

NO. 08-0667

IN THE SUPREME COURT OF TEXAS

EBERHARDT SAMLOWSKI, M.D.

Petitioner

V.

CAROL WOOTEN

Respondent

**ON APPEAL FROM THE 413TH JUDICIAL COURT
OF JOHNSON COUNTY, TEXAS**

RESPONSE TO PETITION FOR REVIEW

**Barney L. McCoy
State Bar No. 13467000
815 Hawthorne St.
Houston, Texas 77006
Telephone: (713) 521-4499
Facsimile: (713) 526-4419**

**LEAD ATTORNEY FOR RESPONDENT,
CAROL WOOTEN**

ORAL ARGUMENT REQUESTED

NO. 08-0667

IN THE SUPREME COURT OF TEXAS

EBERHARDT SAMLOWSKI, M.D.

Petitioner

V.

CAROL WOOTEN

Respondent

**ON APPEAL FROM THE 413TH JUDICIAL COURT
OF JOHNSON COUNTY, TEXAS**

RESPONSE TO PETITION FOR REVIEW

**Barney L. McCoy
State Bar No. 13467000
815 Hawthorne St.
Houston, Texas 77006
Telephone: (713) 521-4499
Facsimile: (713) 526-4419**

**LEAD ATTORNEY FOR RESPONDENT,
CAROL WOOTEN**

ORAL ARGUMENT REQUESTED

IDENTITIES OF PARTIES AND COUNSEL

RESPONDENT:

CAROL WOOTEN

**ATTORNEYS FOR RESPONDENT
CAROL WOOTEN**

LEAD COUNSEL:
BARNEY L. MCCOY
State Bar No. 13467000
815 Hawthorne
Houston, Texas 77006

MICHAEL W. CRAMER
State Bar No. 05002750
16225 Park Ten Place Dr., Suite 500
Houston, Texas 77084

PETITIONER:

EBERHARD SAMLOWSKI, M.D.

**ATTORNEY FOR PETITIONER
EBERHARD SAMLOWSKI, M.D.**

KAY E. ELLINGTON
Law Offices of Kay Ellington, P.C.
211 N. Record Street, Suite 550, LB-12
Dallas, Texas 75202

TABLE OF CONTENTS

IDENTITIES OF PARTIES AND COUNSEL **ii**

INDEX OF AUTHORITIES **iv**

STATEMENT OF THE CASE **vii**

STATEMENT OF JURISDICTION **viii**

ISSUE PRESENTED **ix**

STATEMENT OF FACTS **1**

SUMMARY OF THE ARGUMENT **1**

BRIEF ON THE ARGUMENT UNDER POINT NO. 1 **3**

CONCLUSION AND PRAYER **12**

CERTIFICATE OF SERVICE **15**

APPENDIX **16**

INDEX OF AUTHORITIES

CASES

<u>American Transitional Care Centers of Texas, Inc. v. Palacios,</u> 46 S.W.3d 873 (Tex. 2001)	3,4,5,7
<u>Austin Heart, P.A. v. Webb,</u> 228 S.W.3d 276 (Tex.App. - Austin 2007)	11
<u>Baylor v. Biggs,</u> 2007 LX 6889 (Tex.App. - Dallas 2007)	12
<u>Bowie Memorial Hospital v. Wright,</u> 79 S.W.3d 48, 53 (Tex. 2002),	7,8
<u>Bradshaw v. Gore,</u> 2006 S.W. 3d (LWC-0914) [Tex.App.-Waco (10 th Dist.) 2006]	8,9
<u>Hillcrest Baptist Medical Center v. Wade,</u> 205 S.W. 3d (LWC-5705) [Tex.App.-Waco (10 th Dist.) 2005]	9
<u>Longino v. Crosswhite, Ex Rel. Crosswhite,</u> 183 S.W.3d 913 (Tex. App. - Texarkana 2006)	12
<u>Mallat v. Reeves,</u> 2007 S.W.3d (05-07-00376) (Tex. App. - Dallas 2007)	12
<u>Miranda v. Martinez,</u> 2007 LX1802 (Tex. App. - Corpus Christi - Edinburg 2007)	12
<u>Murphy v. Mendoza,</u> 2006 S.W.3d (08-06-000890 CV) (Tex. App. - El Paso 2006)	12
<u>Raines v. Stephens,</u> 2005 S.W.3d (LWC-1418) [Tex. App.-Waco (10 Dist.) 2005]	8
<u>Wells v. Ashmore,</u> 202 S.W.3d 465 (Tex. App. - Amarillo 2006)	12

Wooten v. Samlowski, 2008 TX-Iw080527454_ _11

Valley Baptist Medical Center v. Gonzales,
2007 LX996 (Tex. App. - Corpus Christi - Edinburg 2007) 12

CODES AND STATUTES

Article 74.351 of the Texas Civil Practices
& Remedies Code vii, viii, 1,3,4,5,7,8,9,10,11

Article 74.351 (r)(6) of the Civil Practices
& Remedies Code ix,3,12

Article 74.351(c) of the Texas Civil Practices
& Remedies Code ix,2,3,11,12,13

Texas Government Code §22.001(a)(6) viii

§13.01 of Article 4590(i) Texas Revised Civil Statutes 3

§13.01(e) of Article 4590(i) Texas Revised Civil Statutes 4

**CAUSE NO.
08-0667**

IN THE SUPREME COURT OF TEXAS

EBERHARD SAMLOSKI, M.D., Petitioner

V.

CAROL WOOTEN, Respondent

**On Appeal from the 413th Judicial District Court
Johnson County, Texas**

RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes Now, Carol Wooten, Respondent in the above styled and numbered appeal, and Plaintiff and Appellant below, and prays the Court to affirm the order of the Court of Appeals for the 10th District of Texas at Waco, reversing the order of the trial court which dismissed the case for failure to provide an adequate expert report in support of the health care liability claims alleged and remanding the case back to the trial court to grant one thirty (30) day extension to Respondent Wooten to cure deficiencies in the expert report and by this response would respectfully show the court the following:

STATEMENT OF THE CASE

This is a medical malpractice case in which Carol Wooten timely filed a §74.351 expert witness report by R. Don Patman, M.D. in which Dr. Patman stated that he was familiar with the applicable standards of care, the manner in which the care rendered by Eberhard Samlowski, M.D. failed to meet the standards and the causal relationship between that failure and the injury, harm, or damages claimed. (CR pp 16-26) Dr. Samlowski timely objected to that report on the grounds that the statement with regards to causation was wholly conclusory and did not give any basis for a connection between the alleged negligent acts and the injuries in question. (CR pp 39-43) Dr. Samlowski followed up that objection with a Motion to Dismiss based on the Plaintiff's failure to file an adequate expert witness report on the issue of causation. (CR pp 44-59) The Plaintiff responded on two grounds:

1. That the expert witness report of R. Don Patman, M.D. was adequate to meet the requirements of §74.351 of the Texas Civil Practices & Remedies Code; and
2. That, should the trial court find that some element of the report of Dr. Patman is inadequate, the trial court grant the Plaintiff a 30-day extension to cure any defects, because Dr. Patman made a good faith effort to comply with §74.351. (CR pp 60-79)

The trial court held that Dr. Patman’s report “does not represent an objective good faith effort to comply with the definition of a expert report as required by law and that the Motion of Defendant Samlowski challenging the sufficiency of the Chapter 74 report should be, in all things GRANTED.” The trial court did not rule on Appellant’s request for a §74.351 extension. On August 30, 2007, the court then dismissed Plaintiff’s cause of action against Dr. Samlowski in a “Final Order subject to Appeal,” containing a “Mother Hubbard” clause. (CR p 80)

Carol Wooten thereafter timely gave notice of appeal and perfected her appeal to the Tenth Court of Appeals. (CR pp 81-85). The Tenth Court of Appeals ruled that the report had a curable defect and that the trial court abused its discretion in not granting Ms. Wooten a thirty (30) day extension to cure the defect. The Court of Appeals reversed the order dismissing Ms. Wooten’s cause of action and remanded the cause to the trial court with the instruction to grant one thirty (30) day extension to Plaintiff in order for her to attempt to cure the causation deficiency in Dr. Patman’s report. Dr. Samlowski then sought Petition for Review from this Honorable Court.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction under Texas Government Code §22.001(a)(6), because the Tenth Court of Appeals decision is not based on an error of law that is of such importance to the state’s jurisdiction that it requires correction by this Court.

ISSUE PRESENTED

POINT NO. 1

Did the trial court abuse its discretion in denying Plaintiff's request for a thirty (30) day extension under the provisions of Section 74.351(c) of the Texas Civil Practices & Remedies Code and dismissing this case because the expert report of Dr. Patman did not represent an objective "good faith" effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code?

STATEMENT OF FACTS

The opinion of the Court of Appeals correctly states the nature of the case.

SUMMARY OF THE ARGUMENT

The trial court erred in finding that the expert witness report of R. Don Patman, M.D. does not represent an objective good-faith effort to comply with the definition of an expert witness report required by Article 74.351 of the Texas Civil Practices & Remedies Code and in dismissing Carol Wooten's cause of action against Eberhard Samlowski, M.D. Dr. Patman did all that was required by Article 74.351 in that he gave his qualifications to render an opinion, set forth the records that he had reviewed, showed his familiarity with the standard of care of surgeons under the same or similar circumstances, enumerated in detail every deviation from the applicable standard of care of Dr. Samlowski, and gave a fair summary of his opinions regarding causation. Thus, Dr. Patman's report was adequate and the case should not have been dismissed.

In case the Court believes that Dr. Patman's report is not adequate on the issue of causation (the only objection raised by the Petitioner), the trial court certainly abused its discretion by ruling that Dr. Patman did not make a good faith effort to give a fair summary of his opinion on causation. Dr. Patman's report certainly discussed the issue of causation with sufficient specificity to inform the Petitioner of the conduct the Respondent has called into question and to provide a basis for the trial court to conclude that the claims have merit. Therefore, the trial court abused its discretion in not granting the Plaintiff thirty (30)

days in which to cure any defects in form. This Court should affirm the ruling of the Tenth Court of Appeals and remand the case back to the trial court with the mandate that Ms. Wooten be given a thirty (30) day extension under §74.351(c) to cure any deficiencies in the report. Alternatively, this Court should remand the case back to the trial court for a consideration of a thirty (30) day extension under §74.351(c) to cure any deficiencies in the report.

POINT NO. 1

(Restated)

Did the trial court abuse its discretion in denying Plaintiff's request for a thirty (30) day extension under the provisions of Section 74.351(c) of the Texas Civil Practices & Remedies Code and dismissing this case because the expert report of Dr. Patman did not represent an objective "good faith" effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code?

BRIEF ON THE ARGUMENT UNDER

POINT NO. 1

The adequacy of an expert witness report under Article 74.351 of the Texas Civil Practices & Remedies Code is one of the most contentious problems in litigation in Texas since House Bill 4 went into effect on September 1, 2003. Since then, there have been over 80 cases decided by the Supreme Court and the Court of Appeals, (50 cases in 2007 alone, to the extent that it is very difficult to give a subsequent history of these cases.) I have not cited all these cases because they would be too numerous - instead I have concentrated on the opinions of the Supreme Court and of the Tenth Court of Appeals.

The predecessor to Article 74.351 of the Texas Civil Practices & Remedies Code was found in §13.01 of Article 4590(i) Tex. Rev. Civ. Stat. One of the purposes of Article 4590(i) was to reduce frivolous medical malpractice lawsuits. American Transitional

Care Centers of Texas, Inc. V. Palacios, 46 S.W.3d 873, 876-877 (Tex. 2001), hereinafter referred to as Palacios. In that case, the Supreme Court held that a trial court’s decision to dismiss a case under §13.01(e) is reviewed for abuse of discretion. The Court further held that to constitute a good faith effort to provide a fair summary of an expert’s opinions, “an expert report must discuss the standard of care, breach and causation with sufficient specificity to inform the Defendant of the conduct the Plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit.” Palacios at 875. The Court further noted that “eliciting an expert’s opinions early in the litigation [is] an obvious place to start in attempting to reduce frivolous lawsuits.” Palacios at 877. These standards set forth by the Supreme Court in Palacios equally apply to §74.351 Tex. Civ. Prac. & Rem. C.

Section 74.351 of the Texas Civil Practices & Remedies Code requires a claimant to serve on each party one or more expert reports together with the expert’s curriculum vitae within 120 days after filing suit. Subsection (r)(6) defines an expert report as “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.” The Court should note that the expert report should be a **summary** of the expert’s opinion.

In the Defendant’s Motion to Dismiss, the only objection to the report was that Dr.

Patman did not adequately give his opinion concerning the causal relationship between the care rendered by Dr. Samlowski and the injury, harm or damages claim. The Defendant alleges that Dr. Patman's opinion with regard to causation is ". . . wholly conclusory and does not give any basis for a connection between the alleged negligent acts and the injuries in question." This is an overstatement on the part of the Defendant.

Dr. Patman's report gave a succinct and accurate summary of his education, training, background and experience, and his Curriculum Vitae was attached to the report. He set forth in detail the documents that he reviewed and an accurate summary of the relevant facts contained therein. He further set forth specifically and succinctly the standard of care governing the Defendant and physicians of ordinary prudence under the same or similar circumstances. He then set forth in detail and specifically each and every deviation from the standard of care by Dr. Samlowski. He further set out all the damages that were caused by Dr. Samlowski's negligence. This is certainly a good faith effort to comply with the requirements of Article 74.351 of the Texas Civil Practices & Remedies Code.

During Dr. Patman's discussion of the breaches of standard of care, he points out (on page 4) that Dr. Samlowski failed to evaluate ". . . all significant complaints and findings identified by appropriate tests, examinations and consultations that might increase operative risk, adversely influence recovery and future well-being, specifically, but not limited to sarcoidosis and the treatment of this disease in the past, pre-operative pulmonary

status, diabetes, and nature and extent of the two prior abdominal operations stated to be due to ‘abdominal tumor’.” This in effect is a statement that these designated conditions increase operative risk, adversely influence recovery and future well-being. He additionally lists many other failures on the part of Dr. Samlowski. He proceeds to list many of the complications of the surgery which include: diaphoretic with very poor respiratory effort, “crackles” in the lungs, hyponatremia, low blood pressure, elevated BUN, elevated creatinine, elevated glucose, large right plural effusion, right lower lobe atelectasis, abdominal ascites, abscess, increasing hypoventilation, bowel perforation, sepsis syndrome, acute respiratory distress syndrome, renal insufficiency/failure and acute blood loss anemia. He follows up by summarizing that Mrs. Wooten was operated on by Dr. Samlowski “for an inaccurate diagnosis following an incomplete pre-operative evaluation with subsequent multiple avoidable and life-threatening complications which resulted in lengthy hospital admission on three occasions between 11/17/04 and 02/05/05.”

After setting out the standard of care and Dr. Samlowski’s deviation from the standard of care, Dr. Patman concluded that Dr. Samlowski’s negligence was a proximate cause of Mrs. Wooten’s developing multiple life-threatening complications that required resultant multiple but avoidable operations, multiple organ failure with permanent damage, and the multiple hospitalizations of prolonged duration. This is a summary of Dr. Patman’s opinions regarding causation. During his long discussions of the many deviations from the standard of care, he set forth many complications that arose as a result of these deviations.

This last statement just wraps up Dr. Patman's report. Dr. Patman's report is certainly adequate and is a good faith effort to meet the requirements of §74.351. After Palacios, the Supreme Court gave further guidance to the interpretation of the adequacy of expert witness reports. In that case, the only statement concerning causality used the phrase "the possibility of a better outcome." The Court held that the report must include the required information within its four corners and that the previous phrase was conclusory. The Court further held that a conclusory report does not satisfy the Palacios test. Bowie Memorial Hospital v. Wright, 79 S.W.3d 48, 53 (Tex. 2002), hereinafter referred to as Wright.

In the instant case, Dr. Patman set forth his opinions with specificity the standard of care governing the Appellee's conduct and then discussed in detail the many deviations from that standard of care. During the course of these discussions, he set forth the many complications that arose from those deviations. At the very end of his report, he summarized that the doctor's negligence caused these complications. When the report is read in total within its four corners (as the Supreme Court report requires in Wright), a reasonable person must conclude that his opinion is fact based, and not merely conclusory. It certainly provides enough information to inform the Appellee of the specific conduct the Appellant has called into question, and to provide a basis for the trial court to conclude that the claims have merit. Therefore, Dr. Patman's report is adequate under Article 74.351 of the Texas Civil Practices & Remedies Code, and the trial court should not have dismissed Appellant's cause of action.

The Tenth Court of Appeals, in Raines v. Stephens, 2005 S.W.3d (LWC-1418) [Tex. App.-Waco (10 Dist.) 2005], hereinafter referred to as Raines, analyzed a medical report containing the phrase that the Plaintiff might have had “the possibility of a better outcome” without explaining how the Defendant’s conduct caused injury to the Plaintiff. This is strikingly similar to the report in Wright, and the Tenth Court ruled that the report was inadequate under Article 74.351 and upheld the trial court’s dismissal. However, for the reasons we set out in our discussion of Wright, Dr. Patman’s report is certainly more informative than the report in Raines.

In Bradshaw v. Gore, 2006 S.W. 3d (LWC-0914) [Tex.App.-Waco (10th Dist.) 2006], hereinafter referred to as Bradshaw, the Plaintiff filed two expert witness reports. With regards to the issue of causation, the report by Dr. Law concluded: “. . . based on reasonable probability, the institution of Acyclovir therapy at an earlier time would have prevented or ameliorated her (the Plaintiff’s) neurological damage.” Dr. Hayden’s report stated “. . . (the patient) should have been given antibiotics, as well as empiric treatment with Acyclovir, and admitted to the hospital.” He further stated that “. . . it is reasonable to believe that had therapy with Acyclovir been initiated earlier in the course of her disease, some or all of her current deficits may have been prevented.” This Honorable Court found that these “reports represent a good-faith effort to summarize the causal relationship between Dr. Gore’s failure to meet the applicable standard of care and Bradshaw’s injury.” This Court found that these reports “informed Dr. Gore of the

specific conduct Bradshaw calls into question and are sufficient for the trial court to conclude that the claims against Dr. Gore have merit.” The Court therefore held that the “trial court abused its discretion in determining that the court failed to adequately address causation.” Bradshaw at p 2.

The Hillcrest Baptist Medical Center v. Wade, 205 S.W. 3d (LWC-5705) [Tex.App.-Waco (10th Dist.) 2005] case is indicative of the current trend in medical malpractice cases. The Plaintiff’s expert report is challenged in virtually every case, even when the report is obviously adequate under Article 74.351. In this case a nurse and a emergency room doctor testified about deviations from standard of care and then a cardiologist testified as to causation. The cardiologist’s report in great detail describes the mechanics of causation between the deviations and the injuries. The trial court refused to dismiss the case, and the Defendant doctor appealed. This Court found that the physician expert reports clearly established the causal relationship between the delay in the Plaintiff’s receiving cardiology care and her injuries. Thus the Court found that the trial court had not abused its discretion in refusing to dismiss the Plaintiff’s case.

Should this Honorable Court believe that Dr. Patman’s expert witness report contained any deficiency with regard to causation, Appellant would point out that the report was a good-faith effort to comply with Article 74.351, and the trial court should have ruled on, and granted, the Appellant the thirty (30) day extension provided for by subsection (c) of Article 74.351 of the Texas Civil Practices & Remedies Code.

In the early 1800s the common law forms of action in Great Britain denied many Plaintiffs relief because their cause of action did not fit one of the recognized forms of action. The law had become so rigid that form outweighed substance. In the area of medical malpractice, we are approaching that rigidity. It is often times not the substance of an expert witness' report, but the form in which that substance is expressed, that determines the outcome of litigation. When one uses a professional testifier as an expert witness, one gets the opinion in the form recognized by the courts. However, the practicing physician (who also teaches at medical schools) is extremely busy and his own patients are his primary concern. We give these busy doctors voluminous records and ask them to render opinions. Increasingly, many attorneys are urging that these opinions have to be expressed in very narrow and predetermined forms. Should the courts follow this urging we will have returned to early 19th Century Great Britain, where form was more important than substance.

Reading Dr. Patman's report within its four corners, and for all the reasons set forth above, one can only conclude that he made a good-faith effort to comply with Article 74.351 of the Texas Civil Practices & Remedies Code. Any deficiency on the issue of causation is a minor deficiency of form. The substance of the report informed Dr. Samlowski of the specific conduct called into question by Dr. Patman and provided the basis for the reasonable person to conclude that Mrs. Wooten's claim had merit. As the Tenth Court put it, ". . . a supplemental report by Dr. Patman could easily cure the

deficiency.” Wooten v. Samlowski, 2008 TX-Iw080527454. Thus, the trial court abused its discretion by not granting the thirty (30) day extension under Article 74.351(c) of the Texas Civil Practices & Remedies Code, and extension timely requested by the Appellant. Thus this Court should reverse and remand, mandating the trial court to grant the thirty (30) day extension.

Alternatively, this Court could follow the procedure utilized by the Third, Fifth, Sixth, Seventh, Eighth and Thirteenth Court of Appeals. In Austin Heart, P.A. v. Webb, 228 S.W.3d 276 (Tex.App. - Austin 2007), Justice Waldrop gives a very good analysis of the utilization of §74.351(c). The Austin Court found that a patient’s expert witness report was deficient because it did not specifically state that the Defendant doctor was the doctor that deviated from the relevant standard of care and injured the patient, but that the patient was entitled to the thirty (30) day extension to cure the report. As Justice Waldrop points out, while the Court finds the report to be deficient under §74.351, “we are also aware that the defect might well be curable. The tenor of the Dr. Cororve’s report, coupled with the fact that there is only one physician defendant, makes it quite likely that Dr. Cororve intended to opine that Dr. Kessler breached the standard of care even though the report did not contain that opinion. The report’s failure on this point is the kind of defect that the cure provisions of section 74.351(c) were designed to address.” Therefore, the Austin Court of Appeals reversed the trial court order and remanded back to the trial court to

consider whether an extension should be granted to give the Plaintiffs an opportunity to cure.

This utilization of §74.351(c) has been followed by the Fifth Court of Appeals in Baylor v. Biggs, 2007 LX 6889 (Tex.App. - Dallas 2007), and Mallat v. Reeves, 2007 S.W.3d (05-07-00376) (Tex. App. - Dallas 2007), the Sixth Court in Longino v. Crosswhite, Ex Rel. Crosswhite, 183 S.W.3d 913 (Tex. App. - Texarkana 2006), the Seventh Court in Wells v. Ashmore, 202 S.W.3d 465 (Tex. App. - Amarillo 2006), the Eighth Court in Murphy v. Mendoza, 2006 S.W.3d (08-06-000890 CV) (Tex. App. - El Paso 2006), and the Thirteenth Court in Valley Baptist Medical Center v. Gonzales, 2007 LX996 (Tex. App. - Corpus Christi - Edinburg 2007), and Miranda v. Martinez, 2007 LX1802 (Tex. App. - Corpus Christi - Edinburg 2007). Like the reports in these cases, the report of Dr. Patman, if it is deficient, is certainly curable. This Honorable Court should at least remand this case back to the trial court with a mandate to grant Plaintiff a thirty (30) day extension under §74.351(c) or for consideration of a thirty (30) day extension under §74.351(c).

CONCLUSION AND PRAYER

The trial court erred in dismissing Respondent's cause of action because Dr. Patman's expert witness report represented an objective "good faith" effort to comply with the definition of an expert witness report pursuant to Article 74.351(r)(6) of the Texas Civil Practices & Remedies Code. The trial court erred in not granting Plaintiff's request

for a thirty (30) day extension under the provisions of Article 74.351(c) of the Civil Practices & Remedies Code. Therefore, this Honorable Court should affirm the ruling of the Tenth Court of Appeals, reverse the ruling of the trial court and remand this case back to the trial court with the mandate to grant Plaintiff a thirty (30) day extension under the provisions of Section 74.351(c), or for consideration of a Section 74.351(c) extension.

WHEREFORE, PREMISES CONSIDERED, Respondent prays this Honorable Court to affirm the ruling of the Tenth Court of Appeals, to reverse the Order of August 30, 2007, granting Defendant's Motion to Dismiss With Prejudice, and to remand this cause of action back to the trial court with the mandate to grant to Plaintiff a §74.351(c) thirty (30) day extension, or alternatively, to remand this case back to the trial court for consideration of a §74.351(c) thirty (30) day extension, and for such other orders as appear proper.

Respectfully submitted,

THE LAW OFFICE OF BARNEY L. MCCOY

Barney L. McCoy
State Bar No. 13467000
815 Hawthorne
Houston, Texas 77006
Telephone: (713) 521-4499
Facsimile: (713) 526-4419

REQUEST FOR ORAL ARGUMENT

TO THE HONORABLE SUPREME COURT OF TEXAS:

Pursuant to Texas Rules of Appellate Procedure 39, Respondent Carol Wooten, by and through her attorney of record, hereby respectfully requests that this Honorable Court grant her request for an oral argument in the above-mentioned cause of action.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Request for an Oral Argument be granted.

Respectfully submitted,

THE LAW OFFICE OF BARNEY L. MCCOY

Barney L. McCoy
State Bar No. 13467000
815 Hawthorne
Houston, Texas 77006
Telephone: (713) 521-4499
Facsimile: (713) 526-4419

LAW OFFICES OF MICHAEL W. CRAMER
Michael W. Cramer
State Bar No. 05002750
16225 Park Ten Place Dr., Suite 500
Houston, Texas 77084

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2008, a true and correct copy of the foregoing has been delivered to the attorney of record for Eberhard Samlowski, M.D., as follows:

KAY E. ELLINGTON
Law Offices of Kay Ellington, P.C.
211 N. Record Street, Suite 550, LB-12
Dallas, Texas 75202

via facsimile and by depositing the same in the U.S. certified mail, return receipt requested, with postage prepaid.

Barney L. McCoy

NO. 08-0667

IN THE SUPREME COURT OF TEXAS

EBERHARDT SAMLOWSKI, M.D.

Petitioner

V.

CAROL WOOTEN

Respondent

ON APPEAL FROM THE 413TH JUDICIAL COURT
OF JOHNSON COUNTY, TEXAS

APPENDIX

- | | |
|--------|-------------------------------------------------------------------------------------|
| Tab. 1 | Order Granting Defendant's Motion to Dismiss With Prejudice, filed August 30, 2007. |
| Tab 2 | Expert Witness Report of R. Don Patman, M.D., together with Curriculum Vitae. |
| Tab 3 | Texas Civil Practices & Remedies Code §74.351. |
| Tab 4 | <u>Wooten v. Samlowski</u> , 2008 TX-Iw080527454. |