesses it. A bystander may not be able to distinguish medical treatment that helps the patient and conduct that is harmful. A physician’s primary duty is to the patient, not to the patient’s relatives.

941 S.W.2d at 81.

Note, however, that an assault and rape of a nursing home patient, witnessed by the victim’s family member, did support a bystander cause of action against the nursing home for failure to protect the patient from her attacker. The cause of action, however, though brought against a “health care provider,” was not a “health care liability claim” under Article 4590i because rape is not health care and the duty to protect from known dangers is a premises liability cause of action. *Health Care Ctrs. of Tex. v. Rigby*, 97 S.W.3d 610 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

32. **Intentional Infliction of Emotional Distress**

The cause of action for intentional infliction of emotional distress is rarely seen in medical malpractice cases. For example, in *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140 (Tex. App.—Tyler 1994, writ denied), the plaintiff alleged that overhearing a nurse’s conversation with another patient regarding the complications that arise from anesthesia (i.e., that some patients die) constituted the intentional infliction of emotional distress. The plaintiff alleged that the conversation should
have been held in a private room out of earshot. In affirming the summary judgment in favor of the defendant, the Tyler court of appeals held that there was no evidence that the remark was made intentionally so that it could be heard by the plaintiff. Without evidence of intent, there is no valid cause of action for intentional infliction of emotional distress.

However, in *Escalante v. Koerner*, 28 S.W.3d 641 (Tex. App.—Corpus Christi 2000, pet. denied), the Corpus Christi court of appeals found that there was sufficient evidence to find that the mother of a twin fetus whose body was allegedly improperly disposed of by the physician suffered severe emotional distress. Specifically, the mother testified that, when she learned that there were remains of the fetus and that she was not going to be permitted to have a burial for those remains as she requested, she “broke down for about three hours” and could not get up. In addition, she vomited, had persistent migraine headaches and would not get out of bed. She also testified at trial three years after the birth that her emotional distress continued. In reversing the trial court’s directed verdict for the doctor, the appellate court found there was sufficient evidence to support the mother’s claim for intentional infliction of emotional distress.

33. Negligent Misrepresentation

In *Caldwell v. Overton*, 554 S.W.2d 832 (Tex. Civ. App.—Texarkana 1977, no writ), the plaintiff sued the defendant-doctor for negligent misrepresentation. The Texarkana court of appeals upheld the trial court’s directed verdict for the defendant on the ground that the plaintiff had failed to introduce any evidence of the standard of care, which the defendant violated in making an alleged negligent misrepresentation. The Texarkana court of appeals held that, to prove that a misrepresentation was negligently made, the plaintiff must establish that a medical standard of care exists concerning representations and that the defendant-doctor violated that standard of care. 554 S.W.2d at 834. See also *Wheeler v. Yettie Kersting Mem’l Hosp.*, 866 S.W.2d 32, 53 (Tex. App.—Houston [1st Dist.] 1993, no writ).

Texas cases dealing with negligent misrepresentation cases in other areas include: *Susser Petroleum Co. v. Latina Oil Corp.*, 574 S.W.2d 830 (Tex. App.—Texarkana 1978, no writ); *Rosenthal v. Blum*, 529 S.W.2d 102 (Tex. Civ. App.—Waco 1975, writ ref’d n.r.e.); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App.—Fort Worth 1971, writ ref’d n.r.e.); *Am. Indem. Co. v. Ernst & Ernst*, 106 S.W.2d 763 (Tex. App.—Waco 1937, writ ref’d).

34. Failure to Consult a Specialist

The general practitioner has a duty to seek a consultant for the patient when he knows or should know that a specialist is needed, that his skill, knowledge or facilities are inadequate, or that a method of treatment is ineffective. *King v. Flamm*, 442 S.W.2d 679, 781 (Tex. 1969). However, the general practitioner is not required to seek a consultant for every conceivable complication that may arise. Rather, the standard of care involved is what a reasonable physician would do in a given situation. See *Id*. Expert testimony is required to demonstrate the applicable standard from which negligence may be imposed. *Henson v. Tom*, 473 S.W.2d 258 (Tex. Civ. App.—Texarkana 1971, writ ref’d n.r.e.); *Richardson v. Holmes*, 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ ref’d n.r.e.).

35. Physician Liability Arising from Worker’s Compensation Examinations or Care

The Tyler court of appeals in *Johnston v. Sibley*, 558 S.W.2d 135 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.) held that a physician’s duty for purposes of evaluating disability for an insurance carrier ran only to the workers’ compensation insurance carrier. However, the physician’s duty to the person examined pursuant to the
physician’s contract with the workers’ compensation carrier is not to cause any bodily injury or harm during the course of the physical examination.

Importantly, the Tyler court of appeals in Johnston indicated that an examining physician may have liability for any representations made to the employee with regard to the medical findings. See also Gooden v. Tips, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ). Thus, the Tyler court of appeals implicitly recognized what the Texarkana court of appeals held in Caldwell v. Overton, 554 S.W.2d 832 (Tex. Civ. App.—Texarkana 1977, no writ)—that the doctrine of negligent misrepresentation as announced in § 552 of the Restatement (Second) of Torts applies to a physician. Thus, a physician undertaking to make a medical examination at the request of a workers’ compensation claimant had a duty to exercise reasonable care in examining the patient and providing medical information to the claimant. Caldwell, 554 S.W.2d at 834.

It is important to note that the court of appeals in Caldwell did not address issues involving a lack of a physician-patient relationship. Of course, as previously noted, court decisions have indicated that, in certain circumstances, liability may exist without a contractual relationship between the patient and physician or health care provider. See Lunsford v. Bd. of Nurse Examiners, 648 S.W.2d 391 (Tex. App.—Austin 1983, no writ).

36. Negligence of Dentists

The case of Williford v. Banowsky, 563 S.W.2d 702, 704 (Tex. Civ. App.—Eastland 1978, writ ref’d n.r.e.) exemplifies the principle that evidentiary rules and standards applicable to medical malpractice suits also apply to dental malpractice suits. Dentists in Texas have been sued for malpractice for (1) negligently performing a tooth extraction, Costa v. Storm, 682 S.W.2d 599 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Weeks v. Heinrich, 447 S.W.2d 688 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.); Gorsalitz v. Harris, 360 S.W.2d 574 (Tex. Civ. App.—Houston 1962, no writ); Devereaux v. Smith, 213 S.W.2d 170 (Tex. Civ. App.—Waco 1948, writ ref’d n.r.e.); Wilkins v. Ferrell, 30 S.W. 450 (Tex. Civ. App. 1895, no writ); (2) failing to refer a patient to a specialist when a tooth infection did not respond to treatment, Costa v. Storm, 682 S.W.2d 599, 602 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); (3) negligently performing an over-denture procedure, Tucker v. Lightfoot, 653 S.W.2d 587 (Tex. App.—San Antonio 1983, no writ); (4) negligently causing a cut in plaintiff’s gum tissue, Allison v. Blewett, 348 S.W.2d 182 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.); (5) negligently performing a root canal, Ritchey v. Crawford, 734 S.W.2d 85 (Tex. App.—Houston [1st Dist.] 1987, no writ); and (6) injuries sustained when patient swallowed a drill bit that dropped in his mouth during treatment. Lopez v. Carrillo, 940 S.W.2d 232 (Tex. App.—San Antonio 1997, writ denied).

37. Liability of Original Tortfeasor for Subsequent Medical Malpractice

One who wrongfully injures another is liable in damages for the consequences of negligent treatment by a doctor or surgeon who was selected by the injured person in good faith with reasonable care. See Cannon v. Pearson, 383 S.W.2d 565, 567 (Tex. 1964). See also City of Port Arthur v. Wallace, 171 S.W.2d 480, 483 (Tex. 1943); Henley v. Crawford, 2008 WL 34734 (Tex. App.—San Antonio 2008, no pet) (mem. op.).

38. “Patient Dumping” or the Duty to Treat in the Emergency Room

“Patient dumping” is the practice of transferring indigent patients from one hospital to another because they are uninsured and cannot afford the medical treatment they are seeking. Thompson v. St. Anne’s Hosp., 716 F. Supp. 8, 9 (N.D. Ill. 1989). For obvious reasons, this practice almost invariably arises in the emergency room setting. Hospitals traditionally had no affirmative duty to treat or render care and
could refuse to do so. *Birmingham Baptist Hosp. v. Crews*, 157 So. 224 ( Ala. 1934). However, in kinder, more modern times, a duty has evolved to treat in the emergency room setting. See Rothenberg, Who Cares?: The Evolution of the Legal Duty to Provide Emergency Care, 26 HOUS. L. REV. 21 (1989).

a. Common Law

The first case to impose a duty to treat in an emergency room of a hospital was *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961). The test set out in Manlove consists of four elements: (1) the hospital must maintain an emergency room; (2) an “unmistakable emergency” must exist; (3) there must be a well-established custom to render care in such circumstances; and (4) reliance by the injured party on the custom.

In the Texas case of *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.), the decedent was an acutely ill pregnant woman who was turned away from two hospitals, and died on her way home from a ruptured uterus. In its opinion, the Corpus Christi court of appeals espoused the principles enumerated in the Manlove test:

While a private hospital may conduct its business largely as it sees fit, liability on the part of the hospital may be predicated on the refusal of service to a patient in the case of an unmistakable emergency if the patient has relied upon the custom of the hospital to render aid in such a case.

*Valdez*, 638 S.W.2d at 114.

b. By Statute

State and federal statutes prohibit Texas hospitals from transferring a patient in an emergency situation until the patient has been “stabilized.” These are the so-called “patient anti-dumping statutes.” Under both the federal and state versions, the fact that the patient may not be able financially to afford such hospitalization or treatment is no defense. The federal statute is found in The Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), 42 U.S.C.A.§ 1395dd (2011). The Texas statute is found in the Texas Transfer Law. TEX. HEALTH & SAFETY CODE ANN., §§ 241.027-.028, 241.055-.056 (West Supp. 1992).

1) Federal Statute


In 1989, Congress passed OBRA 89, which amends sections of COBRA. The portions of OBRA 89 affecting hospitals with regard to emergency medical care are the Medicare Hospital Patient Protection Amendments of 1989. 42 U.S. 1395dd. (2011).

Federal law also controls emergency room conduct. Hospitals are liable for EMTLA violations for refusing to treat patients who are unable to pay when those patients present to the emergency room either in active labor or suffering from a bona fide emergency condition. 42 U.S.C. § 1395dd. EMTLA obligates a hospital to screen and stabilize patients arriving in the emergency room suffering from an emergency medical condition and, if the hospital has actual knowledge of the emergency condition, it must then provide examination, treatment and stabilization of the patient before transfer is permissible. “A patient can also prove an EMTLA violation by showing that the hospital provided such a cursory screening that it amounted to no
screening at all.” Guzman v. Mem’l Hermann Hosp. Sys., 409 Fed. App’x. 769, 773 (5th Cir. 2011). The EMTLA was enacted to address patient “dumping” and to create a new cause of action not available under state law for failure to treat. Miller v. Med. Cir. of Sw. La., 22 F.3d 626, 628 (5th Cir. 1994). It was not intended as a substitute for state medical malpractice actions or to provide a federal remedy for misdiagnosis or medical negligence. Summers v. Baptist Med. Cir. Arkadelphia, 91 F.3d 1132, 1137 (8th Cir. 1996). The statute imposes two requirements on hospitals: (1) that the hospital provide appropriate medical screening to determine whether a medical emergency exists; and (2) that the hospital stabilize the medical condition or transfer the individual to another medical facility. 42 U.S.C. §1395dd(b).

In order to meet the first requirement of “appropriate screening,” the hospital must determine what their screening procedures will be and apply them uniformly to all individuals who come into the emergency room. Summers, 91 F.3d at 1138. Thus, for a claimant to prove that the hospital’s screening procedures are not appropriate, the claimant must establish that he did not receive the same screening examination as every other emergency room patient. Casey v. Amarillo Hosp. Dist., 947 S.W.2d 301 (Tex. App.—Amarillo 1997, writ denied). If the patient fails to prove inappropriate screening, a cause of action may still lie under the EMTLA for failing to stabilize or transfer. In order to prove this second requirement, a claimant must show that the emergency medical condition was “within the actual knowledge of the doctors on duty.” Cleland v. Bronson Health Care Grp., 917 F.2d 266, 269 (6th Cir. 1990).

In Casey v. Amarillo Hosp. Dist., 947 S.W.2d 301 (Tex. App.—Amarillo 1997, writ denied), the parents sued the hospital district under the EMTLA after their child was sent home from the emergency room and died the following morning of meningitis. The Amarillo court of appeals clearly distinguished a cause of action under EMTLA from a medical negligence action, further concluding that the appropriateness of screening is not to be judged against a negligence standard. Further, the Casey court held that, under the “actual knowledge” requirement, the hospital’s actions are to be viewed in terms of the actual diagnosis and not in terms of what the diagnosis should have been. Thus, while one of the doctors entered a “Code 99” notation on the child’s chart, the doctor’s testimony that neither of them thought his condition constituted an emergency was completely uncontroverted by the plaintiffs, who offered no evidence of actual knowledge. Accordingly, the court of appeals held that no genuine issue of material fact existed.

In Watts v. Hermann Hosp., 962 S.W.2d 102 (Tex. App.—Houston [1st Dist.] 1997, no pet.), the Houston court of appeals interpreted the “stabilization” requirement under the statute. In Watts, the patient brought an action against the hospital for failure to treat the emergency medical condition created by amputation of his leg prior to discharging him. First, the court of appeals held that generally no cause of action will lie under the EMTLA when there is not a marked worsening of the patient’s condition by the next day. See also Cleland, 917 F.2d at 271. Second, the Watts court adopted the holdings of other courts of appeals that expert testimony derived from “hind-sight” expert analysis to determine if a medical emergency existed is insufficient to impose liability under the EMTLA. See also Holcomb v. Humana Med. Corp., 831 F. Supp. 829, 835 (M.D. Ala. 1993), aff’d 30 F.3d 116 (11th Cir. 1994); Baber v. Hosp. Corp. of Am., 977 F.2d 872, 880 (4th Cir. 1992). The court held that the meaning of “stabilization” under the statute means that the discharge itself will cause “no material deterioration of the condition before transfer,” and that the evidence presented conclusively established that the patient was stabilized. Thus, the court of appeals
affirmed the trial court’s grant of summary judgment.

As these cases demonstrate, the Emergency Medical Treatment and Labor Act (EMTALA) applies to only a very narrow category of cases.

This is played out in Camp v. Harris Methodist Fort Worth Hosp., 983 S.W.2d 876 (Tex. App.—Fort Worth 1998, no pet.). In Camp, the emergency room physician determined that the patient was suffering from chronic anemia severe enough to most likely cause her death if she did not receive further medical treatment. The patient left the hospital and died the next day. In his testimony at trial, the emergency room physician stated that, while he thought that death was a risk to the patient, he could not say that death was certain to occur. The court of appeals held that whether the physician should have known that the patient had an emergency medical condition was not at issue. The only issue that would give rise to liability under EMTALA was whether the doctor actually made this determination and then failed to act properly. Because the doctor did not actually determine that the patient was suffering from an emergency, he was immune from suit under EMTALA. Id. at 881.

Thus, to prevail on the EMTLA claim, the plaintiff must show that the hospital concluded, through the actual knowledge of the doctors on duty, that the patient was suffering from an emergency medical condition and that the hospital turned the patient away or attempted to transfer the patient before stabilizing him or her. Id. However, because EMTALA is not a negligence statute, the hospital’s action is not judged by the reasonably prudent hospital standard. The hospital’s actions are viewed only in terms of actual, subjective diagnosis. Id. Because of that limitation, the hospital’s negligent determination of whether the patient was suffering from an emergency medical condition does not give rise to an EMTLA cause of action.

2) Texas Legislation


39. Sexual Abuse & Repressed Memories

Does the discovery rule apply to delay the accrual of a cause of action against a parent or other adult in a position of authority for the sexual abuse of a child when the plaintiff alleges total suppression of any memory of the abuse?

The Texas Supreme Court addressed the issue in S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996). In S.V. v. R.V., the plaintiff intervened in her parents’ divorce proceeding, alleging that her father was negligent by sexually abusing her until she was 17-years old. Because the plaintiff did not sue her father within two years of her 18th birthday, as required by the applicable statute of limitations, her action would be barred as a matter of law unless the discovery rule permitted her to sue within two years of when she knew or reasonably should have known of the alleged abuse. The Supreme Court held that the discovery rule did not apply because the plaintiff’s claims were not “objectively verifiable.” The plaintiff had three experts testify that she was suffering from psychological disorders that prevented her from discovering the fact that she had been sexually abused by her father. In ruling that this evidence was not sufficient, the Court cited other kinds of evidence that it would find supplied the objectively verifiable aspect, including a confession from the
abuser, a criminal conviction of the abuser, contemporaneous records of the abuse such as letters or diaries, photographs of the abuse, medical records describing injuries resulting from the abuse and eyewitness accounts of the abuse. Justice Owen’s intelligent dissent pointed out both the improbability of such evidence and the anachronistic reasoning (akin to the requirement, now obsolete, that rape victims provide corroboration of their testimony).

40. Fear of AIDS

In Drury v. Baptist Mem’l Hosp. Sys., 933 S.W.2d 668 (Tex. App.—San Antonio 1996, writ denied), the plaintiff sued the defendant hospital for medical malpractice and violations of the Texas Deceptive Trade Practices Act when, during an operation, the plaintiff received “banked” blood despite her stated preference that the physician and hospital use only direct donor blood. The plaintiff sought damages for mental anguish based on her fear of contracting the Human Immune Deficiency virus (HIV) and, ultimately, the Acquired Immune Deficiency Syndrome (AIDS). In holding that the plaintiff could not recover for these damages because her fear was not reasonable, the San Antonio court of appeals reasoned that the plaintiff could not recover when she failed to establish that she was actually exposed to HIV. Id. at 674. In the absence of some proof that the plaintiff was actually exposed to the disease-causing agent, the Drury court held that any fear of contracting HIV or AIDS is, as a matter of law, unreasonable. Id. at 675.

41. Negligent Disregard of Patient’s DNR Directive

There may be no liability for the negligent disregard of a patient’s instructions not to use artificial means to prolong a patient’s life. In Stolle v. Baylor Coll. of Med., 981 S.W.2d 709 (Tex. App.—Houston [1st Dist.] 1998, writ denied), the Houston court of appeals held that there was no liability for the defendants’ failure to abide by the parents’ instructions not to use “heroic efforts” to save the life of their child.

The mother had given birth to twins, one who died immediately after birth and one who remained severely brain-damaged. The parents directed the physicians and hospital not to use heroic efforts to prolong the life of their child. A little over three months after her birth, the child suffered an apneic episode with accompanying bradycardia. A nurse working for the hospital administered chest compressions and saved the child’s life.

The parents sued the hospital and physicians, alleging that they negligently violated their directive not to use life-sustaining measures and this negligence resulted in further brain damage to the child, prolonged the child’s life and resulted in extraordinary costs in caring for the child for the rest of her life. The defendants moved for summary judgment on the basis that they were immune from liability by the § 672.016(b) of the Texas Natural Death Act.

The Texas Natural Death Act provides that a qualified patient may ask that care be withheld so that the life is not artificially prolonged. A “qualified patient” is a patient with a “terminal condition.” A “terminal condition” is defined by the Act as an “incurable condition caused by injury, disease, or illness that would produce death regardless of the application of life-sustaining procedures.” The Stolle court held that whether the child was a “qualified patient” was immaterial because the defendants would be immune either way. If the child did have a terminal condition, she would be a “qualified patient” and the defendants would be immune under the Texas Natural Death Act, which provides that no caretaker will be subject to liability for failing to effectuate a qualified patient’s directive. TEX. HEALTH & SAFETY CODE ANN. § 672.016(b) (West 1992). Moreover, if the child did not have a terminal condition, then the conditions for invoking the written directive to physicians were not met, meaning that the defendants
would be under a duty to take reasonable measures to save the child’s life. Under either scenario, the defendants were not liable.

42. Long-Arm Jurisdiction, Out-of-State Physicians

A Michigan physician who agreed to prescribe post-operative physical therapy through a Texas health care provider had insufficient contacts with Texas in order to be subject to personal jurisdiction in the courts of this state. *Brocail v. Anderson*, 132 S.W.3d 552 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)

VI. PLEADING AND PROVING THE HOSPITAL LIABILITY CASE

A. Proving the Plaintiff’s Cause of Action

1. Vicarious Liability
   a. Liability of Hospitals for Negligent Acts of Physician

   1) Physician as Independent Contractor

   As a general rule, medical practitioners are independent contractors in relation to hospitals, thus the hospital is not liable for the doctor’s negligent acts. *Schloendorff v. Society of New York Hosp.*, 211 N.E. 125 (N.Y. 1914). However, it has been implied that the rule might be different where the physician is provided by the hospital and not chosen by the patient. *Jeffcoat v. Phillips*, 534 S.W.2d 168 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.).

   Despite the general rule that physicians are considered independent contractors, some doctors can be categorized as hospital employees. *See Young v. Baylor Univ. Med. Ctr. Found.*, 607 S.W.2d 651 (Tex. Civ. App.—Fort Worth 1980, no writ).

   Much evidence is required in order for a plaintiff to prove that a physician is an employee rather than an independent contractor of a hospital. *Farlow v. Harris Methodist Fort Worth Hosp.*, 284 S.W.3d 903 (Tex. App.—Fort Worth 2009, pet. denied) was a case in which the plaintiff proved the existence of the following documents, which plaintiff claimed showed control: a Physician Recruitment Agreement, a Relocation Reimbursement Addendum, a Collections Guaranty Addendum and other documents. Further, the plaintiff attempted to show actual control by delineating the following: 1) the defendant physician used the hospital’s equipment to perform surgery (not his own), 2) the operating room was assigned as scheduled by a hospital employee, 3) the hospital assigned nurses—that is, they were not requested specifically by the physician, and 4) the physician, when on call, was required to respond within thirty (30) minutes. These facts, however, were insufficient to show actual control or an agency relationship with the hospital.

   2) Duty of Hospital to Restrain Mentally Ill Patient

   In *Texarkana Mem’l Hosp. v. Firth*, 746 S.W.2d 494 (Tex. App.—Texarkana 1988, no pet.), the decedent, a mentally-ill patient, jumped through a window in her room on the fourth floor. Prior to her jump, the patient had told various nurses of her intentions. As a result, she was sedated but left alone in her room until the next morning. Because the “closed” units were full, the patient was left in a room with a window. Her survivors brought a wrongful death suit against the hospital seeking both actual and exemplary damages. The court of appeals affirmed the trial court’s judgment for the plaintiffs holding that the jury could have properly found that the failure to have “screens” on the window was a circumstance created by a policy decision of the hospital. Further, since the nurses in question were “vice-principals” they could legally bind the hospital. Thus, a finding of gross negligence against the hospital was affirmed on the grounds that the nurses failed to monitor and observe the decedent properly. *Id.*
The Concepts of Apparent Agency and Agency by Estoppel

(i.) Generally

Courts often refer synonymously to the doctrine of apparent agency as the “ostensible agency” doctrine or the “holding out” theory. However, apparent agency differs dramatically from the separate doctrines of actual agency and vicarious liability. Generally, a third party must prove the following three elements to recover against a principal for the apparent agent’s negligence: (1) that the person dealing with the agent reasonably believed in the agent’s authority; (2) that the principal’s act or omission generated such belief; and (3) that the third person relied on the agent’s authority and was not negligent in so doing. See RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Conversely, the doctrine of vicarious liability typically requires a finding that the principal had control over the tortfeasor and the doctrine of actual agency focuses on the existence of a relationship between the principal and the agent. Neither control by the principal nor a relationship with the principal are necessary to establish apparent agency.

(ii.) Apparent Agency in the Hospital Setting

Apparent agency is found in the hospital setting where the patient reasonably believes, as a result of the hospital’s representations, that the physician is acting under the hospital’s authority. An apparent agency situation frequently arises in hospital emergency room treatment when a patient travels to a hospital known to have emergency facilities for emergency medical care. Under these circumstances, the patient often reasonably believes that the emergency room doctor treating him is an agent or employee of the hospital. In Brownsville Med. Ctr. v. Gracia, 704 S.W.2d 68 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.), the Corpus Christi court of appeals adopted the concept of apparent agency as advanced in the Restatement. See RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Gracia was the first Texas case to apply apparent agency to a hospital setting, although it was arguably foreshadowed by Young v. Baylor Univ. Med. Ctr. Found., 607 S.W.2d 651 (Tex. Civ. App.—Fort Worth 1980, no writ) (court discussed vicarious liability and seemed to be willing to base such liability on either actual or apparent agency).

In Gracia, a nine-year old boy was rushed to the defendant-hospital’s emergency room with severe stomach pains. The emergency room doctor told the plaintiffs that their child was suffering from “a simple case of anemia” and the doctor sent the boy home. When the child died from an acute appendicitis and traumatic abdominal injuries, the plaintiffs sued the defendant-hospital for the emergency room physician’s negligent refusal to admit the boy. Although the hospital claimed that the doctor was an independent contractor, the jury found that such doctor was an “ostensible agent” of the hospital. The record reflected two factors in support of an apparent agency representation by the hospital: (1) the patients did not seek treatment from a particular doctor, but instead sought treatment from the defendant-hospital; and (2) the hospital directly billed its patients for the emergency room doctors’ services. In determining that the hospital was liable for the acts of its apparent agent, the jury made the following two findings: (1) that Brownsville Medical Center held itself out to the general public as providing to the public reasonably competent emergency room physicians; and (2) that appellees relied on said representations by Brownsville Medical Center.

Conversely, where the record shows that no employment contract exists, that the physician bills patients directly for his services, that the physician only had staff privileges, or that the physician does not maintain an office or set hours at the hospital, ostensible agency may not be found to exist. See Lopez v. Central Plains Reg’l Hosp., 859 S.W.2d 600 (Tex. App.—

The Texarkana court of appeals recently reiterated that ostensible agency is established only when the hospital engages in some affirmative conduct that holds the doctor out as its agent or employee or when it knowingly allows the doctor to hold himself out as an employee. Garrett v. L.P. McCuistion Comty. Hosp., 30 S.W.3d 653 (Tex. App.—Texarkana 2000, no pet.).

(iii) Distinguishing Apparent Agency from Agency by Estoppel

While these two concepts are sometimes considered by the courts to be synonymous, they are distinct. Apparent agency focuses on reliance by third parties on representations by the principal. Agency by estoppel is based on the principal’s failure to take reasonable action to notify the third party of the nonexistence of a principal-agent relationship. RESTATEMENT (SECOND) OF AGENCY § 8 (1958). The Texas Supreme Court has held that, to the extent that apparent agency theory conflicts with that of agency by estoppel, the Court declines to adopt or recognize it. Sampson v. Baptist Mem’l Hosp. Sys., 969 S.W.2d 945 (Tex. 1998).

In the hospital setting, agency by estoppel is found most often where the hospital failed to inform the patient that the physician involved was not actually its employee or agent under circumstances where the patient would reasonably believe that he was. Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433 (Mich. 1978). In that case, the hospital failed to put the patient on notice that the physicians were independent contractors rather than its employees; therefore, the hospital was estopped from denying that the physicians were its employees.

(iv) Agency by Estoppel

The doctrine of agency by estoppel has been applied to malpractice cases in Texas. In Smith v. Baptist Mem’l Hosp. Sys., 720 S.W.2d 618 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.), the San Antonio court of appeals discussed both the doctrines of apparent agency and agency by estoppel. As noted above, the crucial difference between such doctrines is that apparent agency requires some overt act or representation, while agency by estoppel does not. Compare RESTATEMENT (SECOND) OF AGENCY § 267 (1958), with RESTATEMENT (SECOND) OF AGENCY § 8(b) (1958).

(v) Apparent Agency Under the Texas Tort Claims Act

Several Texas cases have held that, while a governmental entity can be vicariously liable for the negligence of an employee under the Texas Tort Claims Act, it cannot be liable for the negligence of an apparent agent. For instance, in Dumas v. Muenster Hosp. Dist., 859 S.W.2d 648 (Tex. App.—Fort Worth 1993, no writ), the Fort Worth court of appeals held that the parents could not sue a government hospital for the death of their son due to the alleged negligence of one of the physicians working at the hospital. Quoting from Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30 (Tex. 1983), the Dumas court held that a governmental entity can only be liable for the acts of its employees. Because the physician involved in Dumas was an independent contractor and not an employee of the hospital, the hospital was immune from any liability under the Texas Tort Claims Act. See also Mitchell v. Shepperd Mem’l Hosp., 797 S.W.2d 144 (Tex. App.—Austin 1990, writ denied); Harris v. Galveston Cnty., 799 S.W.2d 766 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Dumas and similar cases ignore the plain and simple language of the Texas Tort Claims Act, which provides that a governmental entity will be liable for injury or death caused by the condition or use of
tangible property “if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West Supp. 1993). Under this provision, it would seem that, since a private hospital is liable for the actions of its physicians who are merely independent contractors under the doctrine of apparent agency, a government hospital should also be liable under the same circumstances.


4) Non-Delegable Duty of Hospitals

Commonly, hospitals will claim that the physician being sued is not their employee or agent, but is instead an independent contractor. Thus, a hospital seeks to shield itself from liability by claiming that it is not responsible for the results of negligently performed health care within the hospital. This tactic was affirmed by the San Antonio court of appeals. Sampson v. Baptist Mem’l Hosp. Sys., 940 S.W.2d 128 (Tex. App.—San Antonio 1996), rev’d on other grounds, 969 S.W.2d 945 (Tex. 1998) (refusing to find such non-delegable duty in malpractice action against hospital).

5) Vicarious Liability

Texas does not impose a non-delegable duty on hospitals for the malpractice of emergency room physicians nor does it recognize a cause of action for apparent agency in the emergency room context. Sampson v. Baptist Mem’l Hosp. Sys., 940 S.W.2d 128, 137-38 (Tex. App.—San Antonio 1996), rev’d on other grounds, 969 S.W.2d 945 (Tex. 1998). (“To the extent that the Restatement (Second) of Torts § 429 [apparent agency] proposes a conflicting standard for establishing liability, we expressly decline to adopt it in Texas.”).

6) Joint Venture

In addition to the previously-discussed theories, which may be utilized when the hospital attempts to insulate itself from liability by contracting with an independent association for the provision of physicians, it must be remembered that the contract itself may impute liability from the association to the hospital. While no Texas courts have addressed this legal theory in the hospital setting, Texas has long recognized the concept that a combination of persons who are engaged in the joint prosecution of a particular transaction for their mutual benefit or profit may be liable for the tortious acts of each other. See, e.g., Shoemaker v. Estate of Whistler, 513 S.W.2d 10 (Tex. 1974); Woolard v. Mobil Pipeline Co., 479 F.2d 557 (5th Cir. 1973), cert. denied, 414 U.S. 1025 (1973). The requisite elements of a joint venture are the following: (1) a mutual right of control; (2) a community of interest; (3) a right to share in profits; and (4) sharing of costs, expenses or losses. See e.g., Ayco Dev. Corp. v. G.E.T. Servs. Co., 616 S.W.2d 184 (Tex. 1981); Coastal Plains Dev. Corp. v. Micrea, Inc., 572 S.W.2d 285 (Tex. 1978); Price v. Wrather, 443 S.W.2d 348 (Tex. Civ. App.—Dallas 1969, writ ref’d n.r.e.).


7) Joint Enterprise

To hold a hospital liable under the theory of joint enterprise, a plaintiff must prove a “community of pecuniary interest”—not just a “common business or pecuniary interest.” St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 544 (Tex. 2003).
8) Standing to Invoke Medical Practices Act

Since Article 4495b regulates doctors, not hospitals, it has no application to a factual determination of whether or not a hospital negligently allowed a physician to practice medicine without a Texas license in violation of the act. *Lopez v. Central Plains Reg’l Hosp.*, 859 S.W.2d 600 (Tex. App.—Amarillo 1993, no writ).

9) Hospital Liability for Residents

A resident “employed” by a medical foundation, though working at a hospital, might not be an “employee” of the hospital for liability purposes. (This holding is described by Justice Enoch, in his dissenting opinion, as “quite literally nonsense.”). *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 544 (Tex. 2003).

(i). Hospital Liability for Gross Negligence

In some circumstances punitive damages are recoverable in health care liability claims. A plaintiff must, however, prove such claims by clear and convincing evidence. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004), rev’d on other grounds, 271 S.W.3d 238 (Tex. 2008). In *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361 (Tex. 1987), the jury found that the hospital was grossly negligent in failing to provide proper facilities to monitor the blood gases of premature infants even though it had the financial ability to obtain the necessary facilities. *In Texarkana Mem’l Hosp. v. Firth*, 746 S.W.2d 494 (Tex. App.—Texarkana 1988, no pet.), the jury found that the hospital was grossly negligent in its care of the deceased, a psychiatric patient who jumped to her death from a hospital window.

To establish gross negligence for the purpose of awarding punitive damages, the evidence must show an objective element and a subjective element. That is, the evidence must establish that: 1) when viewed from the actor’s standpoint, the act or omission involved an extreme degree of risk, considering the probability and magnitude of potential harm to others, and 2) the actor must have actual, subjective awareness of the extreme risk, yet proceed with conscious indifference to the rights, safety or welfare of others. *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728 (Tex. App.—Houston [14th Dist.] 1996, no writ). See also Tex. Civ. Prac. & Rem. Code Ann., § 41.001(7)(B) (West 1997) (definition of malice).

Section 41.001 of the Texas Civil Practice and Remedies Code defines “malice,” for the purposes of awarding punitive damages, both as it is defined above and as “a specific intent by the defendant to cause substantial injury to the claimant.” *TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7)(A) (West 1997).*

2. Direct Corporate Liability

a. Direct Corporate Hospital Liability Doctrine

The doctrine of direct corporate hospital liability is recognized by courts throughout the United States. The trend toward this doctrine originated with the case of *Darling v. Charleston Cmty. Hosp.*, 200 N.E.2d 149 (Ill. App. Ct. 1964), aff’d, 211 N.E.2d 253 (Ill. 1965), cert. denied, 383 U.S. 946 (1966). This concept is based upon a duty owed by the hospital directly for the patient’s care, management and safety.

The doctrine of corporate hospital liability has developed from the emergence of modern hospitals as independent, organized, integrated, high-tech health care delivery systems. Modern hospitals, through voluntary boards and professional staff personnel, have the authority and capacity to be responsible for the overall governance of the health care system to assure quality care and treatment for patients within the system. *See Mulholland, The Evolving Relationships Between Physicians and Hospitals*, 22 TORT INS. L.J. 295 (1987).
The theory of direct corporate hospital liability is recognized in Texas. For example, professional associations can be held liable under a direct liability theory even if their principals are found not to be negligent in their individual capacities. See, e.g., Battaglia v. Alexander, 93 S.W.3d 132 (Tex. App.—Houston [14th Dist.] 2002, rev’d on other grounds, 177 S.W.3d 893 (Tex. 2005). In Battaglia, individual anesthesiologists, each of whom were the sole members of their Professional Associations, contracted to provide anesthesia services for a hospital. Though the individual anesthesiologists were found not to have been negligent in the incident in question, their P.A.s could still be held liable for failing to appropriately staff, supervise, and manage their respective anesthesia departments.

b. Negligent Credentialing

The cause of action in Texas for improperly-credentialed physicians is a malice cause of action. Agbor v. St. Luke’s Episcopal Hosp., 952 S.W.2d 503 (Tex. 1997). Confusingly, Agbor was followed by Garland Comty. Hosp. v. Rose, 156 S.W.3d 541 (Tex. 2004), which did two interesting things with regard to negligent credentialing causes of action: First, the Court “assume[d] without deciding” that Texas recognized such claims, and, second, the Court, throughout the extensive opinion, referred to such claims as negligent credentialing, not malicious credentialing. Ultimately, the Court held “that a claim for negligent credentialing is a health care liability claim under the MLIIA.” 156 S.W.3d at 541.

Though all of the conduct occurred prior to the plaintiff’s admission to the hospital, the Court opined:

[R]egardless of when the acts occurred, the allegations all revolve around the same basic premise: that the Hospital put [the plaintiff] at risk by allowing Dr. Fowler to treat her. It makes no sense to conclude that some credentialing claims are subject to the MLIIA and others are not, depending upon what point in time the credentialing decisions occurred… When a Plaintiff’s credentialing complaint centers on the quality of the doctor’s treatment, as it does here, the hospital’s alleged acts or omissions in credentialing are inextricably intertwined with the patient’s medical treatment and the hospital’s provision of health care.

Id. at 545-46.

Interestingly, in a footnote, the Court stated that it had “never formally recognized the existence of a common-law cause of action for negligent credentialing, but [would] assume for purposes of this case that such a claim exists.” Id. at 542 n.1. The opinion, throughout, carried this assumption forward and implicitly answered the question raised in Agbor v. St. Luke’s Episcopal Hosp., 952 S.W.2d 503 (Tex. 1997) as to whether or not a claim for negligent credentialing exists in Texas.

Yet the Court retreated almost immediately from its use of the “negligent” credentialing language in an opinion reinforcing the stringency of the burden of proof in malice cases, while nonetheless reminding practitioners that the malice element of a malicious credentialing cause of action must be proven “only” by a preponderance of the evidence (not by “clear and convincing evidence”). Romero v. KPH Consol., Inc., 166 S.W.3d 212 (Tex. 2005).

Documents relating to the initial credentialing process of a medical peer review committee are protected from discovery by § 5.06 of Article 4495b of the Texas Revised Civil Statutes (recodified as Subtitle B, §§ 151.001 to 165.160 of the Texas Occupations Code).

A further factor making credentialing claims extraordinarily difficult to prosecute is that discovery of any documentation about the process is virtually impossible. For example, a plaintiff is barred from discovery of even initial credentialing information pertaining to physicians on a hospital staff. Brownwood Reg’l Hosp. v. 11th Court of Appeals, 927 S.W.2d 24 (Tex. 1996); Mem’l Hosp. – The Woodlands v. McCown, 927 S.W.2d 1, 8 (Tex. 1996).

c. Negligence in Failing to Supervise

The Houston court of appeals reversed a summary judgment and held that a fact issue existed regarding the hospital’s control over a physician. Berel v. HCA Health Servs. of Tex., Inc., 881 S.W.2d 21 (Tex. App.—Houston [1st Dist.] 1994, writ denied). In Berel, the plaintiffs alleged that they were wrongly admitted to a psychiatric hospital without proper testing. Because the hospital had a quality assurance committee, which could overrule the admission decisions of the psychiatrist, the court ruled there was a fact issue as to whether or not the committee had sufficient control of the psychiatrist to hold the hospital liable. *Id.*

The Fort Worth court of appeals has addressed a hospital’s direct liability for failure to supervise as well. In LaCroix, the plaintiff and her family sued the hospital for damages for the hypoxic injuries she suffered during obstetrical anesthesia. Denton Reg’l Med. Ctr. v. LaCroix, 947 S.W.2d 941 (Tex. App.—Fort Worth 1997, writ denied). The hospital policies provided for an anesthesiologist to perform a preanesthesia evaluation, discuss with the patient the anesthesia plan, and supervise a CRNA by being “physically present or immediately available in the operating suite.” The plaintiff specifically alleged that, in addition to the negligence of the physician and nurse anesthetist, the hospital was directly liable for her damages by entering into a contract with an anesthesia provider that controverted its own hospital policies. The court of appeals, relying on the expert testimony and other factual support in the record, concluded that the evidence was legally and factually sufficient to support a finding that the hospital owed a duty to the plaintiff to have an anesthesiologist provide or supervise all of her anesthesia care and that its breach of this duty was the direct cause of her brain injury.

In addressing the defendant’s points of error, the LaCroix court carefully distinguished this case from cases involving vicarious liability. Arguing that the court of appeals erred under theories of vicarious liability, the defendant pointed out that a defendant can only be held vicariously liable under respondeat superior or agency theories if the employee or agent is negligent and proximately causes the occurrence in question. The court of appeals held that, while the defendant’s recitation of the law was correct, vicarious liability did not apply to the direct liability claims against the hospital.

The LaCroix plaintiff’s primary claim against the hospital was one of direct liability, involving the hospital’s contractual arrangement with the anesthesia provider that contradicted its own internal policies and standards. Because the plaintiff’s claim involved the hospital’s breach of a duty owed directly to plaintiff, not mediated by the negligence of other health care providers, the rules governing vicarious liability do not apply. Thus, the jury’s ability to find the other health care providers negligent is irrelevant to a consideration of the hospital’s breach of duty to the plaintiff that directly caused her injury. Under these facts, the jury was free to hold the hospital culpable without finding liability on the part of any other defendant.

A direct liability claim arises from the negligent performance of a duty owed directly to the patient. Among these duties are: a duty to provide its patients with appropriate and usable medical equipment, Bellaire Gen. Hosp. v. Campbell, 510
S.W.2d 94, 98 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref’d n.r.e.); a duty to keep its premises in a reasonably safe condition, Charrin v. Methodist Hosp., 432 S.W.2d 572, 574–75 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ); a duty to the patient not to negligently allow termination of medical care, Garcia, 704 S.W.2d at 77; a duty to use reasonable care in formulating policies and procedures that govern its medical staff and nonphysician personnel, Air Shields, Inc. v. Spears, 590 S.W.2d 574 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.); a duty to exercise reasonable care in the selection of its medical staff and to periodically monitor and review the medical staff’s competency. Park North Gen. Hosp. v. Hickman, 703 S.W.2d 262 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).

d. Liability for nursing negligence

Hospitals have always had respondeat superior liability for the negligence of their nurse employees. Nurses are required to act non-negligently and to follow appropriate standards of nursing practice. Practitioners should be extremely careful to clearly delineate nursing from medical negligence, however, as nurses are neither required nor permitted to make medical judgments or diagnoses. A confusing case seems to conflate two concepts: first, that a nurse is required by the Nurse Practice Act to know the condition he or she is treating and, second, that knowing a medical diagnosis is not the same as making the diagnosis. Methodist Hosp. v. German, 369 S.W.3d 333 (Tex. App.—Houston [1st Dist.] pet. denied).

e. Negligence in Selection of Nursing Home Staff

A nursing home has also been held liable for not exercising reasonable care in the selection of its nursing staff. Deering's W. Nursing Ctr. v. Scott, 787 S.W.2d 494 (Tex. App.—El Paso 1990, writ denied).

f. Negligence in Retention of Incompetent Physicians

Prior to the Supreme Court’s decision in Agbor v. St. Luke’s Episcopal Hosp., 952 S.W.2d 503 (Tex. 1997), a hospital was also liable for negligence in retaining an incompetent physician on its medical staff where the hospital had knowledge or reason to know that the physician was incompetent. Park North Gen. Hosp. v. Hickman, 703 S.W.2d 262 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.). The knowledge required of hospitals in these circumstances could be either actual or constructive. However, in Agbor, a case addressing negligent credentialing, the Supreme Court effectively abolished such a cause of action by imposing on claimants a duty to prove that the hospital acted with malice when it credentialed the negligent physician. Because negligent retention and negligent credentialing are factually closely related, it is arguable that Agbor imposes the same proof problems on a claimant bringing a negligent retention cause of action. See also KPH Consol., Inc. v. Romero, 102 S.W.3d 135 (Tex. App.—Houston [14th Dist.] 2003), aff’d, 166 S.W.3d 212 (Tex. 2005) (demonstrating the extreme difficulty of proof of the malice requisite under Agbor).

A hospital has a duty, however, to monitor and periodically review the competency of its medical staff physicians. Park North Gen. Hosp. v. Hickman, 703 S.W.2d 262 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).

g. Negligence in Formulating or Enforcing Rules or Policies

A hospital is liable for negligence in the formulation or enforcement of its rules or policies for health care in the hospital. Air Shields, Inc. v. Spears, 590 S.W.2d 574 (Tex. App.—Waco 1979, writ ref’d n.r.e.). In Spears, the Waco court of appeals held that the defendant hospital was liable for following its own negligently-formulated policies that allowed oxygen usage for premature babies.

h. Inadequate Facilities
It has been held that inadequate facilities and a failure to warn thereof may render a hospital or clinic liable for the patient’s injuries. Such a lack of facilities may give rise to an award of punitive damages. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004), rev’d on other grounds, 271 S.W.3d 238 (Tex. 2008). In *Hernandez v. Smith*, 552 F.2d 142 (5th Cir. 1977), an obstetrical clinic, which had no facilities for caesarean delivery, was held liable for the unsuccessful delivery and resulting death of a fetus. The clinic’s liability was based on its failure to inform the patient that facilities for caesarean delivery were not available when she had contracted for delivery at the clinic. In its decision, the Fifth Court of Appeals noted that the hospital might have discharged its liability to the patient by warning of the deficiency. Punitive damages were also awarded because the office manager of the clinic failed to advise the plaintiff of the lack of facilities and such conduct demonstrated a conscious disregard for the plaintiff’s welfare.

In *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, the Texas Supreme Court held that the evidence was sufficient to support gross negligence on the part of hospital for its decision not to have echocardiogram services on standby for its emergency medical services. 271 S.W.3d 238, 253 (Tex. 2008) (“In sum, there is sufficient evidence to support the jury's conclusion that Columbia Medical acted with conscious indifference to an extreme risk of serious injury when it (1) elected to outsource echo services without a guaranteed response time while providing emergency services, (2) failed to communicate this limitation to its medical staff so they could consider other options to treat critical care patients, and (3) delayed obtaining the echo in spite of the serious risk to Hogue's health....[However,] [w]e do not hold that Texas law requires all hospitals to provide all services to all patients.”).

i. Hospital Liability for Refusal to Admit or Premature Discharge

In *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.), the Corpus Christi court of appeals held that a hospital could be liable for its refusal to admit an emergency patient.

In *Brownsville Med. Ctr. v. Gracia*, 704 S.W.2d 68 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.), the Corpus Christi court of appeals relied on Restatement (Second) of Torts § 323, comment c, which discussed the case in which a hospital undertook to treat a minor and transferred him to a community hospital when it was determined that he could not pay. Because he was transferred at a time when his needs were of an acute nature, a direct independent duty was incurred by the hospital and the breach of which was a proximate cause of the minor’s injuries.

j. Liability of Corporate Officers

Although corporate officers are normally insulated from personal liability for their activities performed in the scope of their duties for the corporation, a corporate officer may be held individually liable for tortious conduct if he knowingly participates in the conduct or has actual or constructive knowledge of the conduct. In *Portlock v. Perry*, 852 S.W.2d 578 (Tex. App.—Dallas 1993, writ denied), the Dallas court of appeals held that the owner and president of a medical clinic could not be held personally liable for medical malpractice when the defendant was not medically trained and had no background in the health care industry. The defendant’s only act, hiring a radiology consultant and administrator who in turn hired the physician and technicians, was insufficient to constitute participation in the conduct which gave rise to the lawsuit. *Id.* at 585.

k. Health Maintenance Organizations—Liability for Health Care Treatment Decisions
In June of 2004, the United States Supreme Court dealt a substantial blow to individuals suffering improper benefits—denial by their HMOs. In *AETNA Health Inc. v. Davila*, 542 U.S. 200 (2004), Justice Thomas held that claims against HMOs covered by ERISA are preempted by that Act and, thus, cannot be brought in state court.

Under legislation, enacted by the Texas Legislature in 1997, health maintenance organizations, health insurance carriers and other managed care entities can be held responsible for the health care treatment decisions they make. Section 88.002 of the Texas Civil Practice and Remedies Code provides that an HMO has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care. TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(a) (West1999). This section also provides that an HMO will be liable for damages for harm to an insured or enrollee proximately caused by the health care treatment decisions made by the HMO’s employees, agents, ostensible agents, or representatives who are acting on behalf of the HMO. TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(b) (West 1999)

The Health Care Liability Act is comprehensive. It provides that an HMO may not remove a physician or other health care provider from its plan or refuse to renew the physician or health care provider with its plan for advocating on behalf of an enrollee for appropriate and medically necessary health care for the enrollee. TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(f). The Act also provides that nothing in any law of this State prohibiting a health insurance carrier, HMO or other managed care entity from practicing medicine or being licensed to practice medicine may be asserted as a defense in an action brought against it pursuant to this section or any other law. TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(h). The notice provisions of Article 4590i apply to the HMO cause of action, but none of 4590i’s other limitations, such as that on damages or the statute of limitations apply.

In Texas, approximately half of all individuals covered by HMOs are covered by ERISA plans. School teachers, county employees, government employees, and police officers, among others, are not in ERISA plans, thus, accordingly, Davila does not apply to them.

I. Health Care Quality Improvement Act of 1986–Federal

Congress enacted the Health Care Quality Improvement Act of 1986 to improve the quality of medical care in hospitals, HMOs, group medical practices, professional societies, peer review committees and their respective participants. The Act also provides immunity from damages to a physician for good-faith peer review actions that adversely affect a physician’s clinical privileges, membership in a group practice, or professional society. A witness, complainant or other person who provides information to a peer review body regarding the professional conduct or competence of a physician is not liable for damages under any federal or state law unless such information is false and the person providing it knew that it was false. See 42 U.S.C. § 11101, 11111-11152 (West Supp. 1988).

Note that the privilege is jealously guarded. Even a physician who sought peer review materials relating to himself could not necessarily obtain them, the confidentiality requirement is contained in the Texas Occupations Code, which both protects the materials and allows for discovery in certain limited circumstances. One such circumstance, found at Texas Occupations Code Sec. 160.007(a) requires disclosure to a physician under committee investigation if the committee “takes action that could result in” discipline. A doctor seeking discovery contending that the mere fact of the meeting triggered disclosure requirements had not met his burden. A
mere meeting does not constitute ‘action that could result in discipline.’ There is yet no bright line ruling (as the case has been remanded for determination at the trial court level of whether or not any ‘action’ beyond the mere meeting occurred,) but the case highlights the relative sanctity of the privilege. In re Christus Santa Rosa Health System, 492 S. W. 3d 276, (Tex. 2016) [no citations available at press time].

The Texas Supreme Court addressed the interpretation of this Act in St. Luke’s Episcopal Hosp. v. Agbor, 952 S.W.2d 503 (Tex. 1997). In Agbor, the plaintiffs appealed from a summary judgment granted to the hospital asserting that the trial court erroneously interpreted the Texas Medical Practice Act as requiring a showing of malice in a claim for negligent credentialing. Since the Act was premised on §§ 11.01–11.52 of the Health Care Quality Improvement Act of 1986, the Agbor Court discussed the history of the federal act and cited the findings that Congress had issued. The federal act provided immunity from civil liability to persons participating in professional peer review meetings and to the professional peer review body itself. The Texas Act provided immunity to a health care entity for “any act, statement, determination or recommendation” made in the course of a peer review and for participating in “medical peer review activity.” 952 S.W.2d at 510 (citing §§ 5.05(l) and (m) of Article 4495b). In agreeing with the defendant that the statute required a showing of malice for a plaintiff to recover in a negligent credentialing cause of action, the Court found that the plain language of the statute provided immunity for peer review activities, which necessarily include patient claims for negligent credentialing. In reaching this conclusion, the Court failed to take into consideration the legislative purpose of the Medical Practice Act to provide this immunity for a health care entity, peer review committee and members to make peer review determinations without “retaliatory” suits from disgruntled physicians. The Act was not intended to extend to separate negligent acts by the health care entity. The result of the Court’s decision was to vitiate a negligent credentialing cause of action. All that exists now is a cause of action for malicious credentialing.

m. Charitable Immunity and Liability

The 2003 Legislature enacted Texas Civil Practice & Remedies Code § 84.004(a) in an effort to expand the immunity of volunteers working within the course and scope of their volunteer duties and functions for any charitable organization. This includes volunteer health care providers. TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(c) (West 1997).

The patient must sign a consent form, indicating recognition that charity care is being provided, in return for which the immunity is conferred. This consent form can be signed by a “person responsible for the patient,” who is not necessarily the “patient’s parent, managing conservator, legal guardian, or other person with legal responsibility for the care of patient,” which had been the language contained in the predecessor statute. TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(c) (West 1997).

In order to defeat immunity, the patient must either show that the volunteer was not acting in the course and scope of his delegated acts, not in the course and scope of his medical licensure, or that the actions performed were intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others. TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(c) (West 1997).

n. Charitable Hospital Liability Limitations

Some hospitals across the state will additionally be able to avail themselves of new protections enacted by the 2003 Legislature. In order to qualify for the protections listed, the hospital must annually receive a certification from the Texas
Department of Health to the effect that it provided:

1) charity care in an amount equal to at least 8% of the net patient revenue of the hospital or hospital system during the preceding fiscal year of the hospital or system; and

2) at least 40% of the charity care provided in the county in which the hospital is located.

Mathematically, obviously, no more than two hospitals per county could qualify for this exemption.

Hospitals that do qualify for this exemption receive the tort claims liability cap of $100,000 per person / $300,000 per incident for non-economic damages.

VII. NURSING HOME LIABILITY

The 2003 Legislature made two significant changes, both of which have had a tremendously negative impact on nursing home liability litigation by plaintiffs.

A. Repeal of Texas Human Resources Code § 32.021(1), (k) and Texas Health and Safety Code § 242.050

The Legislature amended Chapter 32 of the Texas Human Resources Code and Chapter 242 of the Texas Health and Safety Code as provided below:

§ 32.062. ADMISSIBILITY OF CERTAIN EVIDENCE RELATING TO NURSING INSTITUTIONS.

(a) The following are not admissible as evidence in a civil action:

(1) any finding by the department that an institution licensed under Chapter 242, Health and Safety Code, has violated a standard for participation in the medical assistance program under this chapter; or

(2) the fact of the assessment of a monetary penalty against an institution under Section 32.021 or the payment of the penalty by an institution.

(b) This section does not apply in an enforcement action in which the state or an agency or political subdivision of the state is a party.

(c) Notwithstanding any other provision of this section, evidence described by Subsection (a) is admissible as evidence in a civil action only if:

(1) the evidence relates to a material violation of this chapter or a rule adopted under this chapter or assessment of a monetary penalty with respect to:

(A) the particular incident and the particular individual whose personal injury is the basis of the claim being brought in the civil action; or

(B) a finding by the department that directly involves substantially similar conduct that occurred at the institution within a period of one year before the particular incident that is the basis of the claim being brought in the civil action; and

(2) the evidence of a material violation has been affirmed by the entry of a final adjudicated and unappealable order of the department after formal appeal; and

(3) the record is otherwise admissible under the Texas Rules of Evidence.

§ 242.017. ADMISSIBILITY OF CERTAIN EVIDENCE IN CIVIL ACTIONS.

(a) The following are not admissible as evidence in a civil action:

(1) any finding by the department that an institution has violated this chapter or a rule adopted under this chapter; or

(2) the fact of the assessment of a penalty against an institution under this chapter or the payment of the penalty by an institution.

(b) This section does not apply in an enforcement action in which the state or an agency or political subdivision of the state is a party.
(c) Notwithstanding any other provision of this section, evidence described by Subsection (a) is admissible as evidence in a civil action only if:

(1) the evidence relates to a material violation of this chapter or a rule adopted under this chapter or assessment of a monetary penalty with respect to:

(A) the particular incident and the particular individual whose personal injury is the basis of the claim being brought in the civil action; or

(B) a finding by the department that directly involves substantially similar conduct that occurred at the institution within a period of one year before the particular incident that is the basis of the claim being brought in the civil action; and

(2) the evidence of a material violation has been affirmed by the entry of a final adjudicated and unappealable order of the department after formal appeal; and

(3) the record is otherwise admissible under the Texas Rules of Evidence.

The effect of these provisions has been to radically limit the evidence available to plaintiffs in demonstrating systemic abuses by nursing homes. Plaintiffs can still introduce evidence of violations involved in their particular case or findings by the department that involve substantially similar conduct within one year prior to the incident giving rise to the claim. However, in order to do so, the violation in question must have been the subject of the entry of a final adjudicated and unappealable order of the department and must be otherwise admissible under the Texas Rules of Evidence.

This change will make it extraordinarily difficult for plaintiffs to recover punitive damages in such cases.

B. Changes to The Punitive Damages Statute

The second significant change made by the Texas Legislature as related to nursing homes was a change in the punitive damages statute. Section 41.008 of the Texas Civil Practice & Remedies Code previously provided that the cap on exemplary damages did not apply for "injury to a child, elderly individual, or disabled individual. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(c)(7) (West 2002)."

The modification to this section by the 2003 Legislature was to add the phrase “but not if the conduct occurred while providing health care as defined by section 74.001.”

Accordingly, exemplary damages in nursing home cases are now subject to the cap that applies to other cases, restricting exemplary damages to an amount that does not exceed an amount equal to the greater of:

(1) two times the amount of economic damages; plus

(2) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(3) $200,000.

Obviously, limitations of this sort eviscerate nursing home liability claims, which ordinarily do not have economic losses.

VIII. PRELIMINARY DISCOVERY

A. Discovery Tools in Medical Malpractice Cases

Note the discussion at pp. 77 et. seq., of the discovery stay imposed on defendants and, to a lesser extent on plaintiffs, prior to the filing of a plaintiff’s 120-day report.

B. Rule 202 Depositions

The political battle over whether Rule 202 depositions are permitted in Chapter 74 cases was finally resolved by the Supreme Court, which sided with health care defendants. The Supreme Court ruled that Rule 202 depositions are not permitted in Chapter 74 cases. In re Jorden, 249 S.W.3d...
“Because the statute here specifically applies to ‘a cause of action against a health care provider,’ it applies both before and after such a cause of action is filed. To the extent a presuit deposition is intended to investigate a potential claim against a health care provider, it is necessarily a ‘health care liability claim’ and falls within the coverage of Section 74.351(s). Jorden, 249 S.W.3d at 422.

C. Incident, Unusual Occurrence or Variance Reports

The incident report (sometimes known as “variance” or “unusual occurrence” report) is a standard form that hospitals and nursing homes provide their employees to record any mishaps, accidents or unusual occurrences at the nursing home. See Perdue, The Law of Texas Medical Malpractice, 22 HOUS. L. REV. 1, 548–49 (2d ed. 1985). Such reports are almost always made on the date of the incident, or shortly thereafter, in the regular course of the hospital’s business. Id. For that reason, the work product privilege, which is often asserted to prevent discovery of these reports, is rarely meritorious. Because the recordation of the incident involving the patient may be vital to establishing liability, the attorney should be particularly cognizant of the hospital’s or nursing home’s report. It should also be pointed out that incident reports should be specifically requested during discovery since they will rarely be kept with the patient’s records. See Id. at 548.

D. Compelling Physical and Mental Examinations

As another discovery tool, it may be appropriate in some cases to conduct a mental or physical examination of the patient. The rule governing physical and mental examinations is Rule 204 of the Texas Rules of Civil Procedure.

Rule 204 provides that a party may compel another party to submit to a physical or mental examination by a qualified physician or submit to a mental examination by a qualified psychologist.

The court may issue the order for the examination only for good cause shown and only in circumstances in which the mental and physical condition of a party is in controversy. TEX. R. CIV. P. 204.1(c).

The order must be in writing and the motion requesting the examination must be made no later than 30 days before the end of any discovery period. TEX. R. CIV. P. 204.1(a).

If a party does not seek the examination of a person whose physical or mental condition is in controversy, that party is prohibited by Rule 204 from commenting to the court or the jury on the party’s willingness or unwillingness to submit to the examination. The party whose condition is in controversy is also prohibited from commenting on the failure of the other side to conduct the examination. TEX. R. CIV. P. 204.3.

The leading case on whether a mental examination should be allowed is Coates v. Whittington, 758 S.W.2d 749 (Tex. 1988). The Texas Supreme Court in Coates was interpreting former Rule 167a, but its analysis applies to Rule 204 as well. The Court interpreted this rule as requiring the party moving to compel a mental examination to meet a two-pronged burden: (1) The movant must show that the party’s mental condition is “in controversy;” and, (2) the movant must demonstrate that there is “good cause” for a compulsory mental examination. The Supreme Court in Coates also emphasized that any mental examination ordered pursuant to Rule 167a must be made by a physician. The Court held that a psychologist was not a physician and could not conduct a Rule 167a mental examination. Id. at 751. Moreover, in applying Rule 167a’s two-pronged test, a routine allegation of mental anguish or emotional distress does not place the party’s mental condition in issue. The plaintiff must assert mental injury that exceeds the common emotional reaction to any injury or
loss in order to be subjected to a Rule 167a exam. Id. at 753. Under appropriate circumstances, a plaintiff can discover a defendant physician’s mental or physical condition. R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994).

1. Expert Witnesses
   a. The Rule

   Rule 195 of the Texas Rules of Civil Procedure, entitled “Discovery Regarding Testifying Expert Witnesses,” provides a fairly extensive procedural outline for designating and disclosing the opinions of expert witnesses. The only permissible discovery tools that a party may use to request information concerning a testifying expert witness are requests for disclosure under Rule 194.

   Rule 195 governs the deadlines for designating experts. Rule 195.2 provides that a claimant, or any other party seeking affirmative relief, must designate its expert the later of either 30 days after the request is served or 90 days before the end of the discovery period. All other experts must be designated the later of either 60 days before the end of the discovery period or 30 days after the request is served. TEX. R. CIV. P. 195.2. This does not relate to the 120-day deadlines for the plaintiff’s designation of expert reports set forth in Chapter 74. See discussion at page 74ff, supra.

   Rule 195.5 provides that if an expert report has not been provided, the court has the power to order that the expert reduce his/her factual observations, test results, supporting data, calculations and opinions to tangible form. TEX. R. CIV. P. 195.5.

   Rule 195.7 states that the expert’s fees for preparing for, giving, reviewing and correcting the deposition must be paid by the party who retained the expert.

   Under the Comments section to Rule 195, the Supreme Court noted that this new rule does not limit the permissible tools of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. A party may still take advantage of interrogatories and requests for production when consulting experts are involved. Rule 195 also does not apply to expert witnesses who are not retained by a party. For example, a party may want to take the deposition of a treating physician who is not subject to the control of any of the parties to the litigation. In that event, the procedures set forth in Rule 195 do not apply. The intended effect of Rule 195 is to reduce unfair surprise and undue expense. See Tex. R. Civ. P. 195, cmt. 3 (West 1999).

   b. Failure to Comply
Rule 215 of the Texas Rules of Civil Procedure deleted the “good cause” safety valve previously allowed for failure to disclose the identity of a witness. See Clark v. Trailways, Inc., 774 S.W.2d 644 (Tex. 1989); E.F. Hutton & Co., Inc. v. Youngblood, 741 S.W.2d 363 (Tex. 1987); Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987); Morrow v. HEB, 714 S.W.2d 297 (Tex. 1986). Additionally, Rule 203 has been combined with 215 to create one comprehensive rule addressing sanctions.

Production of a grossly inadequate report by a defendant’s expert does not require exclusion of his testimony. In Mauzey, the plaintiff opted not to depose the expert to flesh out his testimony and could not rely on the discovery rules to require that he be stricken as an expert. Mauzey v. Sutliff, 125 S.W.3d 71 (Tex. App.—Austin 2003, pet. denied).

2. Depositions of Hospital Corporate Officers

The Texas Rules of Civil Procedure were amended to address specifically depositions of corporate officers. Under Rule 199, a party may subpoena the testimony of an agent of a corporation or other organization. The subpoena must describe with reasonable particularity the matters on which the deposition examination will be conducted. If this is done, the corporation must designate one or more persons to testify on its behalf regarding matters set forth in the subpoena. TEX. R. CIV. P. 199.2(b)(1).

3. Photographs

Photographs, if they exist, are discoverable under the Rules of Civil Procedure. TEX. R. CIV. P. 196.1. To the extent that a party asserts that photographs are witness statements, they are still discoverable without objection under Rule 194. In Terry v. Lawrence, 700 S.W.2d 912 (Tex. 1985), the Supreme Court held that photographs are not “communications” protected from discovery. Although this case was interpreting former Rule 166b (3), its analysis still applies.

4. Financial Condition of a Hospital

In Birchfield v. Texarkana Mem’l Hosp., 747 S.W.2d 361 (Tex. 1987), the plaintiffs contended that Texarkana Mememorial Hospital was grossly negligent in refusing to provide proper facilities to monitor blood gases. The hospital contends that it did not have the financial ability to provide such facilities. The Supreme Court held that evidence of the hospital’s financial condition was admissible to show its financial ability to provide proper facilities. Id. at 365. The opinion, when compared with the court of appeals’ opinion in Hall v. Birchfield, 718 S.W.2d 313 (Tex. App.—Texarkana 1986) rev’d on other grounds, 747 S.W.2d 361 (Tex. 1987), foreshadowed the Texas Supreme Court’s opinion in Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988) (orig. proceeding), in which the Court held that information relating to a defendant’s net worth is relevant to the issue of punitive damages. Therefore, the Lunsford Court held that the net worth evidence is discoverable in a case involving gross negligence. See generally, G. Powell & Leiferman, Results Most Embarrassing:Discovery and Admissibility of Net Worth of the Defendant, 40 BAYLOR L. REV. 527 (1988).

The 1995 Legislature amended § 41.011 of the Texas Civil Practice & Remedies Code, the exemplary damages statute, to provide that, for purposes of imposing punitive damages, the trier of fact shall consider evidence relating to the net worth of the defendant. This amendment had the effect of not only codifying the Lunsford decision, but also extending it. Specifically, if the trier of fact must consider evidence of the net worth of the defendant, then such evidence must be discoverable. Essentially, in a gross negligence claim in which punitive damages would be imposed, the discoverability of the net worth of the defendant evolved from being merely permissible to being mandatory because of
the 1995 amendment to the exemplary damages statute.

5. Privileges

Traditionally, the party resisting discovery by asserting privileges or exclusions from discovery has the burden to produce evidence concerning the applicability of the privilege. Peeples v. Fourth Supreme Judicial Dist., 701 S.W.2d 635 (Tex. 1985); Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 649 (Tex. 1985)(orig. proceeding), Griffin v. Smith, 688 S.W.2d 112 (Tex. 1985). Additionally, because privileges contravene “the fundamental principle that the public … has a right to every man’s evidence,” they are not favored in the law and are strictly construed. Jordan, 701 S.W.2d at 647. All privileges in Texas stand on equal footing. West v. Moore, 116 S.W.3d 101 (Tex. App.—Houston [14th Dist.] 2002, no pet.). See generally Cassidy & Rice, Privileges & Discovery: Part One, the Expanding Scope of Discovery, 52 Tex. B.J. 462 (1989). See Rule 193.3 of the Texas Rules of Civil Procedure for the procedure governing the assertion of privileges.

a. Physician-Patient Privilege: Rule 509

The Texas Rules of Evidence define the parameters of the physician-patient privilege by providing for privileges concerning a patient’s confidential communications, identity and information. TEX. R. EVID. 509.

In Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988), the Supreme Court clarified the boundaries of the physician-patient privilege when a medical malpractice proceeding is brought by a patient against a physician. When the patient files suit, the privilege is waived completely as to the defendant-physician, but only as to subsequent treating physicians or prior physicians to the extent that they have records or communications relevant to the underlying suit. Accordingly, the Mutter trial court’s order requiring the plaintiffs to waive completely their physician-patient privilege as to all physicians who provided care or treatment did not properly balance the competing interests involved and should have been drawn more narrowly to respect and preserve whatever privileged communications or records might have existed after suit was filed. Id. at 601.

The Mutter ruling is consonant with general rules regarding privileges. Additionally, the Mutter opinion properly balances the competing interests involved by requiring disclosure of all relevant information. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985). See also Turner, Confidences of Malpractice Plaintiffs Should Their Secrets be Revealed? 28 S. TEX. L. REV. 71 (1987) (containing an excellent discussion of these points); TEX. R. CIV. EVID. 509. For an application of the physician-patient privilege to the non-judicial and non-administrative context, See § 5.08 of Article 4495b (recodified as Subtitle B, §§ 151.001 to 165.160 of the Texas Occupations Code), which still governs this issue.

The Houston court of appeals apparently ignored the problem inherent in ex parte meetings between defense counsel and the plaintiff’s treating physicians. In Hogue v. Kroger Store No. 107, 875 S.W.2d 477 (Tex. App.—Houston [1st Dist.] 1994, writ denied), the defense counsel met privately with a treating physician of the plaintiff. The physician later testified at trial for the defense. The trial court limited the plaintiff’s cross-examination by excluding evidence regarding the impropriety of the meeting between the treating physician and defense counsel without the plaintiff’s authorization. The appellate court ruled that, because the defendant properly and timely designated the expert witness, the meeting was with his own medical expert prior to trial to discuss non-privileged matters. Therefore, there was no impropriety.

Texas Rules of Evidence 509 and 510 also apply to the medical records of a
defendant physician. Under Rule 509(d)(4), the privilege should not be applicable as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense. TEX. R. EVID. 509(d)(4). See also TEX. R. EVID. 510(d)(5).

In R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994), the plaintiffs sued the defendant doctor for failing to diagnose and treat the plaintiff during her pregnancy, including failing to determine that she was pregnant with twins until after the first one was born. During discovery, the plaintiffs sought to obtain the defendant’s medical records from his admission to Charter Palms Hospital and Tropical Texas Center for Mental Health and Retardation. The defendant contended that the records were privileged under Rules 509 and 510 of the Texas Rules of Evidence, pertaining to physician-patient information and confidential mental health information, respectively. The plaintiff contended that the records were discoverable under the exception in Rule 510(d)(5), which states that the privileges do not apply to communications or records “relevant to an issue of physical, mental or emotional condition of a patient at any proceeding in which any party relies upon the condition as a part of the party’s claim.” The defendant argued that the records were privileged unless his mental or emotional condition was an “element” of a party’s claim or defense. The Supreme Court disagreed, stating that the 1988 amendments to the exceptions in Rules 509 and 510 replaced the language “element of his claim or defense” with the language “a part of the party’s claims or defense.” The new word “part” does not mean the same thing as the deleted word “element.” The Court promulgated a two-prong test to determine discoverability: 1) the records sought to be discovered are relevant to the condition at issue, and 2) the condition is relied upon as a part of the party’s claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Id. at 843.

In a mandamus case after R.K. v. Ramirez, the plaintiffs sought the psychiatric records of the defendant physician after amending their petition to allege that the defendant may have been under the influence of controlled substances and/or alcohol at the time he provided medical care to the patient. M.A.W. v. Hall, 921 S.W.2d 911 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding). After granting mandamus, the Houston court of appeals held that, to the extent the plaintiffs alleged that the defendant may have been under the influence of drugs and/or alcohol at the time of treatment, the defendant’s psychiatric records addressing the substance abuse were discoverable. However, the records remained privileged as to any other issue. The court of appeals also held that the defendant did not waive his objection by disclosing records to the court for an in camera review or by signing an agreed protective order. Or that the trial court, in ordering that a protective order allowing the disclosure of some of the medical records without ordering the redaction or deletion of irrelevant information, did not sufficiently protect the privileged information.

The Austin court of appeals followed the holdings in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994), and Coates v. Whittington, 758 S.W.2d 749 (Tex. 1988) that the filing of claims involving “routine” mental anguish allegations does not place a plaintiff’s mental health into dispute. In re Nance, 143 S.W.3d 506 (Tex. App.—Austin 2004, orig. proceeding). In the Nance case, the plaintiffs’ decedent’s MHMR records were sought to be discovered by the defense and plaintiffs filed a motion for protective order. The court of appeals held that the records were protected under the physician/patient privilege.

A party needing the medical records of non-party patients at the same institution
at which the plaintiff was treated was denied those records by the Corpus Christi court of appeals. Despite the opportunity to completely redact all identifying information and all privileged information from such non-party records, the Corpus Christi court of appeals held that the physician/patient privilege applied and that discovery of such records would violate the non-party patients’ constitutional privacy rights. The dissent emphasized the fact that the U.S. Supreme Court had not afforded any recognition to any such “privacy” interest relating to the content of medical records. *In re Columbia Valley Reg’l Med. Ctr.*, 41 S.W.3d 797 (Tex. App.—Corpus Christi 2001, orig. proceeding).

Paradoxically, however, a short time after its decision in *In re Columbia Valley*, the Corpus Christi court of appeals issued its opinion in *In re Whiteley*, 79 S.W.3d 729 (Tex. App.—Corpus Christi 2002, orig. proceeding), holding that a defendant physician had in effect opened the door to discovery by the plaintiff of other patients’ records by his defensive assertion that he had “previously performed” the same procedure “many times” without complications. This allowed the plaintiff discovery of other patient records relevant to this defensive assertion, once identifying information had been redacted from such records.

b. Psychotherapist-Patient Privilege: Rule 510

In *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981), the Supreme Court held that the psychotherapist-patient privilege prevented discovery of the identities and locations of other patients of a defendant-psychiatrist in a malpractice case alleging sexual misconduct. However, four justices dissented and discussed the right to privacy claim.

While the reasoning of *Mutter* is also applicable to Texas Rule of Evidence 510, it should be noted that the party claiming the privilege still has the burden of asserting the privilege. Absent invoking the privilege together with proof to support it, psychiatric records are also discoverable—assuming a nexus of relevancy exists between the records and the plaintiff’s claims. *Kentucky Fried Chicken Nat’l Mgmt. v. Tennant*, 782 S.W.2d 318 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding). A plaintiff’s assertion that the defendant’s psychotherapist’s records might contain evidence of the defendant’s habitual alcoholism was insufficient to place the defendant’s condition in issue. *Dossey v. Salazar*, 808 S.W.2d 146, 148 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

In a product liability suit involving automobile design, the Corpus Christi court of appeals held that the plaintiff could not raise the psychotherapist-patient privilege if the plaintiff was doing it offensively. Citing *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985), the court of appeals opined that “the justification for this privilege lies in the policy of encouraging the full communication necessary for effective treatment of a patient by a psychotherapist. The protection against disclosure of confidences is primarily erected to protect the patient against an invasion of his privacy.” *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 619 (Tex. App.—Corpus Christi 1994, writ denied). When a plaintiff seeks affirmative relief against a defendant through the judicial system, she cannot simultaneously attempt to assert the psychotherapist-patient privilege and deny the benefit of material evidence to the defendant. “A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain in silence against otherwise pertinent and proper questions which may have a bearing upon his rights to maintain his action.” *Id.* at 619 (citing *Ginsberg*, 686 S.W.2d 105, 107–08).

c. Peer Review and Related Privileges
The peer review privilege is designed to encourage open and honest evaluation of the quality of medical or health care services and the competency of physicians by protecting certain records and proceedings from discovery. *Mem'1 Hosp.–The Woodlands v. McCown*, 927 S.W.2d 1, 8 (Tex. 1996) (interpreting Article 4495b, re-codified as § 151.001, et seq. in the Texas Occupations Code, effective September 1, 1999). The nature of the privilege is that documents made by or for a medical peer review committee are confidential and protected from discovery unless they are made in the regular course of business or the privilege has been waived. *In re Osteopathic Med. Ctr. of Tex.*, 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, orig. proceeding); TEX. OCC. CODE ANN. §§ 160.007(a), (e) (West 2000); TEX. HEALTH & SAFETY CODE ANN. §§ 161.032 (a), (c) (West Supp. 2000).

1) Article 4495b

Article 4495b has been recodified as §§ 151.001 to 165.160 of the Texas Occupations Code. Because there are few material changes and the majority of practitioners still refer to Article 4495b, reference to the statute in this section will be to Article 4495b unless otherwise noted.

Article 4495b, like § 161.032, provides that privileged records and proceedings of hospital committees are not subject to court subpoena. See TEX. REV. CIV. STAT. ANN. art 4495b, § 5.06(j) (West Supp. 1991). The statute provides:

> Unless disclosure is required or authorized by law, records or determinations of or communications to a medical peer review committee are not subject to subpoena or discovery and are not admissible as evidence in any civil, judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee.

TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.06(j) (West Supp. 1991).

Interestingly, the Texas judicial branch’s inherent power to compel production of documents and witnesses has been curtailed by Article 4495b, while under Article 4495b the Texas State Board of Medical Examiners has been given authority to subpoena the same documents and information protected from discovery and court subpoena. Thus, an administrative agency has been given greater power than the Texas courts. See TEX. REV. CIV. STAT. ANN. art. 4495b § 5.06(k) (West Supp. 1991).

2) Health & Safety Code, § 161.032

Section 161.032 provides:

> Records and proceedings of a medical committee are confidential and are not subject to court subpoena unless the records … [are] made or maintained in the regular course of business by a hospital.

TEX. HEALTH & SAFETY CODE ANN. § 161.032(a), (f) (West 2001).

In *Texarkana Mem’l Hosp. v. Jones*, 551 S.W.2d 33 (Tex. 1977), the Supreme Court held that the minutes of post-incident hospital staff meetings and hospital board of directors’ meetings were statutorily exempt from discovery under Article 4447d [now § 161.032] since they were not part of the normal course of business of the hospital. However, medical records made in the normal course of business such as clinical records of patients and business and administrative files are discoverable.

In *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985)(orig. proceeding) and *Griffin v. Smith*, 688 S.W.2d 112 (Tex. 1985), the Supreme Court held that since the deliberations of a hospital committee are protected from
discovery, the privilege extends to documents prepared by or at the direction of the committee for committee purposes. The privilege, therefore, extends to minutes, correspondence between members relating to the deliberation process, and any formal committee work product such as recommendations. See TEX. CIV. STAT. ANN. art. 4447d, § 3 (West Supp. 1992). However, the privilege does not extend to documents gratuitously submitted to a committee or generated without committee impetus.

Texas courts have held that the identity of the members of hospital committees is not privileged under § 161.032. Likewise, the statute does not prevent discovery of any evidence not generated by a committee or at the request of a committee for a committee purpose. See Santa Rosa Med. Ctr. v. Spears, 709 S.W.2d 720 (Tex. App.—San Antonio 1986, orig. proceeding). Committee members are not privileged to withhold knowledge of facts and circumstances about a given case that comes from information that was not from committee impetus or purpose. See Jordan, 701 S.W.2d at 648; Santa Rosa Medical Ctr., 709 S.W.2d at 724.

3) Peer Review Privilege Case Law

In Agbor v. St. Luke’s Episcopal Hosp., 952 S.W.2d 503 (Tex. 1997), the Supreme Court held that the Texas Medical Practice Act—Article 4495(b) of the Texas Revised Civil Statutes—prescribed a threshold standard of malice to state a cause of action against a hospital for its credentialing activities. In reaching this decision, the Supreme Court relied on only two subsections of the Act in deciding that a patient, when pursuing a negligent credentialing claim against a hospital, must show that the hospital credentialed its staff with malice. The Court did not consider the Act as a whole. As the dissent makes apparent, the terms “malice” and “negligent” represent two different states of mind on behalf of the actor and, therefore, are necessarily mutually exclusive. If a patient must show a threshold level of malice, which is knowing and purposeful conduct, before he or she can bring a credentialing cause of action against a hospital, then under no circumstances could the patient bring a negligent credentialing cause of action.

Three other cases increase the difficulty of piercing the privilege. In the first case, Ginsberg v. Fifth Court of Appeals, 927 S.W.2d 12 (Tex. 1996), the Texas Supreme Court held that documents relating to the initial credentialing process of a medical peer review committee are protected from discovery by § 5.06 of Article 4495b of the Texas Revised Civil Statutes. After this initial holding, the remaining question for the Supreme Court was whether records of and communications to a medical peer review committee are discoverable when a plaintiff alleges that communications to the committee were made with malice. The Court held that, even under those circumstances, the documents were not discoverable. Id. at 16. The Court, relying on a “plain meaning of the statute” argument, stated that Article 4495b does not provide an exception to its confidentiality provision whenever a plaintiff presents a prima facie case of malice. Id. at 17. The Court recognized that its holding would make proof of any cause of action more difficult and went so far as to state that the privilege from discovery enumerated in Article 4495b could effectively bar proof of some claims. Id. at 18. However, in support of its decision, the Court stated that the statute does not prohibit discovery of the sought-after information from alternative sources. Id. The Court refused to recognize the fact that, in many cases, the medical peer review documents are the only source of the information.

The Supreme Court reached parallel holdings in Brownwood Reg’l Hosp. v. 11th Court of Appeals, 927 S.W.2d 24 (Tex. 1996) and Mem’l Hosp.—The Woodlands v. McCown, 927 S.W.2d 1 (Tex. 1996). The Court held that a plaintiff is barred from discovery of even initial credentialing information pertaining to physicians on a
hospital staff. The Supreme Court overruled McAllen Methodist Hosp. v. Ramirez, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993, orig. proceeding), which explicitly permitted discovery of initial credentialing information.

Suits by physicians demonstrate part of the problem with the Supreme Court’s holdings in Agbor and related discovery cases. For example, a physician suing a hospital for malicious denial of credentials encountered enormous difficulty in obtaining the information he needed to prove his case. In Wheeler v. Methodist Hosp., 95 S.W.3d 628 (Tex. App.—Houston [1st Dist.] 2000, no pet.), the Houston court of appeals exhaustively analyzed both discoverable and non-discoverable documents and categories of documents involved in attempting to demonstrate malice in the credentialing process. Though the case involved a suit by a physician, the analysis ought to be identical in patient suits involving malicious credentialing of negligent physicians.

Physicians seeking to pierce the peer review privilege in litigating anti-competitive activities by a hospital may do so under certain circumstances. In In re Osteopathic Med. Ctr. of Tex., 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, orig. proceeding), the Fort Worth court of appeals held that the peer review privilege applied to protect documents from discovery in a premises liability case. The plaintiff filed her cause of action against a rehabilitation facility for injuries she suffered when she fell in the bathroom. The rehabilitation facility was owned by a hospital, which was also named as a defendant. The hospital filed a cross-action against the rehabilitation facility. As part of the discovery process, the plaintiff sought the Security Services Incident Report completed by the facility’s security department after the fall and the Patient Quality Event Tracking Report.

The hospital argued that the peer review privilege protected these documents from discovery because the peer review committee evaluated cases involving patient care at both the hospital and its outside facilities like the rehabilitation center and, pursuant to hospital policy, incident reports are prepared immediately following an unusual event.

The plaintiff contended that the documents were discoverable for several reasons:

1) the documents were prepared by the rehabilitation facility itself and not the hospital;
2) the hospital filed a cross-action against the facility;
3) this was a premises case, not a medical negligence case; and
4) the documents did not relate to the quality of medical or health care or the competency of physicians.

With regard to the first to arguments, the court of appeals did not find it material that the documents were prepared by persons outside the hospital, stating that
there was no “statutory requirement” that the documents be made by hospital employees or medical staff. The court’s reasoning seemingly fails to take into consideration the fact that the documents were prepared outside the hospital by non-hospital employees is some evidence that the documents were not generated by committee impetus. Further, the fact that the hospital filed a cross-action against the facility raised the issue of waiver. A good-faith argument that the hospital waived its privilege by calling into question the actions of its own facility could be put forth. Allowing the hospital to file a cross-action accusing its own facility of negligence while simultaneously allowing the hospital to keep reports of that negligence concealed raised significant sword and shield concerns. Id. (citing Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985)).

Regarding the latter two arguments, the court of appeals held that because the plaintiff failed to cite any authority limiting the application of the privilege to specific causes of action, the privilege was applicable in this premises case and, arguably, to other non-medical cases as well. The court of appeals’ analysis, however, was flawed because the authority limiting the application of the privilege is found in the statute that established the privilege. The peer review privilege was designed to encourage open and honest evaluation of the quality of medical or health care services and the competency of physicians by protecting certain records and proceedings from discovery. Mem’l Hosp.—The Woodlands v. McCown, 927 S.W.2d 1, 8 (Tex. 1996) (interpreting Article 4495b, recodified as § 151.001, et seq. in the Texas Occupations Code, effective September 1, 1999). “Medical peer review” means “the evaluation of medical and health care services, including evaluation ... of patient care provided by” professional health care providers. In re Osteopathic Med. Ctr. of Tex., 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, orig. proceeding). See also TEX. OCC. CODE ANN. § 150.002(7).

Nothing in the facts of the underlying case raised patient care issues. The plaintiff fell and hurt herself. If she had done so in a cafeteria or amusement park, the documents would not be protected by the peer review privilege. Simply because the plaintiff had the misfortune to fall in a physical therapy facility, she was denied access to valuable information that would either prove or refute her allegations of ordinary negligence. A suit involving acts of ordinary negligence does not automatically involve patient care or medical issues simply because the act of negligence occurred in a health care facility. See Rogers v. Crossroads Nursing Servs., Inc., 13 S.W.3d 417 (Tex. App.—Corpus Christi 1999, no pet.).

6) Peer Review and Nursing Files

Trial courts must do more than simply look at the labels on documents to determine whether or not they are privileged. Trial courts are required to examine the documents to determine whether they meet hospital committee bylaws and are, therefore, appropriately privileged or not. Additionally, it is important to remember that simply because a document passes through a peer review committee does not make it privileged. In re Living Ctrs. of Tex., Inc., 175 S.W.3d 253 (Tex. 2005).

a. Investigative Privilege

The Texas Supreme Court, in Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989), Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801 (Tex. 1986) and Turbodyne Corp. v. Heard, 720 S.W.2d 802 (Tex. 1986), held that only investigations made after there is good cause to believe a suit will be filed are subject to the investigative privilege. The party asserting an investigative privilege, as with all privileges, has the burden of producing evidence supporting the privilege. See e.g. Loftin, 776 S.W.2d at 147.

In Kupor v. Solito, 687 S.W.2d 441 (Tex. App.—Houston [14th Dist.] 1985,
orig. proceeding), the Houston court of appeals held that the investigative privilege did not apply in a medical malpractice case to a doctor’s communications with attendants at a dialysis center where the patient died. In so holding, the Kupor court recognized that the communications were not made in connection with the prosecution or defense of a lawsuit because no claim or lawsuit was pending at the time.

b. Work Product Privilege: Rule 192.5

The work product privilege is specifically addressed in the Texas Rules of Civil Procedure. Rule 192.5 defines work product, describes what material and information is and is not discoverable under the privilege, and sets forth some exceptions to the privilege. “Work product” is now defined as:

Material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representative, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

A communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). The rule states that an attorney’s mental processes are “core work product” and are never discoverable. Other types of work product may be discoverable upon a showing that the requesting party has a substantial need for the materials or information and that the party is unable, without undue hardship, to obtain the information by some other means. TEX. R. CIV. P. 192.5(b).

The rule further defines the exceptions to the work product privilege, meaning the listed items are not considered work product even if they are made in anticipation of litigation.

Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

1. Information discoverable under Rule 192.3 concerning experts, trial witnesses, witnesses statements, and contentions;

2. Trial exhibits ordered disclosed at a pre-trial conference or under a discovery control plan;

3. The name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

4. Any photograph or electronic image of underlying facts or any photographs or electronic image of any sort that a party intends to offer into evidence; and

5. Any work product created under circumstances within an exception to the attorney-client privilege.

TEX. R. CIV. P. 192.5(c). Work product and its exceptions were defined for the first time in Texas procedural history. This work product definition replaces the former “attorney work product” and “party communication” privileges provided for by former Rule 166b. Also eliminated is the “witness statement” privilege. Witness statements are now also discoverable but the
Supreme Court has commented that the elimination of the “witness statement” privilege does not automatically render all witness statements discoverable. It simply subjects them to the same rules concerning the scope of discovery and privileges applicable to other information.

**c. Waiver**

The waiver provisions of *Peeples v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635 (Tex. 1985) apply in medical malpractice actions. See also *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 649 (orig. proceeding); *Griffin v. Smith*, 688 S.W.2d 112 (Tex. 1985). For example, in the *Jordan* case, some of the documents were privileged. Yet the hospital was deemed to have waived the privilege since those documents were disclosed to a grand jury in the course of a criminal investigation. *Jordan*, 701 S.W.2d at 649.

Furthermore, partial disclosure of documents protected by the hospital committee privilege may result in implied waiver of privilege as to additional material that has not been disclosed if disclosure of any significant part of privileged material is made. TEX. HEALTH & SAFETY CODE ANN. § 161.032(b) (West 2001); TEX. R. EVID. 511. See also *Terrell State Hosp. v. Ashworth*, 794 S.W.2d 937 (Tex. App.—Dallas 1990, orig. proceeding) (state hospital impliedly waived hospital committee privilege by disclosing a significant part of a “psychological autopsy” that had been performed after patient committed suicide).

The failure of the party resisting discovery to plead specifically the applicable privilege or exemption results in waiver of the privilege or exemption. Accord *Scrivner v. Casseb*, 754 S.W.2d 354, 358 (Tex. App.—San Antonio 1988, no pet.). Hence, the party resisting discovery may not simply assert that the information or document is “privileged.” The party resisting discovery must specifically plead the privilege or he waives his right to assert any privilege.

In *Santa Rosa Med. Ctr. v. Spears*, 709 S.W.2d 720 (Tex. App.—San Antonio 1986, orig. proceeding), the San Antonio court of appeals held that the hospital’s claim to an Article 4447d privilege (now Texas Health & Safety Code § 61.032) concerning the reports and conclusions of the hospital’s medical staff, Cardiac Cath Lab Committee, which evaluated the defendant-doctor’s performance and recommended revocation of his staff and cardiology section privileges, was not waived where an investigative television news reporter obtained a copy of the committee’s report from an unknown and unauthorized source and reference was made to the report during the television station’s evening news program pertaining to an investigation of certain heart surgeons and cardiologists at the defendant-hospital. The San Antonio court of appeals ruled that an improper and unauthorized disclosure does not defeat the privilege. It is waived only by voluntary disclosure or consent to disclose and the privilege is not waived without the hospital having an opportunity to claim the privilege. *Id.* at 723 (citing Texas Rules of Evidence 511 and 512(2)). Texas Rule of Civil Procedure 193 codifies this holding. If a party inadvertently produces privileged information, the party does not waive the privilege if he or she asserts the privilege within 10 days of discovering the inappropriate production. TEX. R. EVID. 193.3.

Waiver also occurs if the party resisting discovery fails to produce evidence (i.e., affidavits or live testimony) of the privilege or exemption at the initial hearing on his or her objections, privileges and exemptions to discovery. See *Ins. Co. of N. Am. v. Downey*, 765 S.W.2d 555 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding). The party asserting a privilege has the burden of producing evidence to show that the documents in question qualify for the privilege as a matter of law. *Barnes v. Whittington*, 751 S.W.2d 493, 494 (Tex. 1988); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985)(orig.
The party resisting discovery may attempt to prove the applicability of the privilege through affidavits or live testimony. TEX. R. CIV. P. 193.4(a). In some circumstances, the documents themselves may constitute the only evidence of the applicability of the privilege. Weisel Enters., Inc. v. Curry, 718 S.W.2d 56, 57 (Tex. 1986). In these situations, the trial court abuses its discretion if it refuses to conduct an in camera inspection of the allegedly privileged documents after the documents have been properly tendered to the court at the initial hearing on the resisting party’s objections to discovery. Id. If the party resisting discovery is not asserting a privilege or exemption, but rather is asserting undue burden, unnecessary expense, harassment, annoyance or invasion of personal constitution or property rights, the court is not required to conduct an in camera inspection of the individual documents prior to ruling on the objection. See Hoffman v. Fifth Court of Appeals, 756 S.W.2d 723 (Tex. 1988).

A. Mandamus as a Remedy

In Walker v. Packer, 827 S.W.2d 833 (Tex. 1992), a medical malpractice case, the plaintiff sought to discover documents from a non-party to impeach the defendant’s expert witness. The plaintiff sought documentation of the limitations placed on the obstetrics faculty members of the University of Texas Health Science Center at Dallas relating to their testifying in medical negligence cases. In an unrelated lawsuit, the Walkers’ attorney deposed a member of the obstetrics faculty who testified that the obstetrics department had a written policy requiring its members to obtain authorization from other faculty members prior to testifying on behalf of a plaintiff. The trial court refused to compel the discovery since the witness was not a party and the information was sought solely for impeachment purposes. The Supreme Court noted that, while the trial court erred in its “mechanical approach to discovery rulings” and that the trial court had clearly abused its discretion, it would not issue mandamus.

The Walker Court held that a party must prove that it has no adequate remedy by appeal. An ordinary appeal is not inadequate merely because it involves more expense or delay than mandamus relief. The majority then distinguished three circumstances in which an ordinary appeal might be inadequate: (1) disclosure of privileged information, which would materially affect the rights of the aggrieved party; (2) when the party’s ability to present a viable claim or defense is vitiated or completely compromised by the trial court’s discovery error; or (3) when the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record.

A mandamus case that flies in the face of Walker v. Packer is the Supreme Court case of Able Supply Co. v. Moye, 898 S.W.2d 766 (Tex. 1995). The defendants had been trying to get the medical records of the plaintiffs for several years. The Supreme Court stated that, although it held in Walker that mandamus would not issue to permit discovery, despite arguments that refusal of mandamus would unfairly prejudice a party’s ability to litigate, forcing appeal and increasing litigation costs, the Court would issue mandamus here because denial of discovery would delay litigation, require appeal and increase costs. Able was clearly a roll-back of the Walker holding. “Mandamus will issue where a party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error.” 898 S.W.2d at 772. This language creates an opening for issuance of mandamus where the Court had previously refused the opportunity. See also the discussion at Section II, M.3, p.86ff, regarding the availability of mandamus in the Section 13.01 context.

The Supreme Court has held mandamus to be appropriate in cases
involving the denial of dismissal motions. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458 (Tex. 2008)(orig. proceeding). In an astonishing opinion by Justice Brister, the Court held that “we now hold that mandamus relief is available when the purposes of the health care statute would otherwise be defeated.” This magnificently overbroad language arguably permits mandamus review of any trial court action that a defendant contends vitiates the purposes of Chapter 74. Since “sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded,” mandamus should be granted in cases where “unnecessary costs mount up.” As argued by the dissent, the holding in *In re McAllen* is a radical departure from the Court’s seminal mandamus case of *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), in which the Court made it clear in denying mandamus relief to a plaintiff that simply incurring costs in the prosecution of a lawsuit does not justify the availability of mandamus relief.

IX. SUMMARY JUDGMENT PRACTICE

A. Summary Judgment Practice in Texas

Summary judgment practice in Texas was significantly changed with the promulgation of the no-evidence motion for summary judgment. See TEX. R. CIV. P. 166a(i). Rule 166a(i) provides:

After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i). This summary judgment standard was in part taken from the seminal United States Supreme Court case, *Celotex v. Catrett*, 477 U.S. 317 (1986).

1. Adequate Time for Discovery

The “Notes and Comments” to Rule 166a(i) are intended to “inform the construction and application of the rule.” See “Notes and Comments” to Texas Rule of Civil Procedure 166a(i). The Supreme Court wrote that any discovery period set by a pre-trial order should be an adequate time for discovery unless there is a showing to the contrary. Also any discovery period mandated by Rule 190 should also provide ample opportunity to conduct discovery before filing a rule 166a(i) motion.

The Supreme Court also commented that the no-evidence motion must be specific in its challenge and not be conclusory or lodge general no-evidence challenges to an opponent’s case. Essentially, a movant must state with particularity the specific element of the respondent’s cause of action under attack.

2. How Much Evidence is Enough?

The Supreme Court is quick to state in the “Notes and Comments” to Rule 166a(i) that a respondent is not required to marshal his or her proof. The response need only point out evidence raising a fact issue on the challenged element or elements.

3. Applicability of Rule 166A(i)

The burden and standard set forth in subsection (i) of Rule 166a only applies to no-evidence summary judgments. A summary judgment filed under the general summary judgment rule will continue to be governed by that rule. See “Notes and Comments” of Texas Rule of Civil
Procedure 166a(i). The new no-evidence standard applies only when the party without the burden of proof alleges entitlement to judgment as a matter of law because the party with the burden of proof failed to produce legally sufficient proof to support the theory of liability. Phan Son Van v. Pena, 990 S.W.2d 751 (Tex. 1999).

A. Summary Judgment Proof

Even if pleadings are verified, they do not constitute summary judgment proof. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). Any evidence to be utilized in a summary judgment hearing must be admissible at trial in all respects. See Hittner & Liberato, Summary Judgments in Texas, 20 ST. MARY’S L.J. 243, 243–305 (1989); Hittner, Summary Judgments in Texas, 22 HOUS. L. REV. 1109, 1124–25 (1985). Presenting admissible evidence is easier under Rule 193 of the Texas Rules of Civil Procedure, which makes the authentication (and therefore the admissibility) of documents automatic in certain circumstances. In addition, the proof must be on file at the time of the hearing in order for the trial court to consider it. Wales v. Williford, 745 S.W.2d 455, 457 (Tex. App.—Beaumont 1988, writ denied). See also Williams v. Huber, 964 S.W.2d 84 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (affidavit that was not timely filed will not be considered for summary judgment purposes even if it is otherwise sufficient).

Note that proof submitted by an expert witness at the summary judgment stage is not objectionable merely because the expert has not been identified in response to an interrogatory request seeking the “names” of experts. Gandara v. Novasad, 752 S.W.2d 740, 742 (Tex. App.—Corpus Christi 1988, no pet.).

1. Affidavits

Affidavits must affirmatively show that the affiant has personal knowledge of the facts he or she asserts. TEX. R. CIV. P. 166a(e). See also Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984). The affidavit need not explicitly describe how personal knowledge is gained when it is apparent from the testimony itself. Lopez v. Carrillo, 940 S.W.2d 232 (Tex. App.—San Antonio 1997, writ denied) (defendant-dentist’s affidavit listing her qualifications and, as the treating dentist, relating her personal knowledge of the facts giving rise to the incident and the treatment that followed held to be competent summary judgment evidence). The facts asserted must be of a kind “admissible in evidence” at trial. Brownlee, 665 S.W.2d at 112. See also TEX. R. CIV. P. 166a(e). Unless the opposing party objects, defects in the form of an affidavit will not be grounds for reversal of a summary judgment. TEX. R. CIV. P. 166a(f). An affidavit not signed by the affiant, however, but by the affiant’s son was held to be substantively defective and could not be amended. De Los Santos v. Sw. Tex. Methodist Hosp., 802 S.W.2d 749 (Tex. App.—San Antonio 1990, no writ).

An affidavit is defective or insufficient if it is conclusory. In a motion for summary judgment in an informed consent case, the defendant failed to state in his affidavit in support of the summary judgment how he obtained the patient’s consent, what information he gave to the patient, and who obtained the patient’s consent. The defendant simply stated in his affidavit that informed consent was given by the patient. The Corpus Christi court of appeals held this to be conclusory and, therefore, insufficient. Urban v. Spohn, 869 S.W.2d 450 (Tex. App.—Corpus Christi 1993, writ denied).

The El Paso court of appeals affirmed the trial court’s granting of a summary judgment because the plaintiff’s affidavit was defective. Specifically, the plaintiff’s affidavit referenced the patient’s medical records without attaching or serving sworn or certified copies of the medical records. The Ceballos court held that this was a substantive defect and therefore, “the opposing party need not point out the defect because the trial court is not required to give the party offering the affidavit an
opportunity to amend.” A substantive defect vitiates any evidence contained in the party’s affidavit. The domino effect of no evidence is to deem the defendant’s affidavit uncontroverted, thereby making summary judgment appropriate. Ceballos v. El Paso Health Care Sys., 881 S.W.2d 439 (Tex. App.—El Paso 1994, writ denied).

An evidentiary defect in the substance of movant’s affidavit may also be grounds for reversal. See Blaschke v. Citizens Med. Ctr., 742 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1987, no writ). On appeal from the granting of a motion for summary judgment, however, any alleged defects in the form of the plaintiff’s affidavit cannot be made for the first time on appeal. Martin v. Durden, 965 S.W.2d 562 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). Additionally, if the affidavit is to support a summary judgment, it should be based on reasonable medical probability. See e.g., Duncan v. Horning, 587 S.W.2d 471, 473 (Tex. Civ. App.—Dallas 1979, no writ) (defendant’s affidavit, which stated an opinion based on reasonable dental probability, supported summary judgment); Hernandez v. Calle, 963 S.W.2d 918 (Tex. App.—San Antonio 1998, no pet.) (affidavit sufficient so long as expert’s opinion on causation is based on a reasonable degree of medical probability); Martin v. Durden, 965 S.W.2d 562 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (the plaintiff must at least produce evidence establishing that there is a medical probability that defendant’s negligence caused plaintiff’s injuries and that mere speculation and conjecture are not enough).

The principles governing affidavits submitted to support or oppose a summary judgment motion and the effect of Texas Rule of Evidence 704 and Birchfield v. Texarkana Mem’l Hosp., 747 S.W.2d 361 (Tex. 1987) are crucial to summary judgment practice in medical malpractice cases.

a. Opportunity to Amend

If a plaintiff submits an affidavit that is defective in form, rather than in substance, the plaintiff is entitled to amend his or her affidavit. “A defect is substantive if the evidence is incompetent, and it is formal if the evidence is competent but inadmissible.” Keeton v. Carrasco, 53 S.W.3d 13, 24 (Tex. App.—San Antonio 2001, pet. denied).

2. Depositions

Deposition testimony will uphold a summary judgment if it is “clear, positive, direct, otherwise free from contradictions and inconsistencies and could have been readily controverted.” TEX. R. CIV. P. 166a(c). To be used as summary judgment evidence, a deposition or relevant excerpts therefrom must be signed and filed with the trial court prior to the time of the hearing. Velde v. Swanson, 679 S.W.2d 627, 630 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.). In Deerfield Land Joint Venture v. Southern Union Realty Co., 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied), the Dallas court of appeals set forth the proper procedure for using depositions as summary judgment evidence. Motions for summary judgment supported by portions of depositions that are not properly authenticated are not proper
summary judgment evidence, even if they are attached to the motion or response. Further, the appellate court will not consider improperly presented depositions, even if the parties stipulate as to the depositions’ authenticity. *Id.* at 610. Also, a party must request that the deposition be included in the transcript to make it a part of the appellate record. *Khalaf v. United Business Invs., Inc.*, 615 S.W.2d 869 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

When deposition testimony conflicts with an affidavit, a fact issue is presented. *Johnston v. Vilardi*, 817 S.W.2d 794, 797 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In *Cantu v. Peacher*, 53 S.W.3d 5 (Tex. App.—San Antonio 2001, pet. denied), the San Antonio court of appeals determined that, when an expert’s deposition and affidavit attached as summary judgment evidence conflict, the court must examine the nature and extent of the differences and the facts asserted in the deposition and affidavit. If the differences are variations on a theme, consistent in the major allegations but with some variances of detail, this is grounds for impeachment and not a vitiation of the later filed document. If, on the other hand, the subsequent affidavit clearly contradicts the witness’ earlier testimony involving the suit’s material points, without explanation, the affidavit must be disregarded and will not defeat the summary judgment motion.


3. **Answers to Interrogatories and Requests for Admissions**

Answers to interrogatories and requests for admissions may only be used against the answering party. *Sprouse v. Tex. Employers Ins. Ass’n*, 459 S.W.2d 216, 220 (Tex. Civ. App.—Beaumont 1970, writ ref’d n.r.e.). Answers and admissions are also subject to ordinary objections such as “conclusion hearsay and opinion testimony.” *See Hittner, Summary Judgments in Tex.*, 22 HOUS. L. REV. 1109, 1123 (1985).

4. **Medical Records**

As with all other documents, medical records must also be admissible to support or controvert a motion for summary judgment. See, e.g., *Lopez v. Hink*, 757 S.W.2d 449, 450 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (inaudible pathology report is not competent summary judgment proof). The medical records, as well as any other summary judgment proof, must be attached to the motion or response to be competent. *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983).

Medical records can be used to either support a motion for summary judgment or controvert summary judgment evidence. For instance, if the medical records contain conflicting explanations as to the cause of death, that alone may be sufficient to defeat summary judgment. *See Milo v. Park Place Hosp.*, 883 S.W.2d 779, 783 (Tex. App.—Beaumont 1994), rev’d on other grounds, 909 S.W.2d 508 (Tex. 1995). Whether a plaintiff is required to attach medical records to his or her response to the motion for summary judgment is debatable.

In *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439 (Tex. App.—El Paso 1994, writ denied), the plaintiff supplied detailed affidavits from qualified experts who criticized the care that the physician and hospital nurses provided. The experts’ opinions were based upon reviewing the decedent’s medical records. However, the plaintiff failed to attach to the affidavits the medical records. The El Paso court of
appeals concluded that, because the plaintiff failed to attach the medical records, the affidavits had no probative force and did not raise a fact issue. *Id.* at 445. The Ceballos court stated that the failure to attach the medical records to the plaintiff’s response was a defect in substance which the trial court could raise on its own. *See also* Franklin v. Beiser, No. 05-96-00485-CV, 1998 WL 2855 (Tex. App.—Dallas Jan. 7, 1998, no pet.) (expert’s affidavit defective for failure to attach pages of medical records referred to in the affidavits). However, in Mathis v. Bocell, 982 S.W.2d 52 (Tex. App.—Houston [1st Dist.] 1996, no pet.), the Houston court of appeals held that the failure to attach records is a defect of form only and, if objection is not made at the trial court level, then the objection is waived.

### B. Determining if Summary Judgment is Proper

1. **Has the Movant Negated an Essential Element of the Claimant’s Claim or Defense?**

   The initial burden in a summary judgment under a Rule 166a(c) proceeding is on the movant. The determinative issue is not whether the non-movant raised fact issues with reference to his cause of action but whether the movant’s summary judgment evidence “establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff’s cause of action.” *Nixon v. Mr. Property Mgmt. Corp.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

2. **Has a Fact Issue Been Raised?**

   Once the movant’s proof negates an essential element of each of the plaintiff’s legal theories, the plaintiff has the burden to raise a fact issue to defeat a summary judgment. *See* TEX. R. CIV. P. 166a(c). At this point, the court will consider the respondent’s summary judgment proof attached to his written response. *Id.*; *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983).

Any issue not presented to the trial court in a written response cannot be raised for the first time on appeal to defeat the summary judgment. *TEX. R. CIV. P. 166a(c).*

3. **The Movant Must Raise All Grounds at the Trial Court Level**

   The movant cannot raise at oral argument any defense or grounds for summary judgment not presented in its motion. *See* TEX. R. CIV. P. 166a(c). For example, in *Roberts v. Sw. Tex. Methodist Hosp.*, 811 S.W.2d 141, 144 (Tex. App.—San Antonio 1991, writ denied), the defendant moved for summary judgment on grounds that it had no duty to obtain informed consent. The plaintiff had filed suit on a battery theory, not on informed consent. Relying on arguments not contained in the defendant’s motion for summary judgment, the trial court granted the motion. The court of appeals reversed and remanded. *Id.* Since the arguments upon which summary judgment was granted were not contained in the motion for summary judgment, they could not be considered. Further, if the trial court grants a summary judgment, the movant cannot present any additional grounds or defenses in support of the summary judgment on appeal. *Blaschke v. Citizens Med. Ctr.*, 742 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1987, no writ).

4. **Expert Testimony Must Be Sufficient**

   The trial court considers all admissible summary judgment proof in the form of affidavits, depositions, answers to interrogatories, requests for admissions, pleadings and other documents at the time of the summary judgment hearing. When the movant relies on an affirmative defense, the proof must negate conclusively the plaintiff’s cause of action. *Blaschke v. Citizens Med. Ctr.*, 742 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1987, no writ).

   In relying on the defendant-nurse’s answers to interrogatories, wherein the nurse admitted that she did not follow any of the
detailed procedures for conducting an emergency screening of a rape victim, the Houston court of appeals held that a material fact issue existed regarding whether the hospital materially departed from its standard emergency screening procedures. Therefore, the hospital was not entitled to summary judgment. *C.M. v. Tomball Reg’l Hosp.*, 961 S.W.2d 236 (Tex. App.—Houston [1st Dist.] 1997, no writ).

In medical malpractice actions, the expert medical witness’ summary judgment proof, either via affidavit or deposition testimony, requires that the expert state his qualifications, familiarity with the applicable medical standard of care, the specific medical standard of care under the circumstances, whether the defendant physician’s specific conduct met or departed from the standard, and whether such conduct probably caused the patient’s injury or death. *See Coan v. Winters*, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.). An expert’s affidavit is not rendered incompetent by the presence of hearsay because hearsay can be relied on by experts in forming their opinions. *Lopez*, 940 S.W.2d at 235 (dentist’s inclusion in affidavit of what physician told her concerning plaintiff’s medical condition, although hearsay, did not render affidavit incompetent). Affidavits of the movant-physician, which are merely conclusory and do not negate specific allegations of negligence, are inadequate to support a summary judgment. *See generally Urban v. Spohn*, 869 S.W.2d 450 (Tex. App.—Corpus Christi 1993, writ denied).

In *Lopez v. Central Plains Reg’l Hosp.*, 859 S.W.2d 600 (Tex. App.—Amarillo 1993, no writ), the Amarillo court of appeals held that the expert testimony was too speculative to support an allegation of the hospital’s negligence. In its motion for summary judgment, the defendant hospital maintained that the plaintiff’s expert’s testimony was insufficient to establish a causal connection between the negligence of the nurses and the injuries suffered by the plaintiff. The expert’s affidavit stated “the warning signs of fetal distress hopefully would have been picked up much earlier,” and the failure to do so “probably caused Dr. Triplett to make the hasty decision to deliver this baby vaginally.” In affirming the summary judgment, the appellate court stated that in order to show that the negligence of the nurses proximately caused the plaintiff’s injuries, the testimony must show a causal connection beyond the point of conjecture. Conjecture and speculation do not raise a fact issue of proximate cause.

5. Expert Must Be Familiar with the Standard of Care

The Amarillo court of appeals has held that a pharmacist is not qualified to testify on the appropriate standard of care applicable to an orthopedic surgeon. *Nail v. Laros*, 854 S.W.2d 250 (Tex. App.—Amarillo 1993, no writ). The *Nail* opinion appears to have turned largely on the legal inability of the pharmacist to prescribe medicine and concomitantly to be familiar with the appropriate standard of care in doing so. The *Nail* court did not otherwise attempt to distinguish the numerous cases that have allowed an expert in one field to testify as to principles in another, where the expert had practical knowledge of the principles or the standard of care in the other field. See, e.g., *Marling v. Maillard*, 826 S.W.2d 735, 740 (Tex. App.—Houston [14th Dist.] 1992, no writ) (retired oral and maxillofacial surgeon as to propriety of neck surgery); *Bilderback v. Priestly*, 709 S.W.2d 736, 741 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.) (physical therapist with a doctorate testified in case against orthopedic surgeon).

So long as the expert is familiar with the standard of ordinary care under the same or similar circumstances, the affidavit will not fail simply because the expert is licensed outside of Texas and does not reference more specifically the standard of care in Texas. *Hall v. Huff*, 957 S.W.2d 90 (Tex. App.—Texarkana 1997, pet. denied). Indeed, given the standards of care accepted
nationally for virtually every medical specialty today, it would be fallacious to suggest that the standards of care are different in Texas from any other state in the Union.

6. The Standard of Care Must Be Specifically Stated


The patient’s own affidavit may be sufficient to preclude summary judgment in favor of the defendant-health care provider if the cause of action pertains to injuries that are within the common knowledge of laymen. Malone v. Hendrick Med. Ctr., 846 S.W.2d 951 (Tex. App.—Eastland 1993, writ denied). Thus, the affidavit of a patient whose legs were burned because of a hot water heater is sufficient, even without expert testimony, to rebut the summary judgment proof of the defendant-hospital. Id.

7. Causal Link Must Be Established

The Corpus Christi court of appeals, in Garza v. Levin, 769 S.W.2d 644 (Tex. App.—Corpus Christi 1989, writ denied), upheld the defendant physician’s summary judgment proof because the defendant’s own affidavit adequately negated the plaintiff’s allegations of negligent failure to diagnose and treat a ruptured appendix and because the plaintiff’s summary judgment evidence did not controvert it. The defendant physician’s affidavit described his medical qualifications, described the treatment he performed in detail, stated that he was familiar with the medical standard of care, and that his treatment of the plaintiff satisfied this standard. The defendant also reached conclusions necessary to meet threshold requirement of establishing the standard of care. In Whittley v. Heston, the San Antonio court of appeals found the physician’s affidavit conclusory and also pointed out that the deposition testimony of another defense expert could not establish whether the defendant’s actions complied with the standard of care merely by stating what he, the other expert, would do under the same circumstances.

Note, however, that the Houston (First) court of appeals held that the specific standard of care applicable to a medical specialist need not be stated in an affidavit in support of a summary judgment—at least where neither party to the appeal briefed the issue. White v. Wah, 789 S.W.2d 312 (Tex. App.—Houston [1st Dist.] 1990, no writ).

The patient’s own affidavit may be sufficient to preclude summary judgment in favor of the defendant-health care provider if the cause of action pertains to injuries that are within the common knowledge of laymen. Malone v. Hendrick Med. Ctr., 846 S.W.2d 951 (Tex. App.—Eastland 1993, writ denied). Thus, the affidavit of a patient whose legs were burned because of a hot water heater is sufficient, even without expert testimony, to rebut the summary judgment proof of the defendant-hospital. Id.
denied that his treatment was negligent and that, in his opinion, based on reasonable medical probability, nothing he did injured the plaintiff. The plaintiff’s personal affidavit was not competent controverting evidence because the medical conclusions of a lay witness cannot controvert expert medical opinion. The affidavit of the plaintiff’s expert stated his qualifications, described the treatment the plaintiff should have received under the proper medical standard of care, and opined, based on reasonable medical probability, that the defendant’s care was substandard. However, the plaintiff expert’s affidavit failed to assert a causal connection between any of the defendant’s alleged negligent acts or omissions and the plaintiff’s injuries. Thus, the Garza court held that the expert’s affidavit did not controvert the proximate cause element of the plaintiff’s action and the defendant was entitled to summary judgment. Id. at 646. The controversy over the required specificity of expert standard of care testimony under Rule 704 and Birchfield was not discussed.

In Hernandez v. Calle, 963 S.W.2d 918 (Tex. App.—San Antonio 1998, no pet.), the San Antonio court of appeals held that, in determining the adequacy of an interested witness’s summary judgment affidavit, the court must find that the interested medical expert’s opinion was based on a reasonable degree of medical probability. The Hernandez court found the requirement that a medical expert’s opinion be based on reasonable medical probability “refers solely to the expert’s opinion on causation.” Id. at 920.

When the best that the plaintiff’s expert can do is opine that a nurse “must have” spoken to a defendant “as she was the only other possible nurse available to participate in the phone call” and that her conduct, as a result, was negligent, such speculative expert testimony was insufficient to support the expert opinion. The El Paso court of appeals also rejected the plaintiff’s attempt to use Rule 406 to include evidence of a person’s habit or routine because there was obviously insufficient time for any “habit” to have developed under the facts of this case in which there was only a four-month interaction history for the so-called “habit.” Ortiz v. Glusman, 334 S.W.3d 812 (Tex. App.—El Paso 2011, pet. denied).

In view of these developments, Texas courts, before and after Rule 704, have affirmed the sufficiency of affidavits submitted with the defendant physician’s motion for summary judgment. It appears that strict and detailed adherence to Texas medical malpractice law regarding admissible and uncontroverted expert medical affidavit or deposition testimony is the standard for the defendant’s success in these cases. See Tillota v. Goodall, 752 S.W.2d 160 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Kemp v. Heffelman, 713 S.W.2d 751 (Tex. App.—Houston [1st Dist.] 1986, no writ); Wheeler v. Alameda-Luebbert, 707 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1986, no writ); Milkie v. Menti, 658 S.W.2d 678 (Tex. App.—Dallas 1983, no writ); Duncan v. Hornig, 587 S.W.2d 471 (Tex. Civ. App.—Dallas 1979, no writ).

8. Fact Issue on Unpleaded Theories is Sufficient

Once the non-movant files a written response to the motion for summary judgment, the trial court must consider the response and any proof attached thereto as a basis to defeat the motion. TEX. R. CIV. P. 166a(c). Even when the respondent has not pled a particular legal theory, summary judgment is improper if his written response incorporates the legal theory and that theory raises a fact issue. See Meisler v. Bankers Capital Corp., 668 S.W.2d 828, 829–30 (Tex. App.—Houston [14th Dist.] 1984, no writ); Am. Imagination Corp. v. W.R. Pierce & Associates, 601 S.W.2d 147, 148 (Tex. App.—El Paso 1980, no writ). In other words, when the respondent raises a legal theory in his written response that he has not previously pled, the movant should file an amended motion for summary judgment or
challenge that legal theory with special exceptions. *Meisler*, 668 S.W.2d at 830.

9. **Respondent’s Summary Judgment Proof**

Summary judgment proof tendered by the respondent is subject to the same conditions as that furnished by the movant. *See* TEX. R. CIV. P. 166a(c). The proof will not be sufficient to preclude a summary judgment if it is based only on “surmise or suspicion.” *Vela v. Cameron Cnty.*, 703 S.W.2d 721, 727 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.). Similarly, the affidavit of a lay plaintiff is incompetent summary judgment proof to controvert the sworn medical testimony or proof of the movant’s expert. *Charles v. Zamora*, 811 S.W.2d 174 (Tex. App.—Corpus Christi 1991, writ denied); *White v. Wah*, 789 S.W.2d 312 (Tex. App.—Houston [1st Dist.] 1990, no writ). The summary judgment evidence is conflicting if respondent’s proof, in admissible form, raises a fact issue that defeats the summary judgment motion. *See Ditto Inv. Co. v. Ditto*, 293 S.W.2d 267, 270 (Tex. Civ. App.—Fort Worth 1956, no writ).


10. **Continuances**

When the non-movant’s affidavits show that the non-movant has been unable to obtain affidavits supporting his opposition to summary judgment, the court may grant a continuance to allow affidavits, depositions or other discovery. TEX. R. CIV. P. 166a(f). (The court may also “make such other order as is just” to give the non-movant a chance to produce evidence to defeat a motion for summary judgment). When the non-movant has not yet procured expert testimony to defeat the motion for summary judgment, he should avail himself of this procedural rule. The standard for appellate review regarding the trial court’s decision of whether to allow such additional discovery is whether the trial court abused its discretion.

C. **Appealing the Grant or Denial Of Summary Judgment**

As a general rule, an order granting a summary judgment may be appealed but an order denying one may not. *See* Hittner, Summary Judgment in Texas, 22 HOUS. L. REV. 1109, 1145 (1985). In many cases, a partial summary judgment will be granted in favor of a co-defendant. In these instances, the judgment cannot be appealed until a severance is granted as to the co-defendant in whose favor the summary judgment was granted. *Atlantic Richfield Co. v. Exxon*, 663 S.W.2d 858, 862 (Tex. App.—Houston [14th Dist.] 1983), rev’d on other grounds, 678 S.W.2d 944 (Tex. 1984). While an order denying a summary judgment is usually interlocutory and may not be appealed, an exception exists when both parties file motions for summary judgment and one is granted but the other is overruled. In this situation, the appellate court may consider all issues presented, including the denial of a summary judgment. *Rice v. English*, 742 S.W.2d 439, 445 (Tex. App.—Tyler 1987, writ denied); *Clark v. Perez*, 679 S.W.2d 710, 718 (Tex. App.—San Antonio 1984, no writ). A partial summary judgment as to issues, rather than parties, is interlocutory in nature and not appealable until after a trial on the merits. *See City of Houston v. Socony Mobil Oil Co.*, 421 S.W.2d 427, 430 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref’d n.r.e.).

In *In re Mission Consol. I.S.D.*, 990 S.W.2d 459 (Tex. App.—Corpus Christi 1999, orig. proceeding [mand. denied]), the plaintiff sued the school district and one of its employees for sexual harassment. The school district filed a no-evidence motion for summary judgment. The plaintiff failed to file a response. At the hearing on the
motion, the trial court granted the motion as to the employee, but failed to rule as to the school district. The school district filed a writ of mandamus, complaining that the plaintiff’s failure to file a response entitled the school district to summary judgment and that the trial court abused its discretion in failing to rule on the motion. The Corpus Christi court of appeals held that the trial court should have ruled on the defendant’s motion for summary judgment, but specifically refused to comment on what the ruling should have been. Therefore, the court of appeals compelled a ruling, but not the ruling.

X. CROSS-EXAMINATION OF MEDICAL EXPERTS IN THE MEDICAL MALPRACTICE CASE

A. QUALIFICATIONS OF EXPERT

1. Professional Qualifications

It is well-settled in Texas that examination of a medical expert witness in a medical malpractice case concerning his professional qualifications is appropriate to help the jury evaluate the credibility of the expert or the weight of his testimony in a particular area. Milkie v. Menti, 658 S.W.2d 678 (Tex. App.—Dallas 1983, no writ); French v. Brodsky, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.). By questioning the defendant doctor’s qualifications, the plaintiff places the defendant’s character in question, which allows the defendant to call witnesses to testify to the doctor’s good reputation. Eoff v. Hal and Charlie Peterson Found., 811 S.W.2d 187 (Tex. App.—San Antonio 1991, no writ).

2. Lack of Medical Specialty Board Certification

Cross-examination regarding a medical expert’s certification by any recognized medical specialty board is admissible in a medical malpractice case. French v. Brodsky, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.). Cross-examination evidence that a medical expert is not board-certified in a particular medical or surgical specialty is admissible to impeach the credibility or weight of the medical expert who claims to be a specialist or to possess special knowledge in a particular area in issue in the case. Id.

3. Hospital Medical Staff Privileges

A medical expert witness’s professional qualifications, including privileges to practice his medical specialty on the medical staffs at various area hospitals is admissible to establish his professional qualifications and is also a legitimate subject for cross-examination. French v. Brodsky, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.). A medical expert witness may be cross-examined on whether his hospital medical staff privileges have ever been limited. The reason for such “impeachment” type cross-examinations is that the testimony of the witness raises a rebuttal issue on a matter directly bearing on his professional qualifications.

B. Use of Medical Treatise and Literature

The Texas Rules of Evidence expand the use of treatises from the uses previously recognized at common law. See TEX. R. EVID. 803(18). Rule 803(18) allows learned treatises to be read into evidence, but not received as exhibits, if established as reliable authority by the witness or other expert testimony or by judicial notice. Also Rule 803 (18) permits cross-examination of an expert with treatises established as reliable authorities in the same manner.

Some types of medical literature may not only be introduced as direct evidence but may also establish the appropriate standard of care. See Davis v. Marshall, 603 S.W.2d 359 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.) (package insert
established proper standard of care for application of a case). Additionally, the fact that a learned treatise is published after the incident in question does not disqualify that treatise, at least where the treatise discusses principles in effect or similar to the ones in question at the time of the incident. See, e.g., King v. Bauer, 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied).

C. Use Of Medical Records

A doctor may be cross-examined on the entries of other doctors contained in hospital records, similar to the cross-examination on medical treatises. Moore v. Standard Fire Ins. Co., 461 S.W.2d 213 (Tex. Civ. App.—Amarillo 1970, writ ref’d n.r.e.).

D. Bias, Prejudice, Reputation Or Pecuniary Interest

1. Bias and Prejudice

In order to show bias and prejudice, an expert medical witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying, and related questions. Russell v. Young, 452 S.W.2d 434, 436 (Tex. 1970); Cantu v. Del Carmen Pena, 650 S.W.2d 906 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.).

2. Financial Interest of Expert in Success or Outcome of Case

Texas courts hold that the financial interest of parties and witnesses, including expert witnesses, in the success or outcome of a party in a particular case is a proper subject of disclosure by direct evidence or cross-examination. General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977); Republic Nat’l Life Ins. Co. v. Heyward, 568 S.W.2d 879 (Tex. Civ. App.—Eastland 1978, writ ref’d n.r.e.).

Thus, evidence of whether an expert witness is receiving payment that is contingent upon the successful outcome of the plaintiff’s case is admissible on cross-examination to show bias or pecuniary interest. St. Louis & S.F. Ry. Co. v. Clifford, 148 S.W. 1163 (Tex. Civ. App.—Dallas 1912, writ ref’d n.r.e.); Horton v. Houston & T.C. Ry. Co., 103 S.W. 467 (Galveston 1907, writ ref’d).

Texas court decisions demonstrate that a plaintiff is not damaged by the question of whether or not the expert’s fee is contingent on the outcome of the case because a negative response may boost the expert’s credibility, thus highlighting his lack of greed. Horton v. Houston & T.C. Ry. Co., 103 S.W. 467 (Galveston 1907, writ ref’d).

3. Professional Reputation or Character

Since a malpractice suit is based on a specific act of negligence, evidence of a physician’s professional reputation or character is ordinarily immaterial. See French v. Brodsky, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.); Hackler v. Ingram, 196 S.W. 279 (Tex. Civ. App.—Amarillo 1917, writ ref’d).

4. Prior Litigation Testimonial Experience or Expert

The medical expert witness may also be cross-examined regarding the number of times he has testified in lawsuits in order to show bias and prejudice. Russell v. Young, 452 S.W.2d 434, 436 (Tex. 1970); Cantu v. Del Carmen Pena, 650 S.W.2d 906 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.); Barrios v. Davis, 415 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1967, no writ).

A medical expert may be cross-examined concerning the percentage or number of cases where he has testified for a plaintiff or defendant. Barrios v. Davis, 415 S.W.2d 714 (Tex. App.—Houston [1st Dist.] 1967, no writ); Traders & Gen. Ins. Co. v. Robinson, 222 S.W.2d 266 (Tex. Civ. App.—Texarkana 1949, writ ref’d); Horton v. Houston & T.C. Ry. Co., 103 S.W. 467 (Galveston 1907, writ ref’d).
5. **Specific Financial, Accounting and Income Records of Expert – Not Discoverable or Admissible for Impeachment Purposes**

Texas courts hold that parties are not entitled to pre-trial discovery, for purposes of impeachment only, of the general financial accounting and income tax records or information of any non-party physician or expert witness who has treated the plaintiff and who is expected to give expert medical testimony at trial on behalf of the plaintiff. *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970); TEX. R. CIV. P. 202.

6. **Insurance Carriers**

Cross-examination regarding insurance carriers to show bias has been declared improper. In *Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.), it was held that the trial court properly excluded evidence that one of the defendant’s expert witnesses was insured by the same insurance company, which insured the defendant. In so holding, the Dallas court of appeals recognized that a large judgment against any physician would probably affect the insurance rates of other physicians. This interest, however, was declared to be too remote and would be outweighed by the prejudice caused by informing the jury of the defendant’s insurance protection.

7. **Ex Parte Conferences**

Several federal courts have held that ex parte communications with treating physicians are prohibited without absolute compliance with HIPAA. *Law v. Zuckerman*, 307 F. Supp. 2d 705 (D. Md. 2004); *Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp. 2d 1015 (S.D. Cal. 2004); *Murphy v. Dulay*, No. 4:13CV378-RH/CAS, 2013 WL 5498140 (N. D. Fla. Sept. 25, 2013). The cases hold that HIPAA preempts any state law to the contrary, unless the state protections are more stringent that those established under HIPAA. *See also Smith v. Am. Home Prods.*, 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003). Under these provisions and HIPAA, there are three ways by which “protected health information” may be obtained:

i. A court order, which must be limited to only the expressly authorized protected health information;

ii. In response to a subpoena; and

iii. In response to a proper discovery request.

This would seem to preclude ex parte contact. However, the Supreme Court has told us that such conduct is not per se prohibited and that, in order for defense counsel to be precluded from ex parte communication, a plaintiff must obtain a protective order. In order for plaintiffs to prevent ex parte communication with their physicians through the use of the authorization required by § 74.052(c), they must obtain a protective order by showing “specific and demonstrable injury” will result from the ex parte communication and disclosure of privileged information. In the absence of such proof, it is an abuse of discretion for the trial court to grant a protective order prohibiting the disclosure. Chapter 74 is not in conflict with HIPPA in this regard and, thus, HIPPA does not automatically prohibit ex parte communications in all Chapter 74 cases. *In re Collins*, 286 S.W.3d 911 (Tex. 2009). See also *In re H.E.B. Grocery Co.*, 2007 WL 1150035 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (mem. op.) (denying mandamus of a trial court order precluding ex parte communications with plaintiff’s treating physicians—albeit in a non-health care liability claim).

Though expressing grave concerns about the propriety of such conduct, the San Antonio court of appeals refused to strike the testimony of the physicians who had been so contacted, ruling that the plaintiff
must prove harm as a result of the communication in order to obtain relief. Durst v. Hill Country Mem’l Hosp., 70 S.W.3d 233 (Tex. App.—San Antonio 2001, no pet.). See also James v. Kloos, 75 S.W.3d 153 (Tex. App.—Fort Worth 2002, no pet.) (holding that plaintiff must prove the probable rendition of an improper verdict as a result of the improper ex parte contact).

The Houston court of appeals in Hogue v. Kroger Store No. 107, 875 S.W.2d 477 (Tex. App.—Houston [1st Dist.] 1994, writ denied) held that the trial court did not abuse its discretion when it disallowed cross-examination by the plaintiff’s counsel on the impropriety of a meeting between the plaintiff’s doctor and defense counsel.

E. Other Suits
Ordinarily, evidence of other civil suits against the defendant is considered to be inadmissible as immaterial and prejudicial.

F. Prior Complaints Against Experts
Texas courts have held that a medical expert’s qualifications are subject to impeachment to the same degree as any other expert witness; however, evidence showing only that “complaints” have been made or doubts expressed as to a physician’s competency does not constitute proper impeachment of the witness’s qualifications. See, e.g., Guidry v. Phillips, 580 S.W.2d 883, 889 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.) (medical society records about unrelated complaints against defendant-doctor held inadmissible).

G. Prior Criminal Record Of Expert
Rule 609 of the Texas Rules of Evidence provides that evidence of a conviction is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction substantially outweighs its prejudicial effect.

Rule 609 allows evidence of convictions to attack a witness’s credibility. If the witness’s credibility is not in issue, admissibility must be established on other grounds. For example, in Dudley v. Humana Hosp. Corp., 817 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1991, no writ), the plaintiff offered evidence of a criminal investigation and conviction of the defendant doctor for illegally dispensing prescription drugs to show that the doctor was under stress at the time of the alleged negligence. The court of appeals affirmed the trial court’s exclusion of this evidence because the plaintiffs offered it as circumstantial evidence of stress, without any direct evidence on the record, and because the probative value was outweighed by the prejudicial effect. Id. at 127. In the mandamus proceeding in Menton v. Lattimore, 667 S.W.2d 335 (Tex. App.—Fort Worth 1984, orig. proceeding), the court of appeals implicitly held that the perjured testimony of the defendant-oral surgeon and his surgical assistant during the course of an inquest into the facts surrounding the occurrence would be admissible at trial, despite the court’s ruling that an illegal “perjured or dishonest defense” or “planning or perpetuation of a crime or fraud” exception did not exist under then Rule 186a to allow discovery of a taped interview between defendants and the insurance carrier investigator.

H. Tampering With Expert Witnesses
Texas has a paucity of authority on the pernicious practice of tampering with a designated witness and/or actively seeking to prohibit a designated witness from
testifying. For an interesting outcome to such lawyer conduct, See a ruling from our neighbor state, New Mexico, in Appendix B.

XI. DAMAGES IN MALPRACTICE CASES

A. Damages Law In Tort Cases Apply To Malpractice Actions

The basic law of damages in tort cases, except as modified by Chapter 74, applies to medical malpractice actions. Therefore, the scope of this subpart of the article will be limited to a discussion of recent or significant developments in the law of damages pertaining to torts involving medical malpractice.

B. DAMAGES UNIQUE TO MALPRACTICE CASES

1. Damages for Wrongful Pregnancy

Damages arising from an unplanned birth of a healthy child following a negligently performed or unsuccessful sterilization are limited to the hospital and medical expenses relating to the pregnancy and birth. Courts typically deny recovery for loss of earnings, physical pain and mental anguish. Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.).

In Flax v. McNew, 896 S.W.2d 839 (Tex. App.—Waco 1995, no writ), the plaintiff became pregnant and delivered a normal, healthy child a few months after having undergone a sterilization procedure. She sued the doctor and the hospital in a wrongful pregnancy cause of action. The list of injuries occurring during the pregnancy and for which recovery was sought included swelling, nausea, fatigue, loss of bladder control, severe personality changes, permanent scars, physical impairment during and immediately after the pregnancy, physical and mental pain and suffering, impairment of her relationship with her husband, and approximately $1,500 in medical expenses. The issue on appeal was that of permissible damages in a wrongful pregnancy suit. The court of appeals in following an overwhelming majority of the jurisdictions, adopted the Limited-Damages Rule, under which the expenses of raising and educating the child may not be recovered, but other damages such as those listed by the plaintiff, may be recovered. See also Crawford v. Kirk, 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ denied).

A claim for the cost of rearing a healthy but unplanned child as a result of a negligently performed sterilization procedure was denied as against Texas public policy. Hickman v. Myers, 632 S.W.2d 869 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.).

Recovery was allowed for the medical and hospital expenses for treating a deformed child during the nine months he lived following birth, when the child was born deformed after a negligent vasectomy procedure on the child’s father. Hayes v. Hall, 488 S.W.2d 412 (Tex. 1972). However, it has been held there is no action when the birth of a deformed child is not a foreseeable consequence of a negligently-performed unsuccessful bilateral tubal ligation on the mother. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976).

2. Damages for Wrongful Birth

The Texas Supreme Court has recognized a cause of action for “wrongful birth” of an impaired child. The measure of damages is the added expense of caring for an impaired child, which was proximately caused by negligent prenatal conduct. Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984).

3. Damages for Prenatal Injuries

In Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975), the Texas Supreme Court limited the recoverable damages to the reasonably necessary expenses for the care and treatment of a child’s physical impairment or defect resulting from negligence and injuries to the child which occurred prenatally. See also Yandell v. Delgado, 471 S.W.2d 569 (Tex. 1971).
well-established that prenatal injuries are only compensable if the child is born alive. *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990). There is not a wrongful death or survival cause of action for a fetus that dies in utero. *Witty v. Am. Gen. Capital Distrib.*, 727 S.W.2d 503, 505 (Tex. 1987). *See also Pietila v. Crites*, 851 S.W.2d 185 (Tex. 1993).

The statute that permits a cause of action for wrongful death of an unborn child specifically excludes such claims in health care liability claims. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003. Physicians are the only class of tortfeasors against whom no cause of action may be asserted for the wrongful death of an unborn child. Texas Civil Practice and Remedies Code § 71.003(c) provides a cause of action for negligently causing the death of an unborn child. This section was added by the 2007 Legislature. It provides an exemption for physicians.

XII. THE PLAINTIFF’S APPROACH TO THE COURT’S CHARGE

A. The Court’s Charge in Texas

1. General Rules and Trend Toward Simplification

Paragraph 1 of Texas Rule of Civil Procedure 277 has been amended to provide as follows:

In all jury cases, the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

This amendment to Rule 277 unified the practice of submitting broad-form questions to the jury in the form approved by *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), pursuant to the Supreme Court’s comment on the rule.

B. Instructions And Special Issues - Legal Authority

1. “Negligence” – Conveying the Legal Standard of Conduct for Physicians to the Jury

The test for conveying the “reasonably prudent physician” rule to the jury was stated by the Texas Supreme Court in *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977), which is for physicians to conform to “what a reasonable and prudent physician exercising reasonable care would or would not do under the same or similar circumstances.”

a. The Reasonably Prudent Doctor Standard


Note that recent case law demonstrates an on-going discussion about the correctness of the Pattern Jury Charge definitions of “negligence” and “ordinary care.”

The Texas Pattern Jury Charge defines “negligence” as follows:

“Negligence,” when used with respect to the conduct of [Defendant], means failure to use ordinary care, that is, failing to do that which a [physician] of ordinary prudence would have done under the same or similar circumstances or doing that which a [physician] of ordinary prudence would not have done under the same or similar circumstances.

The Texas Pattern Jury Charges defines “ordinary care” as follows:

“Ordinary care,” when used with respect to the conduct of [Defendant], means that degree of care that a [physician] of ordinary prudence would use under the same or similar circumstances.

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 50.1 (1997).

The argument advanced by litigants is that Texas case law clearly sets the level of care required by a physician as that of a “reasonable and prudent physician.” *See Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977). Yet the Pattern Jury Charge speaks in terms of “ordinary care.” *See* Darrell L. Keith, The Court’s Charge in Texas Medical Malpractice Cases, 48 BAYLOR L. REV. 675, 701–03 (1996) (arguing that the use of “ordinary” instead of “reasonable” in the Pattern Jury Charges’ definition of negligence is inaccurate).

Most recently, in *Hiroms v. Scheffey, M.D.*, 76 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the Houston Court held that while appellants’ argument was “not without merit”, they were unable to address it because an inadequate record had been brought forward on appeal.

b. Same or Similar School of Medicine

The author is of the opinion that submission of the “same or similar school” element in the definition of “negligence” and “reasonable care” or “ordinary care” is not necessary when the undisputed evidence shows the plaintiff’s medical or health care expert witness belongs to the same or similar school of practice as the medical or health care professional defendant. See,
e.g., *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 217 (Tex. App.—Houston [1st Dist.] 1986, no writ) (holding the legal standard of care for physicians which is not defined in terms of “locality” or “same school” exemplifies the modern trend away from such defined standard and toward the “reasonably prudent physician” standard of *Hood v. Phillips*).

However, a situation may occur in which, because needed medical facilities, supplies, equipment or personnel were lacking or unavailable locally, the physician is unable to treat the patient as effectively as other specialists more favorably located. A physician’s difficulties in such a situation must be recognized by reference to his obligation under all the circumstances, but it is still measured by national standards. *Webb v. Jorns*, 488 S.W.2d 407 (Tex. 1972); *Porter v. Puryear*, 262 S.W.2d 933 (Tex. 1953).

Accordingly, in applying the “national standard of care” rule, the trial court should direct the jury to measure the defendant physician’s exercise of care and skill (conduct) in the care of the plaintiff against that of a “reasonably prudent physician or specialist (e.g., orthopedic surgeon) under the same or similar circumstances,” without any specific reference to any community factor or differences.” The portion of the instructions of “same or similar circumstances,” or similar language, has been held to sufficiently charge the jury to take any relevant local circumstances into account without placing improper or undue emphasis on the communities involved in the defendant-doctor’s practice and/or plaintiff’s medical expert witness. See *Hickson v. Martinez*, 707 S.W.2d 919 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

Significantly, the Texas Supreme Court, in *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361 (Tex. 1987), held that the failure to include a reference to “this or similar communities” within the definitions of negligence and ordinary care in the court’s charge was not improper. The Court reasoned that the purpose of a community or “locality rule” “is to prevent unrealistic comparisons between the standards of practice in communities where resources and facilities might differ,” and the means available to the defendant doctor or hospital are part of the relevant “circumstances.” Id. at 366 (citing *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977)).

However, a situation may occur in which, because needed medical facilities, supplies, equipment or personnel were lacking or unavailable locally, the physician is unable to treat the patient as effectively as other specialists more favorably located. A physician’s difficulties in such a situation must be recognized by reference to his obligation under all the circumstances, but it is still measured by national standards. *Webb v. Jorns*, 488 S.W.2d 407 (Tex. 1972); *Porter v. Puryear*, 262 S.W.2d 933 (Tex. 1953).

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Supreme Court's Birchfield ruling affirmed the court of appeals' decision that, for purposes of the court's charge, “the question should convey to the jury a standard based upon what reasonable and prudent members of the medical profession would have done under the same or similar circumstances” as set forth in Hood v. Phillips and without reference to any “locality” standard. See Hall v. Birchfield, 718 S.W.2d 313 (Tex. App.—Texarkana 1986), rev'd on other grounds, 747 S.W.2d 361 (Tex. 1987). Hence, the Supreme Court restricted the trial court’s administration of the “same or similar community” standard to the admissibility of medical expert testimony on the standard of reasonable medical care applicable to a particular malpractice case. See Hickson v. Martinez, 707 S.W.2d 919 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); Eckert v. Smith, 589 S.W.2d 533 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); Roberts v. Tardif, 417 A.2d 444 (Me. 1980). See also Horvath v. Baylor Univ. Med. Ctr., 704 S.W.2d 866, 870 (Tex. App.—Dallas 1985, no writ) (holding that the inclusion of the phrase “in Dallas Texas” in the definition of “ordinary care” did not erroneously indicate that the Dallas standard differed from the national standard because, if the standards were identical nationwide, the inclusion of “in Dallas Texas” was harmless “because Dallas is a part of the nation”).

For a reaffirmation of the Birchfield rule, See Hall v. Huff, 957 S.W.2d 90 (Tex. App.—Texarkana 1997, pet. denied) (trial court held that jury charge need not include the words “this or similar communities” since it is encompassed in the words “same or similar circumstances”).

2. “Proximate Cause” Definition

The terms “reasonable and prudent physician” and “reasonable care” or “ordinary care” are used in the definition of “proximate cause.” Therefore, the same considerations with respect to applying the “same or similar circumstances” and “same or similar community or nationally” standards are involved with a “proximate cause” definition, as well as definitions of “negligence” and “reasonable care.” See Hickson v. Martinez, 707 S.W.2d 919 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

3. “Occasion In Question” Definition

It has been held that, when the term “occasion in question” is defined in the court’s instruction, it must refer to an appropriate period of time concerning the alleged negligent conduct of the medical or health care defendant. Park North Gen. Hosp. v. Hickman, 703 S.W.2d 262, 266 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

4. Inferential Rebuttals

The question of whether issues on inferential rebuttal should be submitted to the jury has been the subject of great debate in Texas. Texas Rule of Civil Procedure 277 specifically provides that “inferential rebuttal issues shall not be submitted but instructions can be.” However, there is still some question as to whether instructions on inferential rebuttal issues should be submitted considering that, in some cases, they constitute a comment on the weight of the evidence. See Perez v. Weingarten Realty Investors, 881 S.W.2d 490 (Tex. App.—San Antonio 1994, writ denied). The following are examples of inferential rebuttals and relative case law.

a. “Sole Cause” and “Sole Proximate Cause”

The special issue of “sole cause” or “sole proximate cause” should not be submitted to the jury in a medical malpractice case. Sendelar v. Alice Physicians & Surgeons Hosp., Inc., 555 S.W.2d 879 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). The following instruction should be substituted for the last sentence of the definition of “proximate cause” if raised by the evidence:

There may be more than one proximate cause of an
event, but if an act or omission of any person not a party to the suit was the “sole proximate cause” of an occurrence, then no act or omission of any other person could have been a proximate cause.

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ §50.5 (1997). However, in a pre-Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) action, the Supreme Court held that submission of such an excess “sole cause” or “sole proximate cause” instruction as part of the instruction on “producing cause” was reversible error. First Int’l Bank v. Roper Corp., 686 S.W.2d 602 (Tex. 1985). Malpractice cases involving pre-Duncan theories of both negligence and products liability could be affected by the Roper decision. See, e.g., Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801 (Tex. 1978) (malpractice-drug product liability case originally brought against a physician and drug manufacturer where the defendant-physician eventually made a “Mary Carter” settlement agreement with the plaintiff).

b. Unavoidable Accident

An “unavoidable accident” claim is an inferential rebuttal issue prohibited from submission, except by instruction if raised by the evidence. See TEX. R. CIV. P. 277; Yarborough v. Berner, 467 S.W.2d 188 (Tex. 1971). The following instruction is recommended in the Texas Pattern Jury Charges and has been expressly approved by the Supreme Court in Lemos v. Montez, 680 S.W.2d 798 (Tex. 1984).

An occurrence may be an “unavoidable accident,” that is, an event not proximately caused by the negligence of any party to it.

Note, however, that the Court shifted its emphasis in inferential rebuttal cases. When the jury was presented with evidence, albeit conflicting, that the delay in delivery of a child was caused by a series of obstetrical emergencies, as opposed to by the nurse’s negligence, an unavoidable accident instruction was proper. Banks v. Columbia Hosp. at Med. City, 233 S.W.3d 64 (Tex. App.—Dallas 2007, pet. denied).

Similarly, note the Supreme Court opinion holding that the inclusion of an improper inferential rebuttal issue did not constitute harmful error. Bed, Bath & Beyond v. Urista, 211 S.W.3d 753 (Tex. 2006). Including an “unavoidable accident” instruction, though improper, did not warrant reversal. “We are not persuaded that harm must likewise be presumed when proper jury questions are submitted along with improper inferential rebuttal instructions.” Urista, 211 S.W.3d at 757. The trial court error, if any, in submitting an
unavoidable accident instruction was harmless error, and therefore, not reversible. Thota v. Young, 366 S.W.3d 678 (Tex. 2012).

c. New and Independent Cause

When evidence of new and independent cause is presented, the definitions of “proximate cause” and “new and independent cause” should be submitted. Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ). A “new and independent cause” is defined as follows:

New and Independent Cause means the act or omission of a separate and independent agency, not reasonably foreseeable by a physician exercising ordinary care, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question, and thereby becomes the immediate cause of such occurrence.

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 50.4 (1997). In medical malpractice cases, it has been held that medical expert testimony as to “probable causes” attributable to a “new and independent cause” theory is necessary to justify submission of such an instruction. Hersh v. Hendley, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ).

The fact that a patient suffered from post-operative complications following surgery does not excuse the surgeon. The Houston (Fourteenth) court of appeals implied that where malpractice leads to surgery, post-operative complications will be seen as flowing directly from the original act of negligence and not a “new and independent cause” which would excuse the negligence. Galvan v. Fedder, 678 S.W.2d 596 (Tex. App.—Houston [14th Dist.] 1984, no writ).

Moreover, in Brownsville Med. Ctr. v. Gracia, 704 S.W.2d 68 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.), the Corpus Christi court of appeals held that the negligence of the defendants—a hospital and a doctor—resulting in a delay of proper diagnosis and treatment of a child’s condition and a hindrance of subsequent diagnosis and treatment, did not render the subsequent medical action or inaction a “new and independent intervening cause.”

However, despite the recent trend towards proliferating instructions, some of the precepts of common-law negligence submission survive. For example, a superseding or new and independent cause instruction is not appropriate when the treating doctors’ failure to be aware of a patient's condition was reasonably foreseeable. In such cases, the “superseding” cause is actually a “concurring” cause and, thus, the superseding cause instruction was improper. Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851 (Tex. 2009).

d. A New Instruction: Mitigation of Damages

In some instances, rather than a contributory negligence instruction, a defendant is entitled to a failure to mitigate damages instruction. The Fort Worth Court of Appeals held that, in light of defendant-physician’s assertion at trial that patient failed to follow physician's instruction to return to the hospital for evaluation if complications arose, a mitigation of damages instruction should have been given because defendant’s argument focused on the exacerbation of patient's post-surgery damages, not on the cause of the artery tear that arose during surgery. Young v. Thota, 271 S.W.3d 822, 833, 835 (Tex. App.—Fort Worth 2008), rev’d, 2012 WL 1649163 (Tex. May 11, 2012). ("[C]ontributory
negligence goes to the proximate cause of the original incident, and mitigation arises from an injured party's duty to act reasonably in reducing his damages....While we acknowledge that patients owe a duty of cooperation to treating physicians who assume a duty of care for them and that such a duty includes a duty to return for evaluation and treatment, that duty does not justify the submission of [patient’s] negligence in contributing to the injury.

In its review of the Fort Worth court of appeals' decision in Thota, the Texas Supreme Court held that, including a jury question on a patient's contributory negligence, if it is error, is harmless error. Thota v. Young, 366 S.W.3d 678 (Tex. 2012). Further, error, if any, in submitting a new and independent cause instruction is also harmless. Note that the asserted contributory negligence of plaintiff occurred after the allegedly negligent medical care. It is difficult to distinguish between contributory negligence in the Thota context and failure to mitigate. Note, however, that Thota does not address long-standing law that a patient's negligence, if any, which brings him to medical care cannot be submitted to the jury.

e. Loss of a Chance Instruction

If the evidence supports a loss of a chance instruction, the court should give it. The jury should be instructed that the plaintiff must prove a greater than 50% chance of survival without the negligence in order to prevail in her proof that the defendant's negligence proximately caused her injury or death. Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851 (Tex. 2009).

5. Informed Consent

a. At Common Law

In Roark v. Allen, 633 S.W.2d 804 (Tex. 1982), the following submission of informed consent was held to be an improper application of the doctrine:

Do you find from a preponderance of the evidence that Dr. Dale Allen failed to obtain the "informed consent" of the parents of Robert Ryan Roark concerning the possible injury to the infant’s head?

The term, "informed consent," as used in this issue, is meant the furnishing by the physician to the parents of the infant sufficient information about the nature and extent of possible injuries sustained at his birth and the complications associated with such injuries, together with the information as to available medical or surgical means to diagnose such injuries and the risks or dangers inherent in connection with such injuries, to permit the parents of the infant to make a knowledgeable and fully informed decision as to accepting or refusing other diagnostic procedures or suggested medical or surgical care or lack of medical or surgical care of fractures to the skull of an infant.

The Roark Court held that the doctrine of informed consent applied only to medical procedures yet to be performed. Thus, informed consent was inapplicable in a situation such as this where the patient had already undergone the proposed treatment and been injured.

b. Informed Consent Cases Under Article 4590i, § 6.01, and Chapter 74

The Texas Pattern Jury Charges provide several variations on the submission of informed consent issues. The PJC provides an issue for informed consent at common law, an issue for informed consent when the procedure is not on list A or B and an issue when the procedure is on list A.

Section 51.10 of the Texas Pattern Jury Charges—Malpractice, Premises and Products—submits the doctrine of informed consent under the common law. This issue would be used only in cases accruing before the enactment of Article 4590i in August 1977 or in cases in which Article 4590i does
not govern, such as when the defendant is not defined as a health care provider under the definition section of Article 4590i. *See Lenhard v. Butler*, 745 S.W.2d 101, 106 (Tex. App.—Fort Worth 1988, writ denied) (holding that psychologist was not a “health care provider” under Article 4590i).

When the procedure for which the plaintiff sues is not on either list A or B, the physician must disclose all risks that could influence a reasonable person in making a decision to consent to the procedure. *Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983); COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 51.11 (1997).

The committee promulgating the Texas Pattern Jury Charges—Malpractice, Premises and Products—states that, if the evidence shows that the procedure which is the subject of this suit is on the B list—that is, the list requiring no disclosure—then no question on informed consent should be submitted to the jury. COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 51.11 (1997).

The issue to be submitted when the procedure in question is an A list procedure includes an instruction at the outset which states:

> The law requires [Dr. Davis] to disclose to [Paul Payne] the risks and hazards of [retinal surgery].

The risks and hazards of [retinal surgery] required to be disclosed are

a. [Complications requiring additional treatment and/or surgery];

b. [Recurrence or spread of disease]; and
c. [Partial or total loss of vision.]

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 51.12 (1997). The comment to this section provides that the particular risks that the plaintiff alleges either were not given or were not given appropriately should be substituted for the risks listed in the instruction. COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 51.12 (1997).

6. **Submitting Res ipsa loquitur by Instruction**

Although rarely used in medical malpractice cases, the instruction submitting the doctrine of *res ipsa loquitur* is as follows:

In answering this question, you may infer negligence by a party, but are not compelled to do so, if you find that: 1) the character of the occurrence is such that it would ordinarily not happen in the absence of negligence, and 2) the instrumentality causing the occurrence was under the management and control of the party at the time that the negligence, if any, probably occurred.

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 51.09 (1997); Haddock v.
Arnspiger, 793 S.W.2d 948, 954 (Tex. 1990).

Only some evidence is required to support giving this instruction, not that the content of the instruction be proven as a matter of law. Schorlemer v. Reyes, 974 S.W.2d 141 (Tex. App.—San Antonio 1998, pet. denied).

7. Damages Limit Instruction

Article 4590i, § 11.02(d), and § 74.303(e)(1) provide that at the trial of a health care liability claim under the Act, the court shall include the following instruction to the jury:

Do not consider, discuss, or speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.

The Texas Pattern Jury Charges Committee recommends the following as the instruction which more fully effectuates the intent of the Legislature.

Do not consider, discuss or speculate whether any party is or is not subject to any damage limit under applicable law.

8. Bad Result Instruction

The trial court must provide the following instructions in its charge to the jury when the court has determined such instruction to be “reasonably applicable to the facts”:

A finding of negligence may not be based solely on evidence of a bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judges of the weight, if any, to be given to any such evidence.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 7.02(a) (West 1997).

9. Establishment of Facts: Direct or Circumstantial Evidence

An instruction on direct and circumstantial evidence may be crucial in malpractice cases involving complicated evidence on standard of care and causation issues. The following instruction on circumstantial evidence is recommended in the Texas Pattern Jury Charges:

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary evidence. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES - MALPRACTICE, PREMISES & PRODUCTS PCJ 80.11 (1997). See also TEX. R. CIV. P. 279. But See Lucas v. United States, 807 F.2d 414 (5th Cir. 1987) (holding that damage limit may be raised at any “practically sufficient time”).
PRODUCTS PCJ 40.7 (1997). It is arguable that a failure to submit such an instruction would be reversible error in a sharply contested malpractice case involving circumstantial evidence on the negligence, causation or other issues, despite early Supreme Court decisions that it is not error to give or to refuse an instruction on circumstantial evidence. 


10. Burden of Proof: Preponderance of Evidence by Definition

Rule 277 of the Texas Rules of Civil Procedure provides that “[t]he placing of the burden of proof may be accomplished by instructions rather than by inclusion in the charge.” The following instruction is recommended at 3 TPJC 40.03 (1990) to properly place the burden of proof:

Answer “Yes” or “No” unless otherwise instructed. A “Yes” answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a “Yes” answer, then answer “No”. Your answers to all other questions that require more than a “Yes” or “No” answers must be based on a preponderance of the evidence.

“PREPONDERANCE OF THE EVIDENCE” means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

11. Instruction on Spoliation

The Supreme Court has expressly refused to recognize an independent tort for the spoliation of evidence. Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998). In recognizing that there were other means available to a party to address wrongful destruction of evidence, the Court stated:

It is simpler, more practical, and more logical to rectify any improper conduct within the context of the lawsuit in which it is relevant. Indeed, evolving remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence. Trial judges have broad discretion to take measures ranging from jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions.

Trevino, 969 S.W.2d at 953. Thus, in the proper case, a trial court has discretion to instruct the jury that it is entitled to presume that the missing evidence would have been harmful to the party who lost or destroyed it.

12. Disapproved Instructions and Definitions

a. Instructions on Rejected Standards of Care for Physicians

The “reasonable physicians would disagree,” “respectable minority,” “considerable number,” “any variance” and “consensus” standards have been expressly rejected as legal standards for the medical profession. The Texas Supreme Court has adopted the “reasonable prudent physician” standard in Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977). An instruction or definition to the jury on any of these rejected standards would be improper. Henderson v. Heyer-Schulte Corp., 600 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).

b. “Poll Taking” Standard
The Supreme Court has rejected all legal standards that concern the medical practice of a given number of physicians or a “polling” of a given number of physicians. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977).

c. “Medical Judgment” or “Recognized Alternative Methods” Standards

The “medical judgment” or “recognized alternative methods” standard provides that a doctor is not medically negligent if: (1) other physicians recognize more than one method for undertaking or performing a particular form of care or treatment at the time in question; (2) the physician is at liberty to select any such methods; (3) the physician merely chooses a recognized alternative method for the procedures he follows in the care or treatment of a patient; and (4) the physician exercises the required skill and care in administering and following the method of his choice. This standard would be true even though other medical witnesses may not agree with the choice he made. See *Graham v. Gautier*, 21 Tex. 111, 120 (1858); *Edinburg Hosp. Auth. v. Trevino*, 215 S.W.2d 356 (Tex. Civ. App.—Fort Worth 1948, writ dism’d).

A Texas court of appeals expressly disapproved the “medical judgment” and “recognized alternative methods” standards in holding that an instruction to the jury on such a standard was improper, since it fails to correctly convey to the jury the “reasonably prudent doctor” standard adopted by the Supreme Court in *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977). See *Henderson v. Heyer-Schulte Corp.*, 600 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.) (holding that *Hood v. Phillips* invalidated the approved instructions in *Forney v. Mem’l Hosp.*, 543 S.W.2d 705 (Tex. App.—Beaumont 1976, writ ref’d n.r.e.)).

d. Physician As Neither Insurer Nor Guarantor

In closely or sharply contested medical malpractice cases, an instruction stating that physicians are neither insurers or guarantors of their care or treatment is reversible error as an improper comment on the case as a whole. *Hersh v. Hendley*, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ). See also *Acord v. General Motors*, 669 S.W.2d 111 (Tex. 1984) (addressing a product liability case involving similar instruction that automobile manufacturers were neither insurers or guarantors of a perfect or accident-proof product).

e. Honest Mistake in Judgment

In a sharply-contested medical malpractice action, an instruction advising the jury that physicians are “not responsible in law for an honest mistake in judgment, unless the mistake is due to want of ordinary care” was an improper comment on the case as a whole, and a direct comment to the jury on the legal effect of an alleged “honest mistake in judgment.” The submission of such instruction was reversible error. *Levermann v. Cartall*, 393 S.W.2d 931, 935 (Tex. Civ. App.—San Antonio 1965, writ ref’d n.r.e.). See also *Acord v. General Motors*, 669 S.W.2d 111 (Tex. 1984). But See *Lone Star Gas v. Lemond*, 897 S.W.2d 755 (Tex. 1995) (holding that the trial court’s added instruction while error, was not reversible error).

13. Submission of Emergency Room Cases

Chapter 74 creates a unique standard of care in emergency room cases. The relevant provisions are found at Subchapter D of Chapter 74.

a. § 74.153 - New Standard of Proof in Emergency Cases

In a suit involving a health care liability claim against a physician or health care
provider for injury to or death of a patient arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that the treatment or lack of treatment by the physician or health care provider departed from accepted standards of medical care or health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with wilful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances.

There are many unknowns about § 74.153. First, no case law has yet defined what the concept of “wilful [sic] and wanton negligence” might possibly mean. “Wilful [sic] or wanton” are terms generally considered inconsistent with negligence. Some advocate for a gross negligence standard in this instance, though it is unclear why the legislature would have used the terms “wilful [sic] or wanton negligence” if it wanted a gross negligence standard. Until case elucidates the proper standard, it is difficult to know how to submit this issue.

It is unknown exactly what “wilful and wanton” negligence constitutes. Traditionally, conduct is either wilful or wanton or negligent, not some combination of all three. So far, we are told that wilful and wanton is not the same thing as gross negligence. Benish v. Grottie, 281 S.W.3d 184 (Tex. App.—Fort Worth 2009, pet. denied). We are also told that wilful and wanton is the same thing as gross negligence. Turner v. Franklin, 325 S.W.3d 771 (Tex. App.—Dallas 2010, pet. denied).


b. § 74.154. Jury Instructions in Cases Involving Emergency Medical Care

(d) In an action for damages that involves a claim of negligence arising from the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

(1) whether the person providing care did or did not have the patient’s medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) the presence or lack of a preexisting physician-patient relationship or
health care provider-patient relationship;
(3) the circumstances constituting the emergency; and
(4) the circumstances surrounding the delivery of the emergency medical care.

(b) The provisions of Subsection (a) do not apply to medical care or treatment:
(1) that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient;
(2) that is unrelated to the original medical emergency; or
(3) that is related to an emergency caused in whole or in part by the negligence of the defendant.

Practitioners are advised to consult the current iteration of the Pattern Jury Charge volume on Professional Liability for suggested methods of submitting health care liability claims and defenses.

XIII. INSURANCE COVERAGE

Though a thorough discussion of coverage issues is beyond the scope of this paper, a few recent opinions are of interest.

A. Multiple Claims And Defendants

Declaratory relief was appropriate in favor of a carrier against insured physicians who had sought a ruling that they had $1 million in coverage a piece. Columbia Cas. Co. v. CP Nat’l, Inc., 175 S.W.3d 339 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). The case relied heavily on construction of the language of the particular policy in question.

In Columbia Casualty, the underlying suit was filed against two physicians at the same facility. The physicians characterized the suit as two “claims,” justifying two applications of the $1 million policy limits. Conversely, the insurer sought a declaratory judgment that the suit constituted a single “claim” for coverage purposes.

The Houston court of appeals held:

[175 S.W.3d at 348 (emphasis added).]

Thus, the physicians had less coverage than they sought.

B. The Importance of the “Claim” Date

The importance of the date of a “claim” under Article 4590i (and presumably Chapter 74) is highlighted in Tex. Med. Liab. Trust v. Transp. Ins. Co., 143 S.W.3d 335 (Tex. App.—Dallas 2004, pet. denied). Therein, the plaintiffs sent a claim letter to one defendant in 1996 during the defendant’s policy term with the carrier TMLT. In 1999, almost three years later and after the defendant had changed carriers, suit was filed (the case involved allegations
of injury to a minor). The defendant who received the initial claim letter, a physician, was also a member of a medical group. That entity did not receive notice until shortly before suit was filed.

Notice was not imputed to the clinic by the sending of the notice letter to the physician. Thus, as no “claim” was made during the clinic’s policy term with TMLT, the TMLT policy did not provide coverage for the clinic once suit was filed, as a matter of law. The successor carrier, Transportation Insurance Company, had the coverage. Thus, the importance of the date of the “claim” is highlighted.

Note the need for thorough analysis here in the context of the “Notice to one is Notice to all” law, now well established, under Section 4.01, Art. 4590i. Although, for purposes of effective 60-day Notice under 4590i/Chapter 74, notice to one defendant is notice to all defendants, for purpose of triggering coverage, actual notice by each defendant is a requisite.
## APPENDIX “A”

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Time Between Negligence &amp; Discovery</th>
<th>Time Between Discovery &amp; Filing Notice</th>
<th>Filing Timely? Y/N</th>
<th>Pertinent Language</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retained Surgical Sponge</td>
<td>5 years</td>
<td>11 months</td>
<td>Y</td>
<td>“Filing of suit within two years of discovery is timely”</td>
<td>Melendez v. Beal, 683 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1984, no writ)</td>
</tr>
<tr>
<td>Pre-natal mis-diagnosis of genetic defect</td>
<td>3 years &amp; 10 months</td>
<td>9 months</td>
<td>Y</td>
<td>“The limitation period of Art. 5.82, Sec. 4, if applied as written, would require the Nelsons to do the impossible – to sue before they had any reason to know they should sue. Such a result is rightly described as “shocking” and is so absurd and unjust that it ought not be possible.”</td>
<td>Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984)</td>
</tr>
<tr>
<td>Retained sponge</td>
<td>2 years &amp; 1 month</td>
<td>Unknown</td>
<td>&amp;</td>
<td>Dissent suggests the test should be “…whether the claimant prosecuted his claim with that degree of diligence that an ordinary person would have exercised under same or similar circumstances”</td>
<td>Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985)</td>
</tr>
<tr>
<td>Retained Surgical Sponge</td>
<td>5 years</td>
<td>11 months</td>
<td>Y</td>
<td>Bradford v. Sullivan, 683 S.W.2d 697 (Tex. 1985) (per curiam)</td>
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<td>--------------------------</td>
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</tr>
<tr>
<td>Negligent use of surgical sutures</td>
<td>3 years &amp; 1 month</td>
<td>3 months (notice) 1 month (suit filing)</td>
<td>Y</td>
<td>Tsai v. Wells, 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.)</td>
<td></td>
</tr>
<tr>
<td>Negligent Radiation Treatment</td>
<td>2 years &amp; 2 months</td>
<td>3 months</td>
<td>Y</td>
<td>If Plaintiff could not know of “the nature of his injury,” that his known stomach problems were caused by the radiation, the statute of limitations was unconstitutional</td>
<td></td>
</tr>
<tr>
<td>Mis-diagnosed mitral valve stenosis as epilepsy</td>
<td>“Could not have been discovered within 2 years of last treatment”</td>
<td>4 months</td>
<td>Y</td>
<td>Deluna v. Rizkallah, 754 S.W.2d 366 (Tex. App.—Houston [1st Dist.] 1988, writ denied)</td>
<td></td>
</tr>
<tr>
<td>Failure to diagnose fracture</td>
<td>20 months</td>
<td>21 months</td>
<td>N</td>
<td>Plaintiff might have gotten some additional time for filing due to proximity of discovery and statute of limitations, but a 21 month delay mooted this because it is unreasonable as a matter of law</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Condition</th>
<th>Time After Discovery</th>
<th>Time Required</th>
<th>N</th>
<th>Note</th>
<th>Citing Case(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haldol-induced tardive Dyskinesia</td>
<td>8 months</td>
<td>“After statute of limitations ran”</td>
<td>N</td>
<td>Waiting for expert opinion after learning of injury does not extend statute of limitations</td>
<td><em>Adkins v. Tafel</em>, 871 S.W.2d 289 (Tex. App.—Fort Worth 1994, no writ)</td>
</tr>
<tr>
<td>Failure to diagnose RSD</td>
<td>9 months</td>
<td>2 years after discovery</td>
<td>N</td>
<td>Discovery well within statute of limitations required filing within statute of limitations</td>
<td><em>Gomez v. Carreras</em>, 904 S.W.2d 750 (Tex. App.—Corpus Christi 1995, no writ)</td>
</tr>
<tr>
<td>Negligent administration of steroids</td>
<td>More than 2 years</td>
<td>1 year minus 2 weeks</td>
<td>N</td>
<td>“The constitutionality of the Article 4590i statute of limitations, as applied to a particular situation, turns on when the Plaintiff acquired knowledge of (1) the injury; (2) its cause; and (3) the identity of the potentially culpable party.” Time spent looking for experts does not extend the statute of limitations.</td>
<td><em>LaGesse v. PrimaCare</em>, 899 S.W.2d 43 (Tex. App.—Eastland 1995, writ denied)</td>
</tr>
<tr>
<td>Negligent placement of screw</td>
<td>4 years</td>
<td>18 months after reaching majority</td>
<td>Y</td>
<td>Adults have 2 years plus a reasonable time after discovery to bring suit. Minors have 2 years after reaching majority.*</td>
<td><em>Weiner v. Wasson</em>, 900 S.W.2d 316 (Tex. 1995); but see <em>Tenet Hosps. Ltd. v. Rivera</em>, 445 S.W.3d 698 (Tex. 2014).</td>
</tr>
<tr>
<td>Failure to diagnose</td>
<td>6 years</td>
<td>13 months</td>
<td>N</td>
<td>Delay excessive as a matter of</td>
<td><em>Fiore v. HCA Health Servs. of Tex., Inc.</em>, 915</td>
</tr>
<tr>
<td>Negligence in failure to remove entire fallopian tube at surgery</td>
<td>1 year &amp; 8 months</td>
<td>11 months</td>
<td>N</td>
<td>Plaintiff offered no evidence why suit could not be brought in the 4 months left under the original 2 year statute of limitations</td>
<td>Radloff v. Dorman, 924 S.W.2d 416 (Tex. App.—Amarillo 1996, writ dism’d by agr)</td>
</tr>
<tr>
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<td>---</td>
</tr>
<tr>
<td>Failure to diagnose cancer</td>
<td>Notice sent 1 year and 3 months after treatment</td>
<td>23 months after notice sent</td>
<td>N</td>
<td>Allegation that time spent looking for experts should extend statute of limitations rejected</td>
<td>Allen v. Tolon, 918 S.W.2d 605 (Tex. App.—Eastland 1996, no writ)</td>
</tr>
<tr>
<td>Negligent prescription of drug for too long a period causing cancer</td>
<td>7 years (discovery of cancer)</td>
<td>24 years</td>
<td>N</td>
<td>Minor child’s statutory wrongful death claim not tolled by minority if parent’s cause of action was barred at time of death</td>
<td>Diaz v. Westphal, 941 S.W.2d 96 (Tex. 1997)</td>
</tr>
<tr>
<td>Failure to diagnose fracture</td>
<td>More than 1 year</td>
<td>N</td>
<td>Delay unreasonable as a matter of law when Plaintiff offered no explanation for the delay</td>
<td>Voegtlin v. Perryman, 977 S.W.2d 806 (Tex. App.—Fort Worth 1998, no pet)</td>
<td></td>
</tr>
<tr>
<td>Event Description</td>
<td>Time Frame</td>
<td>Time Frame Details</td>
<td>Fact Issue</td>
<td>Reasoning</td>
<td>Citation</td>
</tr>
<tr>
<td>-------------------------------------------</td>
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<td>---------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>False diagnosis of cancer</td>
<td>3-1/2 years</td>
<td>1 week less than 1 year</td>
<td>Fact issue was raised</td>
<td>“A claimant is allowed a reasonable time to investigate, prepare and file suit after her injury.” “Reasonableness” of the delay is a question of fact.</td>
<td><em>DeRuy v. Garza</em>, 995 S.W.2d 748 (Tex. App.—San Antonio 1999, no pet)</td>
</tr>
<tr>
<td>Failure to find and remove IUD</td>
<td>2 years and 3 months</td>
<td>10 months</td>
<td>Y</td>
<td>Seven of the 10 months was due to Defendant’s refusal to provide medical records. 90 days recovering from surgery, consulting an attorney, investigating and filing suit. Defendant delay in sending records does not toll statute of limitations but is a factor in determining reasonableness of delay.</td>
<td><em>Gagnier v. Wichelhaus</em>, 17 S.W.3d 739 (Tex.App.—Houston [1st Dist.] 2000, pet. Denied)</td>
</tr>
<tr>
<td>Failure to diagnose fracture</td>
<td>17 months</td>
<td>N</td>
<td>Plaintiff offered No explanation For 17 month</td>
<td></td>
<td><em>Shah v. Moss</em>, 67 S.W.3d 836 (Tex. 2001)</td>
</tr>
<tr>
<td>Misdiagnosis of cancer</td>
<td>4 months Less than 2 Years</td>
<td>After 2 years</td>
<td>N</td>
<td>Delay, therefore it is unreasonable as a matter of law.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>When the Plaintiff discovered that she had cancer with four months remaining on the statute of limitations, she was required to file suit during that four months even though the Defense did not send her the records within that time, and in order for her to discover that there had been negligence in reading an earlier mammogram, expert review would be required. The Court states that upon discovery of her cancer, Mrs. O’Reilly “had discovered her alleged wrong and had four months to file suit before the statute ran,” while acknowledging that “the application of this absolute</td>
<td></td>
</tr>
</tbody>
</table>

limitation to Mrs. O’Reilly under these circumstances is exceedingly harsh,” The Court went on to hold her claim time barred, even though: (1) as a practical matter it would have been impossible for her to know the content of the mammogram before it was revealed to her; (2) as a practical matter she would have had to file a baseless lawsuit in alleging negligence in a reading of a mammogram she had never been permitted to see, much less have an expert review, and (3) even though she had discovered that she had cancer, but in no way could demonstrate that it had existed at the time of the earlier mammogram.

<p>| Negligently performed surgery | 2 years &amp; 2 months | 14 months | N | “A reasonable delay is allowed for investigating, preparation and filing the claim after injury is discovered. The 14 month delay was not for that purpose…We cannot conclude ordinary life experiences can be argued as legitimate bases for delaying the filing of a lawsuit.” | Pech v. Tavarez, 112 S.W.3d 282 (Tex. App.—Corpus Christi 2003, no pet.) |</p>
<table>
<thead>
<tr>
<th>Failure to diagnose syphilis</th>
<th>14 years</th>
<th>2 years</th>
<th>N</th>
<th>Two years is unreasonable as a matter of law, under the facts of this case.</th>
<th>West v. Moore, 116 S.W.3d 101 (Tex. App.—Houston [14th Dist.] 2002, no pet)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Catheter causes injury</td>
<td>4 months</td>
<td>Outside Limitations</td>
<td>N</td>
<td>Plaintiff had approximately 20 months after discovery to file suit</td>
<td>Streich v Lopez, 2004 WL 1902116 (Tex. App.—Corpus Christi 2004, no pet.) (mem. op.)</td>
</tr>
</tbody>
</table>
### APPENDIX “B”

**TOLLING OF THE STATUTE OF LIMITATIONS**

<table>
<thead>
<tr>
<th>CAUSE OF ACTION</th>
<th>TOLLED</th>
<th>NOT TOLLED</th>
<th>AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury to Parent</td>
<td></td>
<td></td>
<td>Parental consortium is a derivative claim. Therefore, if the statute of limitation bars the parent’s claim, it bars the minor’s. Minority offers no tolling. <em>Nash v. Selinko</em>, 14 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 1999, pet. Denied)</td>
</tr>
<tr>
<td>(Parental consortium Claim by minor child)</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Injury to a Minor</td>
<td>X</td>
<td></td>
<td>Minor has until two years after attaining majority to sue.* Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995) (following Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983); but see Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014) (adding the very confusing notion of diligence on the part of the next friend to this analysis).</td>
</tr>
<tr>
<td>Wrongful Death of Parent</td>
<td>X</td>
<td>X</td>
<td>If a parent’s cause of action would have been time barred at the time of death, minority does not toll statute of limitation for minor child’s wrongful death case, because child’s claim is derivative and statute-based. <em>Diaz v. Westphal</em>, 941 S.W.2d 96, 100 (Tex. 1997). If parent could have sued at time of death, statute of limitation for wrongful death is tolled by minority. <em>Bangert v. Baylor Coll. Of Med.</em>, 881 S.W.2d 564 (Tex. App.—Houston [1st Dist.] 1994, writ denied)</td>
</tr>
<tr>
<td>Wrongful Death of Minor</td>
<td></td>
<td>X</td>
<td>Minority tolling of limitations does not toll statute of limitation for parents when death occurs more than two years after last treatment. <em>Gross v. Kahanek</em>, 3 S.W.3d 518 (Tex. 1999)</td>
</tr>
<tr>
<td>Child’s Survival Claim Based on Death of Parent</td>
<td>?</td>
<td>?</td>
<td>No case law directly on point, but <em>Diaz</em>, <em>Bangert</em> and <em>Richardson</em> should control.</td>
</tr>
<tr>
<td>Parent’s Survival Claim Based on Death of Minor</td>
<td></td>
<td>X</td>
<td>Minority tolling of limitations tolls statute of limitation on minor’s cause of action, which becomes survival claim at death (i.e., two years from death). <em>Gross v. Kahanek</em>, 3 S.W.3d 518 (Tex. 1999).</td>
</tr>
<tr>
<td>TTCA Notice</td>
<td>X</td>
<td></td>
<td>Minority does not toll limitations to exempt minors from the six month notice.</td>
</tr>
</tbody>
</table>