

CASE NO. 09-0159

THE SUPREME COURT OF TEXAS

SAMUEL GARCIA, JR., M.D.,
Petitioner

v.

MARIA GOMEZ, INDIVIDUALLY AND AS REPRESENTATIVE OF THE
ESTATE OF OFELIA MARROQUIN, ET. AL., and SAVANNAH ROBINSON,
Respondents

ON APPEAL FROM THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI-EDINBURG
CASE NO.13-08-00054-CV

PETITIONER'S REPLY BRIEF ON THE MERITS

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State Bar No. 09834200

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September 4, 2009

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REPLY ISSUES PRESENTED

- I. **Is a Motion to Dismiss the Proper Procedural Device to Enforce the Section 74.351 Expert Report Requirements?**

- II. **Does a Trial Court Abuse its Discretion by Completely Denying an Award of Attorney's Fees when a Plaintiff Admittedly Fails to Serve the Health Care Liability Defendant with an Expert Report Within 120 Days?**

- III. **Does Section 74.051 of the Texas Civil Practice and Remedies Code Require a Healthcare Liability Defendant to Provide the Plaintiffs with Medical Records from Plaintiffs' Other Health Care Providers as a Prerequisite for the Applicability of the Chapter 74 Protections?**

SUMMARY OF THE REPLY

“There is no point passing laws if the courts will not enforce them.” *Gurkoff v. Jersak*, 278 S.W.3d 776 (Tex. 2009)(dissenting opinion). This is one such case in which both the trial court and the Thirteenth Court of Appeals simply refuse to enforce a law – specifically, Section 74.351 of the Texas Civil Practice and Remedies Code.

It is undisputed that Respondents failed to serve Petitioner with an expert report as required by Section 74.351. Accordingly, the trial court had a ministerial duty to dismiss Plaintiffs’ claims with prejudice and award Petitioner the attorney’s fees and costs incurred in defending this frivolous lawsuit. However, the trial court failed to do so.

Respondents attempt to justify the trial court’s abuse of discretion by asking this Court to re-write Chapter 74 so that (1) a defendant must provide to a claimant all of that claimant’s medical records from all health care providers prior to litigation, as a prerequisite to the applicability of Section 74.351; (2) a new procedural mechanism for the enforcement of Section 74.351 is created; and (3) new evidentiary requirements applicable to an award of attorney’s fees are also created. Such a position is without precedent and is patently absurd.

Accordingly, this Court should exercise its jurisdiction and grant this Petition for Review to correct an absolute miscarriage of justice and to rein in courts which obstinately and consistently refuse to enforce the laws of this State.

REPLY

A. Section 74.351 of the Texas Civil Practice & Remedies Code Provides for a Motion to Dismiss Should a Plaintiff Fail to Comply with the Statute's Expert Report Requirements

Contrary to the arguments advanced by Respondents, the Legislature and the Texas Supreme Court have provided for a motion to dismiss, should a plaintiff fail to meet the statutory expert report requirements. See TEX.CIV.PRAC. & REM CODE §74.351(Vernon Supp 2005); *Am. Transitional Care Ctrs. of Texas, Inc. v. Palacios*, 46 S.W.3d 873 (Tex. 2001). Furthermore, an abuse of discretion standard of review is applicable to a trial court's award or denial of attorney's fees. *Bruni v. Bruni*, 924 S.W.2d 266, 268 (Tex. 1996). Accordingly, Respondents' argument that the instant case involves an interpretation of the "procedural and issues of practice and proof that may apply to a motion to dismiss", ignores well-settled case law. *Id.*; *Diamond v. San Soucie*, 239 S.W.3d 428, 431 (Tex.App.–Dallas 2007, no pet.).

Furthermore, Respondents' argument that a conflict exists as to the standard of review for a trial court's decision to dismiss a case pursuant to Section 74.351 of the Texas Civil Practice & Remedies Code is completely unfounded, as the standard of review is well-established; and is, in any event, irrelevant to the issues presented in this Petition for Review. *Palacios*, 46 S.W.3d at 878.¹

¹ Respondents confuse the case law regarding the applicable standards of review by their assertion that there is a question as to which standard applies to a motion for dismissal pursuant to Section 74.351. (See Respondents' Brief, p. 8). The cases cited by Respondents establish that an abuse of discretion standard is utilized when determining the adequacy of an expert report (*See McDaniel v. Spectrum Healthcare Resources, Inc.*, 238 S.W.3d 788 (Tex.App.–San Antonio 2007, pet. granted; *Esparza v. Safety Nat. Cas. Corp.*, 2007 WL 2274615 (Tex.App.–El Paso 2007, pet. filed); and a *de novo*

B. *It Was an Unequivocal Abuse of Discretion to Deny Petitioner His Statutorily-Mandated Award of Attorney's Fees.*

Respondents' arguments are entirely misplaced, as the issues presented in this petition are confined to an award of attorney's fees pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code; and not pursuant to Rule 166a of the Texas Rules of Civil Procedure. Section 74.351(b)(1) mandates that, upon a plaintiff's failure to comply with Section 74.351(a), the trial court **shall** award the successful defendant reasonable attorney's fees and costs of court. TEX.CIV.PRAC. & REM §74.351(b)(Vernon Supp. 2005)(emphasis added); *Tibbetts v. Gagliardi*, 2 S.W.3d 659 (Tex. App.–Houston [14 Dist.] 1999, pet. denied). “The point of the law mandating expert reports was to shift the costs of meritless cases to those who filed them.” *Gurkoff*, 278 S.W.3d 776.

The legislative purpose in enacting Section 74.351 was to deter frivolous or meritless cases. This Court recently held that “[when a claim lacking merit is immediately dismissed, and the claimant *obliged* to pay attorney's fees, future such claims are deterred.” See *Ebrom v. Hernandez*, 2009 WL 1901114 (Tex. 2009)(emphasis added). This Court further emphasized in *Ebrom* that “[t]he claimant is encouraged to bring only those claims that have merit because not only will those found lacking be dismissed, but the claimant and his attorney *will be*

standard of review is utilized when determining whether Section 74.351 applies – i.e., is the claim a healthcare liability claim? (See *Christus Health v. Beal*, 240 S.W.3d 282 (Tex.App.–Houston [1st Dist] 2007, no pet.). Furthermore, Respondents' reliance on *Turner v. Zellers* is entirely misplaced, as the claims in *Turner* were filed under the Texas Tort Claims Act, not Section 74.351. *Turner v. Zellers*, 232 S.W.3d 414, 418 (Tex.App.–Dallas 2007, no pet.).

saddled with attorney's fees and costs for bringing a meritless claim.” *Id.* (emphasis added).

In the instant case, the Thirteenth Court of Appeals affirmed an outright denial of an award of attorney’s fees, departing from its previous holding that “[a]lthough the trial court has discretion to set the amount of reasonable attorney’s fees, the court may not, in circumstances such as these, completely deny a duly filed motion for attorneys fee’s [sic] and costs of court.” *Trevino v. Carrizales*, 2006 WL 2371350 (Tex.App.–Corpus Christi-Edinburg August 17, 2006, no pet.)(interpreting the mandates of former Article 4590i). “When a health care liability claim is dismissed with prejudice pursuant to Texas Civil Practice and Remedies Code section 74.351(b), the trial court is *required* to award attorney’s fees.” *Granbury Minor Emergency Clinic and Abel Salas, M.D. v. Teagan Thiel*, 2009 WL 2751026 (Tex.App.–Fort Worth August 27, 2009, no pet. h.)(emphasis added). Accordingly, regardless of Respondents’ concession that no report was filed within 120 days, the trial court had an obligation to assess costs and attorney’s fees against Respondents. However, the trial court, in a clear abuse of discretion, simply chose to ignore, rather than enforce, the statute by completely denying Petitioner’s request for attorney’s fees.

Both the trial court and the Thirteenth Court of Appeals failed to consider the fact that “[e]vidence of attorney’s fees that is clear, direct, and uncontroverted is taken as true as a matter of law, especially where the opposing party had the means

and opportunity of disproving evidence but did not.” *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990).

Petitioner met his burden of proof by offering in-court testimony of his attorney, Ronald G. Hole. (R.R. 10-11). Mr. Hole set forth his experience and the amount of reasonable and necessary attorney’s fees incurred in defense of the underlying litigation. (*Id.*). Although given the opportunity to do so, Respondents did not cross-examine Mr. Hole, or offer any rebuttal evidence or argument. (*Id.*).

The Austin Court of Appeals considered similar testimony in *Cumberland Casualty & Surety Company. v. Nkwazi, L.L.C.*, 2003 WL 21354608 (Tex.App.–Austin June 12, 2003, no pet.). In *Cumberland Casualty*, appellee’s counsel testified as to the reasonableness and necessity of attorney’s fees at both the trial court and appellate levels. *Id.* Although appellant’s counsel offered rebuttal testimony as to the trial court fees, appellant’s counsel did not offer any controverting or impeaching evidence, nor did he cross-examine appellee’s attorney, concerning the requested appellate fees. *Id.* The Third Court of Appeals affirmed the trial court’s award of \$40,000.00 in appellate fees because the testimony was clear, direct and capable of being controverted, had counsel chose to do so. *Id.*

Following the precedent set forth in *Cumberland Casualty*, and the cases cited in Petitioner’s Brief on the Merits, Petitioner’s evidence was sufficient to substantiate an award of attorney’s fees. Respondents rely solely on case law interpreting the burden of proof and sufficiency of evidence provided in connection with motions for

summary judgments. (Respondents' Brief, p. 5-6). In doing so, Respondents ignore well-settled legal principles specific to the award of statutorily-mandated attorney's fees. Petitioner is not attempting to lessen the standard of proof, as Respondents argue, but rather questions the Thirteenth Court of Appeals' disparate application of its own standards.

The holding of the Thirteenth Court of Appeals in *ERA Realty*, (i.e., that an affidavit, even though it is not subject to cross-examination, is competent evidence of attorney's fees) cannot be reconciled with its Opinion in the instant case. *Cf. ERA Realty Group, Inc. v. Advocates for Children and Families, Inc.*, 267 S.W.3d 114, 120 (Tex.App.–Corpus Christi-Edinburg 2008, pet. denied). Despite Respondents' attempts to do so, *ERA Realty* cannot be distinguished on the basis that the Court held that “if the offered evidence is unreasonable, incredible, or its belief is questionable either from another witness or attendant circumstances, then such evidence would only raise a fact issue to be determined by the trier of fact.” *Id.* at 120; (Respondents' Brief, P. 6). Such argument ignores the fact that no other witnesses testified during the hearing and no attendant circumstances existed to justify a departure from the principle that “[e]vidence of attorney's fees that is clear, direct, and uncontroverted is taken as true as a matter of law. . . .” *Ragsdale*, 801 S.W.2d at 882.

The trial court had a statutory duty to award at least some amount of attorney's fees. *Gurkoff v. Jersak*, 2008 WL 1700126 (Tex.App–Fort Worth April 10,

2008, pet. denied)(emphasis added). A complete denial of attorney's fees is an abuse of discretion. See *Thiel*, 2009 WL 2751026; *Medical Hosp. of Buna Texas, Inc. v. Wheatley*, 287 S.W.3d 286, 294 (Tex.App.–Beaumont 2009, pet. filed); *Trevino*, 2006 WL 2371350. The Thirteenth Court of Appeals' Opinion made the basis of this Petition for Review is a complete departure from applicable precedent, including its own.

C. *Petitioner Did Not Waive the Section 74.351 Expert Report Provisions.*

1. Chapter 74 Does Not Contain a Prerequisite That a Defendant Provide the Plaintiff with Medical Records from Other Health Care Providers in Order to Benefit from the Statute's Protections.

The language of Chapter 74 is not conditional, and its provisions apply to all health care liability claims, without qualification or waiver. Respondents are absolutely incorrect in their assertion that a defendant health care provider must provide medical records in order to “qualify” for the Section 74.351 “protections.” There is absolutely no legislative or judicial authority to support such a position. Section 74.051(d) provides, in pertinent part, that:

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 the receipt of the written request for such records;

TEX.CIV.PRAC. & REM. CODE §74.051(Vernon 2003). Accordingly, Section 74.051 requires a defendant to provide the requesting party a complete copy of the defendant's medical records pertaining to the plaintiff. *Id.* It does not provide for a waiver of the 74.351 protections, if this is not done.

Regardless, in the instant case, Petitioner fully complied with Section 74.051 prior to suit. Section 74.051 does not require a health care liability defendant to obtain records from all other providers, then provide such records to the plaintiff. *Id.* Instead, a plaintiff can simply request each defendant's records from each particular defendant. *Id.* Or, a plaintiff can simply request her medical records from her healthcare provider, if such provider is not a Defendant. Respondents are attempting to re-write the statute to add a provision requiring a defendant to obtain the medical records from all other providers (some or all of which he may not even be aware), then provide all of the records to the plaintiff within 45 days, so that the other provisions of Chapter 74 may apply. No such language, or requirement, exists.

Respondents' misleading argument is an attempt to persuade this Court that (1) the statutory requirements require Dr. Garcia to keep hospital records in his office chart, and if not, he should obtain them; and (2) by failing to do so, Dr. Garcia has waived the Section 74.351 expert report provisions. This argument is a complete misstatement of the law, and the cases cited and arguments advanced by Respondents are wholly inapplicable to the facts currently before this Court. In fact, there is case law *contradicting* Respondents' position. See *Estate of Regis v. Harris County Hospital Dist.*, 208 S.W.3d 64 (Tex.App.– Houston [14th Dist] 2006, no pet.).

In *Regis*, the plaintiff argued that the expert report could not be completed within 120 days because the defendant delayed over two years in providing the medical records necessary to file an expert report. *Id.* at 66. Following the statutory

language and precedential case law, the Fourteenth Court of Appeals held that if a plaintiff fails to timely file a report, the trial court has no discretion to do anything other than dismiss the case. *Id.* at 67; see also *Valley Baptist Med. Ctr. v. Azua*, 198 S.W.3d 810, 815 (Tex.App.– Corpus Christi-Edinburg 2006, no pet.). The Fourteenth Court of Appeals further noted that “in repealing Article 4590i and enacting Civil Practice and Remedies Code Chapter 74, the legislature specifically removed the trial court’s ability to grant an extension based on a Plaintiff’s diligence.” *Id.* at 68; See also *Soberon v. Robinson* 2006 WL 1781623, at (Tex.App.– Beaumont June 29, 2006, pet. denied); *Emiritus Corp v. Highsmith*, 211 S.W.3d 321 (Tex.App.–San Antonio 2006, no pet.)(holding that “[i]f a Plaintiff wants an extension of time, it [sic] must either enter an explicit agreement with the Defendant or assume the risk of sending a deficient report and seeking an extension to cure the deficiency from the trial court.”).

At no time did Respondents approach Petitioner regarding an extension of time to provide an expert report as a result of Petitioner’s Co-Defendant’s (Doctors’ Hospital at Renaissance’s) alleged failure to provide records. At no time did Respondents notify Petitioner, by any means, of their alleged inability to serve an expert report due to inadequate records prior to the 120-day deadline. Additionally, at no time did Respondents seek court intervention regarding Co-Defendant Doctors Hospital at Renaissance’s alleged failure to provide its complete medical records to Respondent. Accordingly, Respondents’ inability to get the records “necessary to

serve an expert report” does not affect the rigid 120-day deadline in which to serve an expert report. In this case, although Respondents are not seeking an extension of time to serve their report, their argument is essentially the same and must suffer the same fate.

The cases cited by Respondents involve situations in which the appellate courts considered whether defendants can waive a Section 13.01(e) dismissal by waiting very long periods of time to file their motions to dismiss. *Jernigan v. Langley*, 111 S.W.3d 153 (Tex. 2003); *Spinks v. Brown*, 211 S.W.3d 374 (Tex.App.–San Antonio 2006, pet. denied).

In *Jernigan*, this Court held that the defendant did not waive his right to a dismissal by waiting over 600 days in which to file his motion for dismissal pursuant to Section 13.01(e), because former Article 4590i did not contain a deadline by which a defendant must object to the adequacy of Plaintiff’s expert report. *Jernigan*, 111 S.W.3d at 157. Conversely, in *Spinks*, the San Antonio Court of Appeals found waiver of the Section 13.01(e) dismissal because the defendant waited until over six years to file a motion for dismissal, after the case had been tried, reversed on appeal and sent back down to the trial court. *Spinks*, 211 S.W.3d at 376. The court of appeals found that the legislative intent of a quick dismissal of frivolous claims had not been served where the defendant waited over six years to assert Section 13.01(e). *Id.* at 379.

These cases have absolutely no bearing on the case at bar. Instead, *Regis* and *Jernigan* are more instructive as to whether a failure to provide medical records affects the Section 74.351 expert report deadlines. It does not. Nonetheless, Respondents argue that Petitioner intentionally waived the entire TMLA because Dr. Garcia's records, which were timely provided, did not include x-rays taken at Doctors Hospital at Renaissance. Such an argument mischaracterizes the statutory requirements.

Waiver is "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Jernigan*, 111 S.W.3d at 156. Furthermore, waiver is a matter of intent and for "implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." *Id.* More importantly, "[t]here can be no waiver of a right if a person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right." *Id.*

It is inconceivable that co-defendant's alleged failure to comply with the statutory requirements would result in Petitioner waiving his Section 74.351 protections. Petitioner's actions were in now way inconsistent with his intent to assert his right to a dismissal. Accordingly, Respondents' reliance on waiver of the applicability of Chapter 74 is far-fetched, misplaced and clearly erroneous.

2. Petitioner Complied with the Plaintiff's Request for Medical Records Prior to the Filing of Plaintiff's Original Petition.

Respondents advance an inappropriate, false and entirely misleading argument that Dr. Garcia waived the expert report requirements by failing to produce the records from Doctors Hospital at Renaissance, which showed the presence of a filter. (R.R. 7, 9). Even if compliance with Section 74.051 somehow acts as a prerequisite to the applicability of Chapter 74, Petitioner in this case timely complied with the Section 74.051 records request. Thus, there was no waiver.

Respondents' argument erroneously presumes that the hospital records were in Petitioner's possession prior to litigation. Respondents sent Petitioner a written request for his records pertaining to Ms. Marroquin, pursuant to Section 74.051, prior to the filing of the lawsuit. (R.R. 8). In response, Petitioner provided complete and unaltered copies of all the medical records in his possession pertaining to Ofelia Marroquin, in full compliance with Section 74.051. (R.R. 8-11). Respondents even acknowledge receipt of Dr. Garcia's records prior to litigation. (R.R. 5 - 8). Accordingly, it is disingenuous for Respondents to assert such an absurd argument, unsupported by any evidence that Petitioner even possessed, or was required to possess, the x-rays in question.

D. Conclusions

Respondents failed to serve Petitioner with an expert report prior to the expiration of 120 days. That fact is undisputed. The Legislature has mandated that such failure must result in a dismissal with prejudice and an award of attorneys fees

to the defendant(s). The award of attorneys fees is not discretionary. Accordingly, the trial court's failure to award Petitioner any attorneys fees was an absolute abuse of discretion, especially when counsel for Petitioner provided clear, sufficient and uncontroverted evidence of reasonable and necessary attorneys fees.

Additionally, Respondents' "waiver" argument must fail. Even if Section 74.051 is interpreted as a prerequisite, which Petitioner wholeheartedly disputes, Petitioner never waived the applicability of Chapter 74. Waiver must be intentional, and the allegation that Petitioner failed to comply with the Section 74.051 requirements by failing to produce hospital records not in his possession can in no way support an argument for the intentional relinquishment of Petitioner's rights pursuant to Chapter 74. Finally, there was no conduct by Petitioner which was inconsistent with Petitioner's intention to rely upon his right to a dismissal with prejudice. Accordingly, in addition to the dismissal with prejudice, Petitioner is entitled to the reasonable attorney's fees incurred by Petitioner through the point of dismissal, and for all necessary appeals.

PRAYER

Petitioner Samuel Garcia , Jr., M.D. prays that this Court grant his Petition for Review; reverse the trial court's Order Granting Dismissal with Prejudice, in part, and render an order that dismisses Plaintiff's causes of action against Petitioner with prejudice; render an order that awards Petitioner the attorney's fees he is statutorily entitled to recover, as prayed for hereinabove; and that this Court grant Petitioner

such other and further relief, at law or in equity, which he may be justly entitled to receive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cecilia Garza, hereby certify that a true and correct copy of the above Petition for Review has, on this 4th day of **September 2009**, been sent, **by certified mail, return receipt requested** by depositing it enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the care of the custody of the United States Postal Service, to the following counsel of record:

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