No. 09-0159

IN THE
SUPREME COURT
OF TEXAS

Samuel Garcia, Jr., M.D.,
Petitioner

Vs.

Maria Gomez, Individually and as representative
of the Estate of Ofelia Marroquin, et al,
Respondents

On Appeal from the 13th Judicial District Court of Appeals, a case originating in the County Court at Law Number Five of Hidalgo County, Texas

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RESPONSE TO PETITION FOR REVIEW

Savannah Robinson
Law Office of S. Robinson
State Bar No. 17108150
1822 Main St.
Danbury, TX 77534
(979) 922-8825
www.savannahrobinson.com
ATTORNEYS FOR RESPONDENTS

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IDENTITIES OF THE PARTIES AND COUNSEL

Ofelia G. Arcelay
Maria Gomez
Julio G. Marroquin
Juan G. Marroquin
Dolores G. Guerrero
Ezekiel Gonzalez
The Estate of Ofelia Marroquin
Respondents

Savannah Robinson
1822 Main
Danbury, TX 77534
979-922-8825
Attorney for Respondents

Samuel Garcia, Jr., M.D.
Petitioner

I.Cecelia Garza
Ron Hole
Hole & Alvarez
612 W. Nolana Loope, Suite 370
P.O. Box 720547
McAllen, TX 78504
Attorneys for Petitioner

TABLE OF AUTHORITIES

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Other authority:

1. Texas Medical Liability Act, statement of Legislative purpose, Section 10.11(b) of Acts 2003, 78th Leg, Ch. 204. 1

STATEMENT OF THE CASE

Nature of the Case:	This is a medical negligence case brought under the Texas Medical Liability Act.
Trial court:	The Honorable Mario Arnoldo Cantu, Jr., County Court at Law Number Five, Hidalgo County, Texas.
Trial court's disposition:	The trial court denied the attorneys fees requested in conjunction with an agreed dismissal.
Appellate court's disposition:	The 13th Court of Appeals affirmed, finding that the Appellant did not provide sufficient proof of attorneys fees to support judgment. Hon. Chief Justice Rogelio Valdez writing for the Court, Hon. Linda Yanez and Hon. Gina Benavides, participating. *Garcia v. Gomez*, ___ S.W. 3d ___, 2008 WL 5083707 (Tex. App. – Corpus Christi 2008, pet. filed).

STATEMENT OF JURISDICTION

Dr. Garcia seeks to invoke "question of jurisdiction" standing before this Court. However, the assertion of jurisdiction in this case depends on a finding of fact, over which this Honorable Court does not have jurisdiction; i.e., whether the Petitioner was entitled to attorneys fees. Questions of fact are finally determined by the Court of Appeals. TEX GOV'T CODE §22.225(a).

Dr. Garcia also seeks to invoke the "conflicts" jurisdiction of this Court. A jurisdictional analysis must begin with the basic principle that the Court does not have

jurisdiction in the absence of an express constitutional or legislative grant. *Chenault v. Phillips*, 914 S.W. 2d 140, 141 (Tex. 1996). The Legislature has determined that jurisdiction over fact questions is generally final in the courts of appeals. TEX GOV'T CODE §22.225(a). However, the Legislature created exceptions to that general rule for certain questions of law, including those meeting the conflicts standard of Texas Government Code §22.001(a)(2); 22.225(c). That standard is met and this Court has conflicts jurisdiction over appeals when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court on a question of law material to a decision of the case." *Id.*

For this Court to have conflicts jurisdiction, the rulings in the two cases must be "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other." *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W. 3d 550 (Tex. 2004); *Coastal Corp. v. Garza*, 979 S.W. 2d 318, 319 (Tex. 1998). Cases conflict for jurisdictional purposes only if the conflict is upon the very question of law actually decided. *Id.* Likewise, while factual identity between the cases is not required, cases do not conflict if "a material factual difference legitimately distinguishes their holdings." *Id.*, at 320[1].

As argued herein, there is no identity in the factual issues, and there is no conflict between the decisions.

[1] A material factual difference also clearly distinguishes the *City of Galveston* case. Here, we do not have the concerns raised when one governmental entity sues another.

RESPONSIVE ISSUES

I. The Court of Appeals correctly decided the issue before it.

II. What is a motion to dismiss?

III. Failure to provide medical records waives attorneys fees.

STATEMENT OF FACTS

The Texas Medical Liability Act was designed to reduce litigation against health care providers and reduce insurance premiums for those same providers, without unduly restricting the rights of claimants. Section 10.11(b) of Acts 2003, 78th Leg, Ch. 204. The Act has reduced litigation, but has not succeeded in reducing premiums, which have risen.

The gatekeeper function of the Act is a preliminary review by an expert to determine before the litigation is pursued that the claims have merit. The critical prerequisite to this mechanism is the provision of records which are needed to permit such a review. The ***only thing*** a health care provider must do, in order to benefit from the Act, is provide medical records when requested. TEX CIV PRAC & REM CODE §74.051(d).

In this case, the health care provider knowingly and intentionally failed to provide medical records. If the records had been provided, the lawsuit would not have been filed. (RR 8, lines 2 - 23). When the records were received, it was discovered that there was no medical negligence.

Ofelia Marroquin died from a pulmonary embolism that arose after abdominal surgery. (CR[1] 31-32, RR 6, lines 4 -12). She had a history of clotting problems. The treatment for clotting prone patients is to place a "filter" in the abdomen. (RR 6, line 19 through RR 7, line 20). This "filter", which is shaped a wedge-shaped plug, breaks up

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[1] "CR" refers to the Clerk's record, "RR" refers to the Reporter's Record.

the clots as they travel toward the heart and lungs, and is specifically designed to prevent pulmonary embolisms.

Although records requests were made in compliance with the Act, no records showed that Mrs. Marroquin had a blood filter. (RR 7, line 21 through RR8, line 1). It was ***only after suit was filed*** that medical records were forwarded, ***by other defendants,*** that confirmed that sometime in the unknown past, the medically required filter had been placed. (RR 8, lines 2 - 9). ***Only after receiving these records*** could experts agree that the standard of care had been met. (RR 8, lines 10 - 17).

Long after suit was instituted, once the records were provided, the children of Ofelia Marroquin[2] agreed that the dismissal was proper – because the filter was there.

Although the trial court granted dismissal, Dr. Garcia contends that he is entitled to attorneys fees, even though he was sued *only because he failed to comply* with the Act.

Dr. Garcia filed a "motion to dismiss", which is a non-existent procedural device, seeking judgment for attorneys fees. The trial court denied attorneys fees. The Court of Appeals affirmed this ruling, utilizing standards similar to that of a summary judgment for the provision of, and effect of, evidence. In material part, the Court of Appeals held that the testimony concerning attorneys fees was inadequate to sustain judgment.

In the *ad hominem* attacks on the Court of Appeals reasoning and decision, Dr. Garcia neglects to consider that the standard of proof for a "motion to dismiss" should be consistent with recognized procedural devices. Dr. Garcia contends it is the trial court's burden to seek and prove the amount of attorneys fees to which he may be entitled. In no

other field of law is the trial court required to put on evidence, and make unilateral rulings, to benefit a claimant.

SUMMARY OF THE ARGUMENT

The issue before the Court of Appeals, whether attorneys fees should be awarded, was correctly decided. Every claimant must show its entitlement to an award. Dr. Garcia's claims for attorneys fees fail for three reasons: 1) as found by the Court of Appeals, he did not show a required element for the amount of attorneys fees, 2) he did not include the required certification that medical records had been provided as required, and 3) he knowingly and intentionally waived the Act by failing to comply with its ***only*** requirement for health care professionals, by his refusal to provide medical records.

Additionally, this case highlights the procedural questions concerning standards applicable to a "motion to dismiss". The Court of Appeals correctly used a standard of proof similar to summary judgment.

I. The Court of Appeals correctly decided the issue before it.

The Court of Appeals was asked by Dr. Garcia to review the denial of attorneys fees. The children of Ofelia Marroquin also asked the Court of Appeals to consider the burden of proof and standards of evidence that should be applied to a "motion to dismiss". In determining the appeal, the Court of Appeals utilized a standard of proof similar to a motion for summary judgment, and standards of evidence similar to summary judgment evidence. That is, the Court of Appeals, in looking at the evidence provided by the claimant, held the claimant to the traditional burden of showing that he was entitled to

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[2] Attoney, Savannah Robinson has never been served with any complaint and is not a party to this suit.

an award. The Court of Appeals, in reviewing the sufficiency of the evidence, held the claimant to the traditional standard of providing proof on each required element. One required element is that attorneys fees not be speculative, but actually incurred. The Court of Appeals found that this element was entirely lacking in the testimony, precluding the testimony from being considered. This is not error, and is not contrary to any holding by this, or any other Court of Appeals.

The burden of going forward with evidence in support of a claim is generally on the claimant. Thus, one seeking to make a claim must show they are entitled to the award they seek. *See, for example: Moughon v. Wolf*, 576 S.W. 2d 603, 604-605 (Tex. 1978) (a discussion of the burden of proof in a negligence per se claim). This general standard is specifically applicable to traditional motions for summary judgment. *Johnson v. Brewer and Pritchard PC*, 73 S.W. 3d 193, 207 (Tex. 2002). Because the claimant has the burden of proving its entitlement, a non-claimant need not respond to allegations and evidence which are insufficient as a matter of law. *Cove Investments v. Manges*, 602 S.W. 2d 512 (Tex. 1980).

Evidence is generally insufficient if there remains an unanswered question of fact on an essential element of the claim. *City of Keller v. Wilson*, 168 S.W. 3d 802, 823 (Tex. 2005); *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W. 3d 217 (Tex. 2004).

The Act does not create a new procedural device, which is the constitutional authority of the Texas Supreme Court. TEX CONST Art. 5, §3. The Court of Appeals utilized procedural and evidentiary standards that have been approved by the Texas Supreme Court for resolution of similar issues. This is not error.

Dr. Garcia contends that the holding in *Garcia v. Gomez*, conflicts with the prior holding of the Court of Appeals in *ERA Realty Group*. However, Dr. Garcia acknowledges that the attorneys fees proof in *ERA Realty Group* was by affidavit, while the proof in this case was not. Dr. Garcia does not explain why live testimony should be held to a lesser standard of proof than an affidavit. An affidavit may not be conclusory. "Statements of legal conclusions amount to little more than the witness choosing sides on the outcome of the case." *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex.App.-Houston [1st Dist.] 1997, no pet.). This is little difference than the standard of testimony, which requires that an expert's opinion have sufficient factual support so that there is no analytical gap. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 728 (Tex.1998). Conclusory statements cannot support a judgment even when no objection was made to the statements at trial. *City of San Antonio v. Pollock*, ___ S.W. 3d ___, 2009 WL 1165317, *4 (Tex. 2009).

Further, the reasoning of the decision in *ERA Realty Group* goes further than the summary provided by Dr. Garcia. In material part, the decision in *ERA Realty Group* reaffirms that: "This ...does not mean in every case in which a party offers uncontradicted testimony, such testimony mandates an award of the entire amount sought. (cite omitted). Even though the evidence might be uncontradicted, 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. (cite omitted)" *ERA Realty Group, Inc. v. Advocates for Children and Families, Inc.*, 267 S.W. 3d 114, 120 (Tex. App. – Corpus Christi 2008, pet

filed). Thus, it is not merely that the affidavit is uncontested, or alleged to be non-conclusory that determines its sufficiency. It is the review that the Court made that determines its sufficiency, not fully described in the *ERA Realty* decision. The testimony of Dr. Garcia's representative did not attain that threshold, and the Court did articulate the reasons – that there was a missing element of proof.

In order to present a conflict, the rulings in the two cases must be "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other." *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W. 3d 550 (Tex. 2004); *Coastal Corp. v. Garza*, 979 S.W. 2d 318, 319 (Tex. 1998). Cases conflict for jurisdictional purposes only if the conflict is upon the very question of law actually decided. *Id.* Likewise, while factual identity between the cases is not required, cases do not conflict if "a material factual difference legitimately distinguishes their holdings." *Id.*, at 320. This is not the case here.

II. What is a motion to dismiss?

The Court of Appeals, in its memorandum opinion, did not delve into the standards that should be applicable, or distinguish the standards applicable to a "motion to dismiss" from a motion for summary judgment, plea to the jurisdiction, or trial. Nevertheless, analysis of the decision begs the question.

A motion for summary judgment is reviewed *de novo*. *Natividad v. Alexis, Inc.*, 875 S.W. 2d 695, 699 (Tex. 1994). A plea to the jurisdiction is also reviewed *de novo*. *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 394 (Tex.2007). "Motion to dismiss" is some times reviewed *de novo*. *See: Turner v. Zellers*, 232 S.W.3d 414, 418 (Tex. App. –

Dallas 2007, no pet history) (*de novo* review); *McDaniel v. Spectrum Healthcare Resources, Inc.*, 238 S.W.3d 788 (Tex. App. - San Antonio 2007, no pet history) (abuse of discretion review); *Esparza v. Safety Nat. Cas. Corp.*, ___ S.W.3d ___, 2007 WL 2274615 (Tex. App. - El Paso 2007, pet filed) (abuse of discretion review); *Christus Health v. Beal,* 240 S.W.3d 282, 286 (Tex.App.-Houston [1st Dist.] 2007, no pet.) (mixed review).

A motion for summary judgment has a twenty-one day requirement for notice and a seven-day deadline for filing of response. TEX R CIV PRO Rule 166a. The plea has only a three-day notice requirement. TEX R CIV PRO Rule 21. Arguably, a "motion to dismiss" would also have a three-day notice. If testimony were to be provided to the court in the form of affidavit, is three days really enough to allow a considered response?

A motion for summary judgment does not require a hearing. *Gandara v. Novosad*, 752 S.W. 2d 740, 743 (Tex. App. – Corpus Christi 1988, no writ). A plea may require a hearing on disputed evidence, and may require the court to make determinations of fact. *County of Cameron v. Brown*, 80 S.W. 3d 549, 555 (Tex. 2002).

A motion for summary judgment does not allow the Trial Court to take evidence at a hearing. TEX R CIV PRO Rule 166a. A trial court cannot resolve conflicting evidence in order to determine a motion for summary judgment. If a fact question is presented on an essential element of the case, the motion for summary judgment should be denied. *King Ranch, Inc. v. Chapman*, 118 S.W. 3d 742, 751 (Tex. 2003). In contrast, when considering a plea, if there is an unresolved question of fact concerning the Court's jurisdiction, the Court should not dismiss the case, but should continue the motion until

the question of fact has been answered. *Bland Ind. Sch. Dist. v. Blue*, 34 S.W. 3d 547, 554 (Tex. 2000).

The clear distinction is that a motion for summary judgment questions facts, while a plea questions jurisdiction. A "motion to dismiss" also questions jurisdiction, but necessarily requires resolution of facts. Questions of delivery and service, adequacy and expertise, are much more fact intensive than issues regularly confronted on jurisdictional issues. Thus, the approach taken by the Court of Appeals – analogously applying standards applicable to summary judgment evidence – are apt because they are used to question facts.

III. Failure to provide medical records waives attorneys fees.

The Court of Appeals did not rest its decision on the failure of Dr. Garcia to provide medical records. Respondents, the children of Ofelia Marroquin, would re-urge that the Supreme Court consider this ground for affirming the decision of the Court of Appeals.

The Legislative plan, which would avert the filing of lawsuits through a preliminary determination of their merit, fails entirely when the health care provider refuses to provide medical records. This case would not have been filed if the records discovered in the litigation had been provided prior to the litigation as is required by the Act.

Dr. Garcia's "motion to dismiss" did not contain a certification that medical records had been provided. TEX CIV PRAC & REM CODE §74.051(b). They had not been

provided although within his control and power to do so. The relevant records were produced by another party – who is not a party to this appeal.

A health care provider can waive the protections of the Act. *Williams v. Mora*, 264 S.W. 3d 888, 890-891 (Tex. App. – Waco 2008, no pet history) (21 day complaint period). To effect a waiver, the failure to act must be an intentional relinquishment of a known right. *Jernigan v. Langley,* 111 S.W. 3d 153, 156 (Tex. 2003). There is no waiver if a person does nothing inconsistent with an exercise of a right. *Id.* However, where there is an affirmative duty to act, the intentional failure to act is a waiver, because inaction is inconsistent with an intent to rely upon the protections afforded by the Act. *Id.*, at 57.

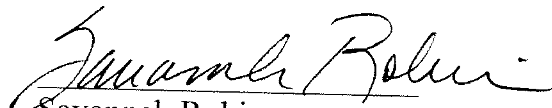
The Act requires that the records be provided within 45 days. TEX CIV PRAC & REM §74.051(d). This imposes a duty to act. It is the *only* prerequisite to the protections of the Act that is required of a health care provider.

Dr. Garcia has waived the application of the provisions of the Texas Medical Liability Act that require the filing of an expert report within 120 days of the filing of suit because of their willful, knowing, and intentional failure to provide medical records after *four* requests. *Spinks v. Brown*, 211 S.W.3d 374 (Tex. App.-San Antonio 2006, pet denied); *Jernigan v. Langley*, 111 S.W. 3d 153, 156 (Tex. 2003).

PRAYER

For all these reasons, Respondent requests that the Petition for Review be denied, and the judgment of the Court of Appeals be affirmed.

Respectfully Submitted,



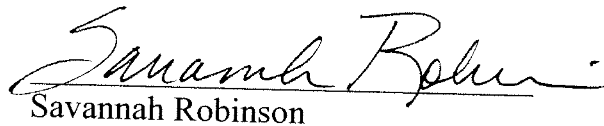
Savannah Robinson
ATTORNEY IN CHARGE
FOR RESPONDENT
SBN: 17108150
1822 Main
Danbury, TX 77534
(979) 922-8825
savannahrobinson@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true, complete and correct copy of the attached and foregoing was this day served pursuant to the Texas Rules of Civil Procedure, on the following persons, on this the 18th day of May, 2009.

I.Cecelia Garza
Ron Hole
Hole & Alvarez
612 W. Nolana Loope, Suite 370
P.O. Box 720547
McAllen, TX 78504

Attorneys for Petitioner



Savannah Robinson