

# Chapter 74: Interlocutory Appeals and Original Proceedings

**Bryan Rutherford**

MACDONALD  DEVIN

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# A Bit of History: Article 4590i

- ◆ As part of medical malpractice tort reform, the Legislature required a health care liability claimant to demonstrate that the claim was not frivolous early in the case, or risk dismissal
- ◆ Medical malpractice claims filed before September 1, 2003, were governed by former Article 4590i, which required a health care liability claimant to serve an expert report and the expert's curriculum vitae on the defendants within 180 days of filing suit
- ◆ If the claimant failed to comply, the trial court had no discretion but to dismiss the claim and award attorney's fees and costs to the defendant
- ◆ The only interlocutory review was by original proceeding

# *Pending 4590i Cases*

- ◆ In 2004, the Texas Supreme Court denied ten consolidated petitions for writ of mandamus, without issuing a written opinion. *In re Woman's Hosp. of Texas, Inc.*, 141 S.W.3d 144, 145 (Tex. 2004).
- ◆ Continued review on a case-by-case basis: 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>
- ◆ No mandamus available: 4<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>

# *Pending 4590i Cases*

- ◆ In 2008, the Texas Supreme Court clarified that mandamus would continue to be available in 4590i cases. *In re McAllen Med. Ctr., Inc.*, \_\_\_\_\_ S.W.3d \_\_\_\_\_, 2008 Tex. LEXIS 759 at \*4-5 (Tex. August 29, 2008).
- ◆ Justice Wainwright sharply dissented to this “Whole New World,” arguing that delay and expense alone do not justify mandamus review.

# The Current Statute: Chapter 74

Appellate Lawyers'  
Employment Security Act

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# The Current Statute: Chapter 74

- ◆ Serve an expert report and C.V. within 120 days of filing suit.
- ◆ More than one expert allowed, but only a qualified physician may offer an opinion regarding causation.
- ◆ If an expert report has not been served, the trial court shall dismiss the claim, and awarding attorney's fees and costs. CPRC 74.351(b)
- ◆ A trial court is required to 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 expert report requirement." CPRC 74.351(l)
- ◆ The trial court has discretion to grant one thirty-day extension of time to a deficiency in an element of the expert report. CPRC 74.351(c)

# *Appellate Review*

- ◆ The interlocutory appeal statute was modified to allow review of an order that “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.” CPRC 51.014(a)(9)
- ◆ Texarkana and Beaumont Courts of Appeals held review of “mixed” orders was through interlocutory appeal
- ◆ Corpus, Austin, El Paso, and San Antonio held mandamus was the proper vehicle
- ◆ *Ogletree v Matthews* resolved the split, holding a “mixed” order is not subject to interlocutory appeal

# ***Purpose of the Expert Report***

- ◆ The preliminary expert report is intended to satisfy two purposes:

(1) to inform the defendant of the specific conduct the plaintiff has called into question, and

(2) to provide a basis for the trial court to conclude that the claims have merit.

# *Standards of Review*

- ◆ Abuse of discretion standard
- ◆ *De novo* standard applies for statutory interpretation
- ◆ “Four corners” rule

# *Cases Prior to November 2007*

- ◆ Little guidance from the Texas Supreme Court
- ◆ Strictly interpreted
- ◆ Followed applicable 4590i interpretations

# *Ogletree v. Matthews*

(Nov. 2007)

- ◆ No interlocutory appeal from an order that both denied a dismissal motion and granted a thirty-day grace period.
- ◆ Section 74.351 contemplated only two kinds of reports:
  - (a) completely absent reports; and
  - (b) deficient but correctable reports.

# *Ogletree v. Matthews*

## ◆ Did not address:

- whether a nurse who is not a physician may issue an expert report on causation (waived objection)
- the fact that the plaintiff did not serve the expert's C.V. at all (ignored by the Court, despite statutory requirement)

# *Ogletree v. Matthews*

- ◆ Justice Willett's concurrence identified a third type of report:
  - “It is indisputable, for example, that a ‘report’ signed by a plumber is no report at all and merits swift dismissal, no matter how brilliantly he describes how the defendant’s departure from accepted standards of care caused the patient’s injury.”

# *Lewis v Funderburk*

(April 2008)

- ◆ The question of jurisdiction in “mixed” motion cases was settled in favor of appellate review
- ◆ A claimant may cure a deficient report from one expert by filing an entirely new report from a different expert

# *Lewis v Funderburk*

- ◆ Justice Willett again concurred, but commented on the report: “Unlike the report at issue in *Ogletree*, which addressed the required elements that make a report a report, the document that Funderburk designated as his report—a February 2002 “thank-you-for-your-referral letter”—bears no resemblance to Chapter 74's definition of an expert report. This doctor-signed letter is no more a report than a doctor-signed prescription or Christmas card would be.”
- ◆ But, held that Lewis waived the issue.

# *Leland v. Brandal*

(August 2008)

- ◆ “[W]hen elements of a timely filed expert report are found deficient, either by the trial court or on appeal, one thirty-day extension to cure the report may be granted.”
- ◆ Sua Sponte, on appeal

# *Other Issues to Watch*

- ◆ “Health care liability claims”
- ◆ The date for serving the expert report may be extended by written agreement of the affected parties
- ◆ Attorney’s fees

# Practice Observations

- ◆ One purpose of the report is to provide the trial court with a basis to conclude the claims have merit
- ◆ Agree to abate the trial court proceedings, to avoid fees and costs
- ◆ Consider both interlocutory appeal and an original proceeding

Thank you

