# Chapter 74: Interlocutory Appeals and Original Proceedings

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# Chapter 74:
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The Legislative purpose behind the Texas Medical Liability and Insurance Improvement Act ("MLIIA") was to lessen "frivolous" medical malpractice litigation, and thereby lower physicians' medical malpractice insurance rates and increase patients' access to physicians. The MLIIA has been expanded over time to include a variety of health care providers, and a range of acts now fall under a broad definition of "health care." The current version of the MLIIA is codified at Chapter 74 of the Texas Civil Practice and Remedies Code, and it became effective on September 1, 2003.

As part of the changes that went into Chapter 74, there is now a right to interlocutory appeal regarding the preliminary expert report requirement. The wide-spread use of this remedy has caused some practitioners to refer to Chapter 74 as the "Appellate Lawyers' Employment Security Act." There have certainly been a number of interlocutory appeals and original proceedings that have tested Chapter 74's expert report requirement. This paper explores the basic questions that have arisen regarding the expert report requirement, and identifies some of the hot issues currently pending in the appellate courts regarding Chapter 74.

## I. A Bit of History: Article 4590i

### A. *Requirements*

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.[1] If the claimant failed to comply, the trial court had no discretion but to dismiss the claim

[1] *See* TEX. REV. CIV. STAT. Art. 4590i, § 13.01(d), *repealed by* Act of September 1, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 TEX. GEN. LAWS 864, 884 (codified at TEX. CIV. PRAC. & REM. CODE Chapter 74).

and award attorney's fees and costs to the defendant.[2] The trial court had discretion to grant one 30-day grace period to allow the claimant to comply with the expert report requirement, upon a showing that non-compliance was due to "accident or mistake."[3] A report that completely omits one of the statutory elements cannot be considered an "accident or mistake."[4]

If the trial court granted a defendant's dismissal motion, the claimant's remedy was to immediately pursue a regular appeal. But, Article 4590i did not provide for interlocutory review of the trial court's decision *not* to dismiss a claim, or of a decision to grant a grace period. If the Legislative purpose for the expert report statute was to prevent a health care defendant from incurring defense costs in an ultimately frivolous case, that purpose would be frustrated by allowing such a claim to proceed.[5] Consequently, when a trial court denied a health care defendant's dismissal motion or granted a claimant an extension to cure, the defendant's interlocutory remedy was to file a petition for writ of mandamus.

### B. *Mandamus Relief*

Mandamus relief is available to correct a clear abuse of discretion, where there is no other adequate remedy at law.[6] Because Article 4590i provided no right to interlocutory appellate review, an original proceeding was the only option available to a health care defendant who wanted to challenge a trial court's denial of a dismissal motion regarding the preliminary expert report.[7] A claimant whose lawsuit was dismissed simply filed a regular appeal.[8] As might be expected, the outcome of these original proceedings varied widely, even with application of the abuse of discretion standard.

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2 *Id.* at § 13.01(e); *Park v. Lynch*, 194 S.W.3d 95, 99 (Tex. App.–Dallas 2006, no pet.).

3 *See* TEX. REV. CIV. STAT. Art. 4590i, § 13.01(g), *repealed by* Act of September 1, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 TEX. GEN. LAWS 864, 884 (codified at TEX. CIV. PRAC. & REM. CODE Chapter 74).

4 *Walker v. Gutierrez*, 111 S.W.3d 56, 65 (Tex. 2003).

5 *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) ("[E]liciting an expert's opinions early in the litigation [is] an obvious place to start in attempting to reduce frivolous lawsuits.").

6 *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

7 *See, e.g., In re Samonte*, 163 S.W.3d 229, 233 (Tex. App.–El Paso 2005).

8 *See, e.,g., Palacios*, 46 S.W.3d 873.

On September 1, 2003, Chapter 74 became effective, and the changes in appellate remedy altered the landscape of 4590i cases in the eyes of several Courts of Appeals. Ambiguous inaction by a majority of the Texas Supreme Court in 2004 led to a split in authority regarding whether mandamus review would continue to be available in the hundreds of 4590i cases still working their way through the system.

### C. *Pending 4590i Cases*

#### 1. Split of Authority from 2004 to 2008

In 2004, the availability of mandamus relief in 4590i cases was thrown into question by an ambiguous ruling. In *In re Woman's Hospital*, the Texas Supreme Court denied ten consolidated petitions for writ of mandamus, without issuing a written opinion.[9] In a concurring and dissenting opinion, Justice Owen chastised the majority for failing to provide guidance to the lower courts regarding interpretation of former Article 4590i[10] in mandamus proceedings.[11]

Compounding the confusion was the following statement the Texas Supreme Court a few months later: "When questions arose concerning the availability of mandamus to review the sufficiency of expert reports required in medical malpractice cases, the Legislature responded by creating an interlocutory appeal from the denial of dismissals of such cases for insufficient expert reports."[12] Was the Court saying that the change in the law was intended to cut off mandamus relief for 4590i cases? Plaintiffs argued this was the case, while defendants attempted to move forward with original proceedings under prior, clearer law.

In a concurring opinion issued after *In re Woman's*, Justice Frost of the First Court of Appeals noted the uncertainty perpetuated by the decision of a majority of the Texas Supreme Court's not to provide any guidance regarding review of Article 4590i:

> [W]hen the matter the high court is deciding is a recurring and unsettled one, an explanation would eliminate uncertainty, foster uniformity and consistency, and advance the Texas Supreme Court's paramount function of speaking with clarity on issues important to Texas jurisprudence.

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9 *In re Woman's Hosp. of Texas, Inc.*, 141 S.W.3d 144, 145 (Tex. 2004).

10 TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon 2003) (repealed).

11 *In re Woman's*, 141 S.W.3d at 148-151 (Owen, J., concurring and dissenting).

12 *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 137-138 (Tex. 2004).

> With more than a thousand 4590i cases reportedly still in the pipeline, the intermediate courts are sure to see this issue again. In the very short time since the Texas Supreme Court denied those ten mandamus petitions, this issue already has arisen several times. Because the issue remains an open one, some litigants will continue to spend time and money seeking relief that our high court has signaled— but not said— is unavailable. Intermediate appellate courts will continue to expend their resources attending to and disposing of original proceedings presenting this issue. And, without binding precedent or a clear pronouncement from the Texas Supreme Court, the panels of these intermediate courts most likely will continue to be divided on the issue. Even though these cases will evanesce in the not-too-distant future, judicial economy would be well served by a definitive answer to this question.[13]

Justice Frost also noted that *In re Woman's* is not binding on the intermediate appellate courts, stating:

> Because the rulings were made without explanation, they are without binding precedential effect, and thus provide no basis for requiring the denial of mandamus relief in any other case raising the same issue.[14]

Following issuance of *In re Woman's*, four other intermediate appellate courts expressly continued to consider the availability of mandamus relief in Article 4590i cases.

In an Article 4590i opinion issued two months after *In re Woman's*, the Amarillo Court of Appeals noted the denial of mandamus relief in that case, but held:

> Pending a definitive ruling from the high court, we will adhere in this case to this court's previously-expressed view that mandamus is available in a proper case.[15]

The Amarillo Court followed its prior holding in *In re Rodriguez*,[16] and analyzed whether the relator at issue met the mandamus standards.[17]

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[13] *In re Schneider*, 134 S.W.3d 866, 872 (Tex. App.–Houston [1st Dist.] 2004) (Frost, J., concurring) (internal citations omitted).

[14] *Id.* at 871 (Frost, J., concurring) (internal citations omitted).

[15] *In re Windisch*, 138 S.W.3d 507, 510 (Tex. App.–Amarillo 2004) (orig. proceeding).

[16] 99 S.W.3d 825, 828 (Tex. App.–Amarillo 2003) (orig. proceeding).

The Beaumont Court of Appeals also addressed the lack of guidance provided by *In re Woman's*, and continued to "consider the adequacy of a remedy by appeal on a case-by-case basis."[18] The Texarkana Court of Appeals has also conducted mandamus review in a post-*In re Woman's* case.[19] The Dallas and El Paso Court of Appeals have held similarly.[20]

Three other Courts of Appeals rejected the case-by-case approach adopted by Amarillo, Beaumont, Dallas, El Paso, and Texarkana. These courts that held mandamus relief was no longer available in 4590i cases generally did not provide any rationale, apart from citing *In re Woman's* as authority.[21]

### 2. Mandamus Still Available

Over four years later, the Texas Supreme Court resolved the issue in *In re McAllen Medical Center*, a case in which 400 plaintiffs sued one heart surgeon and a hospital regarding treatment the surgeon provided to 224 patients.[22] Writing for the majority, Justice Brister stated that "mandamus relief is available when the purposes of the health

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17 *In re Windisch*, 138 S.W.3d at 510, *citing In re Rodriguez*, 99 S.W.3d at 828; *In re Highland Pines Nursing Home, Ltd.*, No. 12-03-0221- CV, 2004 Tex. App. LEXIS 591 (Tex. App.–Tyler, January 21, 2004) (orig. proceeding); *In re Tenet Hosps., Ltd.*, 116 S.W.3d 821, 827 (Tex. App.–El Paso 2003) (orig. proceeding); *In re Collom & Carney Clinic Ass'n*, 62 S.W.3d 924, 929-30 (Tex. App.–Texarkana 2001) (orig. proceeding).

18 *In re Baptist Hosps.*, No. 09-06-00118-CV, 2006 Tex. App. LEXIS 7659 at *18 (Tex. App.–Beaumont, August 31, 2006) (orig. proceeding).

19 *See In re Zimmerman*, 148 S.W.3d 214, 216-17 (Tex. App.–Texarkana 2004 (orig. proceeding) (acknowledging that mandamus may lie to review a trial court's failure to dismiss a medical malpractice case under 4590i, but finding no abuse of discretion by the trial court in granting 30-day extension to file expert affidavit); *accord, In re Hill Regional Hosp.*, 134 S.W.3d 533 (Tex. App.–Waco Apr. 14, 2004 (orig. proceeding) (Gray, C.J., dissenting).

20 *In re Watamull*, 127 S.W.3d 351, 355 (Tex. App.–Dallas 2004) (orig. proceeding); *In re Tenet Hosps., Ltd.*, 116 S.W.3d 821, 827 (Tex. App.–El Paso 2003) (orig. proceeding).

21 *See In re Benavides*, 180 S.W.3d 211, 212 (Tex. App.–San Antonio 2005) (orig. proceeding); *In re McAllen Med. Ctr., Inc.*, No. 13-05-441-CV, 2005 Tex. App. LEXIS 8235, *2 (Tex. App.–Corpus Christi, Oct. 5, 2005 (orig. proceeding); *In re Schneider*, 134 S.W.3d 866, 869-70 (Tex. App.–Houston [14th Dist.] 2004, orig. proceeding).

22 *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, 2008 Tex. LEXIS 759 at *4-5 (Tex. August 29, 2008).

care statute would otherwise be defeated."[23] In holding the health care defendants satisfied the clear abuse of discretion element, the Court noted that the expert's C.V. "was a model of brevity," failing to identify where she graduated from medical school or had hospital privileges, and both her C.V. and report failed to establish that she had any special knowledge or expertise regarding the negligence alleged.[24]

The Court approved of a "balancing" approach to identify 4590i cases in which there was no adequate remedy by appeal, holding:

> The statute was intended to preclude extensive discovery and prolonged litigation in frivolous cases; review by mandamus may actually defeat those goals if discovery is complete, trial is imminent, or the existing expert reports show a case is not frivolous.

The Court considered the facts that the trial court had refused to rule on defendants' dismissal motions for four years, and that the defendants had been forced to attend status conferences, docket calls, and file summary judgment motions, all significant expenses that could have been avoided and that would continue if mandamus were not granted.[25] Under those facts, the Court held that mandamus relief was appropriate.

Citing "A Whole New World," a song from the Disney movie *Aladdin*, Justice Wainwright sharply dissented, joined by Chief Justice Jefferson and Justice O'Neill. The dissent argued that the majority was improperly overextending the reach of *Walker*, and was "jettisoning the well-established precept that delay and expense alone do not justify mandamus review." Justice Wainwright further stated that the majority's opinion was based neither on legislative intent nor judicial precedent, and made mandamus cases the rule rather than the exception.

## II. The Current Statute: Chapter 74

### A. *Requirements*

Chapter 74 requires a claimant in a health care liability claim to serve on each party an expert report and C.V. from a qualified expert within 120 days of filing suit.[26] The expert report may be issued by more than one expert, but only a qualified physician

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[23] *See id*. at *3.

[24] *See id.* at *7-8.

[25] *See id.* at *19-20.

[26] TEX. CIV. PRAC. & REM. CODE §§ 74.351(a); 74.351(r)(5)(C) Vernon 2007).

may offer an opinion regarding causation.[27] If an expert report has not been served, the trial court shall enter an order dismissing the claim, and awarding the health care provider its reasonable attorney's fees and costs.[28] Further, 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."[29] The trial court has discretion to grant one thirty-day extension of time to a deficiency in an element of the expert report.[30]

### B. *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."[31] This seemed fairly straight-forward, at least until some trial courts combined the two types of orders.

Some trial courts began issuing "mixed" orders, which both denied a dismissal motion (under subsection (b)) *and* granted a thirty-day extension to cure a deficiency under (under subsection (c)). Because the first portion of such an order is subject to interlocutory appeal, but the second portion was expressly precluded from interlocutory appeal, this presented a procedural challenge for defendants wanting to challenge the denial. Once again, a split of authority developed, and cautious practitioners filed both an interlocutory appeal and an original proceeding.

The Texarkana and Beaumont Courts of Appeals held that, where a trial court enters one order denying the defendant's Section 74.351(b) dismissal motion, and also enters another order granting the claimant a thirty-day extension under Section 74.351(c), the defendant may bring an interlocutory appeal from the order denying the Section 74.351(b) motion, even though the appeal necessarily implicates the order granting the extension under 74.351(c).[32] By contrast, four other Courts of Appeals held that

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27 TEX. CIV. PRAC. & REM. CODE §§ 74.351(a); 74.351(r)(5)(C); and 74.403(a) (Vernon 2007).

28 TEX. CIV. PRAC. & REM. CODE § 74.351(b) (Vernon 2007).

29 TEX. CIV. PRAC. & REM. CODE § 74.351(*l*) (Vernon 2007).

30 TEX. CIV. PRAC. & REM. CODE § 74.351(c) (Vernon 2007).

31 TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9) (Vernon 2007).

32 *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 851 fn2 (Tex. App.–Texarkana 2006, no pet.); *Soberon v. Robinson,* No. 09-06-00067-CV, 2006 WL 1781623 at *1 (Tex. App.–Beaumont, June 29, 2006, pet. denied) (not designated for publication).

mandamus is the appropriate procedure to address the trial court's improper granting of a thirty-day extension under Section 74.351(c), when the order is coupled with an order denying a Section 74.351(b) dismissal motion.[33]

The Texas Supreme Court resolved this issue in *Ogletree v. Matthews*, holding that "if a deficient report is served and the trial court grants a thirty day extension, that decision– even if coupled with a denial of a motion to dismiss– is not subject to appellate review."[34] Following the *Ogletree* opinion, at least one Court of Appeals has held that mandamus is appropriate where there is a "mixed" order and the expert report was incurably deficient.[35]

### C. *Jurisdiction Over "Mixed" Motions*

A question arose regarding the availability of interlocutory appeal where a health care provider both moved to dismiss under 74.351(b) and challenged the adequacy of an expert report under 74.351(*l*). As with the "mixed" order cases, these "mixed" motions cases created a split in authority, because Subsection (b) denials are subject to interlocutory appeal, while Subsection (*l*) denials are not.

The Waco and Fort Worth Courts of Appeals held they had no jurisdiction to consider an interlocutory appeal where a "mixed" motion was involved.[36] The other twelve Courts of Appeals held that jurisdiction was proper. This summer, the Texas Supreme Court sided with the majority of intermediate courts, holding that a motion that

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[33] *Watkins v. Jones*, 192 S.W.3d 672 (Tex. App.–Corpus Christi, 2006, no pet.) (where defendant filed both mandamus and interlocutory appeal, holding an order that denied dismissal under Section 74.351(b) and granted a thirty-day extension under Section 74.351(c) is reviewable only by mandamus); *Heart Hosp. of Austin v. Matthews*, 212 S.W.3d 331 (Tex. App.–Austin 2006) (holding an interlocutory appeal from the denial of a motion to dismiss under subsection 74.351(b) is proper only if the trial court's order does not also grant an extension under subsection 74.351(c)), *aff'd by Ogletree v. Matthews*, ___ S.W.3d ___, No. 06-0502, 2007 Tex. LEXIS 1028 (Tex. November 30, 2007); *see also Emeritus Corp. & HB-ESC V LP v. Highsmith*, 211 S.W.3d 321, 326 (Tex. App.–San Antonio 2006, pet. denied) (unless the order also grants an extension of time, an order denying a motion to dismiss is subject to an interlocutory appeal); *Padilla v. Loweree*, 242 S.W.3d 544, 547-548 (Tex. App.–El Paso, August 30, 2007, no pet.) (holding mandamus is proper remedy).

[34] *Ogletree*, 2007 Tex. LEXIS 1028 at *13.

[35] *Nexion Health at Oak Manor, Inc. v. Brewer,* 243 S.W.3d 848, 853 (Tex. App.--Tyler 2008) (orig. proceeding) (mandamus fully briefed and currently pending in the Texas Supreme Court).

[36] *Jain v. Stafford*, 214 S.W.3d 94, 97 (Tex. App.–Fort Worth 2006, pet. dism'd); *Lewis v. Funderburk*, 191 S.W.3d 756, 761 (Tex. App.–Waco 2006), rev'd, 253 S.W.3d 204, 206 (Tex. 2008).

sought dismissal and fees was a Subsection (b) motion that triggered jurisdiction under the interlocutory appeal statute.[37]

### D. *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.[38] Typical appellate challenges to the expert report are to the expert's qualifications, and to the causation analysis provided by the expert.

### E. *Standards of Review*

Appellate review of the trial court's order denying a Section 74.351(b) dismissal motion is subject to an abuse of discretion standard.[39] To the extent resolution of the issue before the court requires interpretation of a statute, a *de novo* standard applies.[40]

In considering the adequacy of the expert report, the trial court is prohibited from making inferences beyond the "four corners" of the expert report.[41] A reviewing court may not draw inferences to supply necessary information missing from the expert's report,[42] nor construe a report in the claimant's favor.[43]

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37 *Leland v. Brandal*, 257 S.W.3d 204, 207-208 (Tex. 2008).

38 *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (applying Article 4590i); *Hardy v. Marsh*, 170 S.W.3d 865, 870 (Tex. App.–Texarkana 2005) (same, applying Chapter 74).

39 *See American Transitional Care Ctr. of Texas, Inc., v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) (applying standard of review to Article 4590i, the statutory predecessor to Chapter 74); *see also Emeritus Corp. v. Highsmith*, 211 S.W.3d 321 (Tex. App.–San Antonio 2006, pet. denied).

40 *See Sloan v. Farmer*, 217 S.W.3d 763, 766 (Tex. App.–Dallas 2007, pet. denied); *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.–Houston [14th Dist.] 2004, no pet.).

41 *See Palacios*, 46 S.W.3d at 878 (applying standard to Article 4590i); *Patel v. Williams*, 237 S.W.3d 901, 905 (Tex. App.–Houston [14th Dist.] 2007, no pet.).

42 *Bowie Memorial Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002).

43 *Windsor v. Maxwell*, 121 S.W.3d 42, 50 (Tex. App.–Fort Worth 2003, pet. denied).

## III. Overview of Select Chapter 74 Issues

### A. *Cases Prior to November 2007*

Prior to *Ogletree*, the Texas Supreme Court denied most petitions in Chapter 74 cases without written opinion. Consequently, the Courts of Appeals were interpreting Chapter 74 in a variety of ways, some relying on similarities to Article 4590i, and some breaking new ground. Many of the Courts of Appeals strictly applied the Legislative intent of Chapter 74, holding claimants to high standards.

The Texarkana Court of Appeals considered a case where the plaintiff filed his expert report with the trial court but failed to serve it on the defendant, and held that the plaintiff missed the deadline because the statute requires service.[44]

The Beaumont Court of Appeals has held that service one day past the deadline is too late, and the trial court has no discretion to extend a deadline that is missed entirely.[45]

The Austin and San Antonio Court of Appeals have held that a report that fails to mention a defendant doctor by name is "no report at all," and dismissal was required as to that doctor.[46]

### B. ***Ogletree***

On November 30, 2007, the Texas Supreme Court issued its opinion in *Ogletree v. Matthews*, which addressed a variety of issues.[47] First, the Court held there was no interlocutory appeal from an order that both denied a dismissal motion and granted a thirty-day grace period. Second, the Court held that Section 74.351 contemplated only two kinds of reports: (a) completely absent reports; and (b) deficient but correctable reports. The Court rejected the argument that a deficient report could be "no report at all," a phrase used by several Courts of Appeals.

The Court did not address two additional issues. First, the Court did not reach the issue of whether a nurse who is not a physician may issue an expert report on causation, because the hospital waived that objection by failing to timely raise it. This is an issue in

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44 *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 850 (Tex. App.–Texarkana 2006, no pet.).

45 *Soberon v. Robinson*, No. 09-06-00067-CV, 2006 Tex. App. LEXIS 5666 (Tex. App.–Beaumont June 29, 2006, pet. denied) (mem. op.).

46 *Garcia v. Marichalar*, 185 S.W.3d 70, 72 (Tex. App.–San Antonio 2005, no pet.); *Apodaca v. Russo*, 228 S.W.3d 252 (Tex.–App. Austin 2007, no pet.)

47 *Ogletree*, 2007 Tex. LEXIS 1028.

several cases that are working their way up through the courts. Second, the Court did not address the fact that the plaintiff did not serve the expert's C.V. at all, an unambiguous statutory requirement.

Justice Willett issued a concurring opinion in which he noted that there may be a third variety of expert report: "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." Providing an example, Justice Willett stated:

> 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. Likewise, a doctor- or provider-signed record that totally omits the required statutory elements and makes no colorable attempt to demonstrate liability is no report at all and merits dismissal just as swift.

Interestingly, Justice Willett also ignored the fact that the plaintiff's primary expert had totally omitted a statutory element by failing to provide the C.V.

### C. ***Lewis***

*Lewis v Funderburk*, delivered by the Texas Supreme Court on April 11, 2008, was another important case, because it resolved several Chapter 74 issues. First, the question of jurisdiction in "mixed" motion cases was settled in favor of appellate review. Second, the Court held that a claimant may cure a deficient report from one expert by filing an entirely new report from a different expert. This was a departure from the holdings of several Courts of Appeals, which had held that plaintiffs were stuck with the experts they chose, and could only correct the report issued by that expert.

Interestingly, the expert report offered by the plaintiff was a letter from one treating physician to a referring physician, thanking him for the referral and briefly summarizing the plaintiff's condition eighteen months before the lawsuit was filed. In a concurring opinion, Justice Willett cited his concurrence in *Ogletree*, and stated that he believed the letter could not be considered an expert report at all. He further noted that the plaintiff did not provide a C.V. As in *Ogletree*, however, the defendant waived certain objections by failing to timely present them.

### D. *Grace Period*

The Courts of Appeals had variously held that a plaintiff waived any right to a thirty-day extension, or it could be considered for the first time on appeal. The Texas

Supreme Court resolved the issue recently in *Leland v. Brandal*, holding: "when 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."[48]

### E. *Other Issues to Watch*

Chapter 74 applies only to "health care liability claims," which are defined as claims "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 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."[49] Artful pleading does not allow a plaintiff to avoid the requirements of Chapter 74 by recasting their causes of action as something other than health care liability claims.[50] There are several cases working their way up to the Texas Supreme Court that explore the bounds of what constitutes a health care liability claim, particularly those dealing with "safety or administrative services."

Section 74.351(a) provides that the date for serving the expert report may be extended by written agreement of the affected parties.[51] The Dallas and Fort Worth Courts of Appeals have rejected the argument that an agreed scheduling order that mentions expert deadlines— but not Section 74.351 specifically— satisfies the written agreement requirement.[52] But, the Texas Supreme Court is considering petitions out of Dallas and San Antonio on this issue.[53]

Article 4590i mandated that, when dismissal was appropriate, the trial court assessed the physician's attorney's fees against the claimant or the claimant's attorney as

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48 *Leland v. Brandal*, 257 S.W.3d 204, 205 (Tex. 2008).

49 TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (Vernon 2007).

50 *De La Vergne v. Methodist Healthcare Sys. of San Antonio, L.L.P.*, No. 04-05-00307-CV, 2005 Tex. App. LEXIS 10860 (Tex. App.–San Antonio Dec. 7, 2005, no pet.) (mem. op.).

51 TEX. CIV. PRAC. & REM. CODE § 74.351(a) (Vernon 2007).

52 *See, e.g., Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.–Dallas 2007, no pet.) (scheduling order requiring plaintiff to provide report from "any retained expert" did not extend section 74.351 expert report deadline); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 474 (Tex. App.–Fort Worth 2007, no pet.) (same).

53 *McDaniel v. Spectrum Healthcare Res.,* 238 S.W.3d 788, 792 (Tex. App. –San Antonio 2007, pet. granted); *King v. Cirillo*, 233 S.W.3d 437, 441 (Tex. App.–Dallas 2007, pet. filed).

a sanction. Chapter 74 states that, upon dismissal, the trial court must award "to the affected physician or health care provider reasonable attorney's fees and costs of court incurred."[54] There is no provision explaining who must pay, nor is there any legislative history on this issue. To date, the cases that have held dismissal proper simply remanded for an award of attorney's fees, without specifying against whom, and whether those fees include appellate attorney's fees. I expect this to be a developing area.

[54] TEX. CIV. PRAC. & REM. CODE § 74.351(b) (Vernon 2007).

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## Professional Background

Bryan Rutherford practices in state and federal trial and appellate courts, primarily in matters arising from commercial contract disputes, construction lawsuits, nursing home litigation, and first-party insurance litigation. In his civil practice, Bryan has briefed appeals on a wide variety of issues to the Texas Supreme Court, the intermediate Texas appellate courts, and the U.S. Court of Appeals for the Fifth Circuit, as well as representing clients in trial courts in many Texas counties and all four Texas federal districts. Bryan also aids other litigators in drafting jury charges, substantive trial briefing, and preserving appellate error.

As a former Dallas County Assistant District Attorney, Bryan was lead counsel on over seventy successful criminal appeals, and regularly represented the State of Texas in oral argument before the Dallas Court of Appeals. Additionally, Bryan responded to requests for postconviction DNA testing in noncapital cases, appearing as first chair prosecutor in over half of Dallas County's felony courts.

In a prior life, Bryan was a retail manager for thirteen years.

## Education

South Texas College of Law, Juris Doctor, 1999

Southern Methodist University, Bachelors of Arts (Philosophy and Anthropology), 1994

## Community Involvement

Member, City of Dallas Judicial Nominating Commission, 2007-2009 term

Frequent dabbler in neighborhood political and community improvement issues

Bryan is an avid father and husband, frequently arriving at home before 6:00pm