Case No.

THE SUPREME COURT OF TEXAS

DEBBIE STOCKTON, AS PARENT AND NEXT FRIEND OF WILLIAM STOCKTON, A MINOR
Petitioner

V.

HOWARD A. OFFENBACH, M.D.
Respondent

Appeal from Cause No. 07-05653-M
in the 298th Judicial District Court,
Dallas County, Texas, Hon. Emily Tobolowsky, Presiding

PETITION FOR REVIEW

Robert J. Talaska
SBN: 19613600
Timothy L. Culberson
SBN: 24012484
The Talaska Law Firm P.L.L.C.
1415 North Loop West, Suite 200
Houston, TX 77008
Telephone: 713.869.1240
Facsimile: 713.869.1465

IDENTITIES OF PARTIES AND COUNSEL

Defendants/Respondent:	Howard A. Offenbach, M.D.
Counsel for Defendants/Respondent:	Michael Yanof Stan Thiebaud Stinnett Thiebaud & Remington, L.L.P. 4800 Fountain Place 1445 Ross Ave. Dallas, TX 75202
Plaintiffs/Petitioner:	Debbie Stockton, as Parent and as Next Friend of William Stockton, a Minor
Counsel for Plaintiffs/Petitioner:	Robert J. Talaska Timothy L. Culberson The Talaska Law Firm P.L.L.C. 1415 North Loop West, Suite 200 Houston, TX 77008 Telephone: 713.869.1240 Facsimile: 713.869.1465

TABLE OF CONTENTS

Identity of Parties ii

Table of Contents iii

Index of Authorities iv

Statement of the Case v

Statement of Jurisdiction vi

Issues Presented vii

Should the well-recognized, long-standing, "due diligence" exception to service of process also be applied to toll the running of the 120-day deadline after the lawsuit is filed and the potential defendant is not yet a party and cannot be served within 120 days due to no fault of William Stockton?

Should drug addicted doctor be allowed to avoid liability by avoiding service of report making compliance with Chapter 74.351 impossible?

Statement of Facts 1

Summary of Argument 7

Argument 8

The Court of Appeals erred in reversing the trial court's sound judgment and determining that Petitioner did not comply with Section 74.351(a) in spite of Petitioner's exhaustive attempts to serve her expert report on a drug-addicted physician whose medical license was revoked by this state due to repeated drug abuse.

Prayer 16

Certificate of Service 18

Appendix 19

INDEX OF ATHORITIES

CASES **PAGE**

Herrera v. Seton Nw. Hosp.,
212 S.W.3d 452, 459 (Tex.App.—Austin 2006, no pet.) 10

IKB Industries v. Pro-Line Corp.,
938 S.W.2d 440, 445 (Tex. 1997)... 9

Moreno v. Sterling Drug, Inc.,
787 S.W. 2d 348, 355 (Tex.1990).. 13

Nelson v. Krusen,
678 S.W.2d 918, 927 (Tex.1984)... 13

Park v. Lynch,
194 S.W.3d 95, 97-8 (Tex.App.- Dallas 2006, no writ) 9

Proulx v. Wells,
235 S.W.3d 213, 215 (Tex. 2007).. 11

Ricker v. Shoemaker,
81 Tex. 22, 16 S.W. 645, 646 (1891).. 11

Sax v. Votteler,
648, S.W.2d 661 (Tex.1983).. 13, 15, 16

STATUTES

Gov't Code § 22.001(a)(3)... v

Gov't Code § 22.001(a)(6)... v

STATEMENT OF THE CASE

This is a medical negligence case involving a permanent birth injury to a minor. Judge Emily Tobolowsky signed an order denying Respondent's motion to dismiss in the 298th District Court of Dallas County, Texas. Dr. Howard Offenbach, Respondent, filed his notice of appeal with the 5th Court of Appeals. Justices Francis, Lang-Miers, and Mazzant heard oral arguments and an opinion was written by Justice Lang-Miers. (*Offenbach v. Stockton,* Tex. App. – Dallas March 11, 2009-WL 606709) The 5th Court of Appeals reversed the trial court's denial of the motion to dismiss and remanded for further proceedings. An motion for rehearing en banc was filed and denied on April 13, 2009.

STATEMENT OF THE JURISDICTION

The Supreme Court has jurisdiction over this appeal under Government Code § 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Furthermore, this appeal involves the constitutional validity of a statute, as applied to the facts of this case, necessary to the determination of the case. *See* Gov't Code § 22.001(a)(3).

ISSUES PRESENTED

Should the well-recognized, long-standing, “due diligence” exception to service of process also be applied to toll the running of the 120-day deadline after the lawsuit is filed and the potential defendant is not yet a party and cannot be served within 120 days due to no fault of William Stockton?

Should drug addicted doctor be allowed to avoid liability by avoiding service of report making compliance with Chapter 74.351 impossible?

STATEMENT OF THE FACTS

William Stockton's left shoulder, arm, and hand were permanently injured at birth during a shoulder dystocia (his shoulder was stuck under his mother's pubic bone) on July 24, 1989. His permanent injuries were caused by Defendant, Dr. Howard Offenbach (no longer a licensed physician due to drug abuse for which he was still seeking treatment at the time of William's delivery) because he failed to recognize an abnormal labor and the risks associated with shoulder dystocia and failed to order a c-section.

Dr. Howard Offenbach, the same month he delivered William Stockton, was actually getting treatment for his drug abuse at Ridgeview. (CR 62). He continued to abuse drugs and eventually had his license to practice medicine indefinitely suspended which continues to the present. (CR 64-77). He moved away from his last recorded residence, and was evicted from both The Lakes Apartments in 2005 and PC Village Apartments in 2006 (CR 78-79). Since his evictions, there is no information available to ascertain his current whereabouts. His trail has run cold.

The following is the chronology of William Stockton's efforts to locate Defendant and serve him with a petition and a Chapter 74 expert report:

A. **October 31, 2005 – Chapter 74 Notice Letter sent via certified mail, return receipt requested and regular mail to Dr. Howard A. Offenbach at 7204 Winedale Drive, Dallas, Texas 75231. Certified Letter returned to sender - unclaimed – unable to forward – regular mail letter was not returned to our office. (CR 80-88)**

After the notice letter went unclaimed and the regular mail letter could not be forwarded and was not returned, it was apparent that Dr. Offenbach no longer resided at the above address – his last known address according to public records.

B. **December 15, 2005 – Chapter 74 Notice Letter sent via certified mail, return receipt requested and regular to Dr. Howard A. Offenbach c/o The Medical Protective Company 5814 Reed Road, P. O. Box 15021, Fort Wayne, IN 46885-5021. (CR 89-96)**

Therefore, William Stockton's counsel sent a notice letter to The Medical Protective Company – Dr. Offenbach's last known liability insurance carrier hoping that his carrier would have knowledge of his whereabouts and would forward the notice letter to Dr. Offenbach so that he could cooperate in his defense.

C. **January 5, 2006 – A Rule 202 Petition was filed in Cause No. 06-00132 in Dallas County to take the deposition of the custodian of records at Doctor's Hospital of Dallas relating to missing records from William Stockton's birth**

This petition was served only on the custodian of records for the hospital. Dr. Offenbach was not a party to this proceeding. Furthermore, Mr. Thiebaud never made an appearance as counsel in this matter.

D. **January 9, 2006 – Letter sent to Dr. Howard A. Offenbach c/o Mr. Steve Baggett, The Medical Protective Company, 1252 Cross Creek Drive, Kennedale, Texas 76060 via Certified Mail, return receipt requested and regular mail. (CR 97)**

Mr. Steve Baggett, the insurance adjuster for Dr. Offenbach's liability carrier, responded to the notice letter. (CR 98-99) Counsel for William Stockton, Mr. Tim Culberson, and Mr. Baggett had multiple telephone conversations prior to January 9, 2006 regarding the whereabouts of Dr. Offenbach. Mr. Baggett informed Mr. Culberson that he did not

know where Dr. Offenbach was residing, but he was going to hire Stinnett, Thiebaud & Remington, L.L.P., a firm that has represented Dr. Offenbach in the past, to find him. (CR 100-101) (Plaintiffs' counsel was not informed that Mr. Thiebaud would represent him in this matter.) As a show of good faith, Mr. Culberson sent a copy of the medical records for Mr. Baggett's review. Mr. Culberson also informed Mr. Baggett that he would provide a Chapter 74 expert report for Mr. Baggett's review, prior to filing the original petition, to see if an early resolution could be had in light of Dr. Offenbach's history of drug use and the strong merits of William Stockton's case. (CR 100-101).

E. **April 7, 2006 – Letter sent to Mr. Steve Baggett, The Medical Protective Company, 1252 Cross Creek Drive, Kennedale, Texas 76060 via Certified Mail, return receipt requested and fax outlining Dr. Howard A. Offenbach negligence as well as the Chapter 74 report of Dr. John Spurlock. (CR 102-105).**

Counsel for William Stockton, as promised, served a compliant Chapter 74 report on Dr. Offenbach's liability insurance representative, Mr. Baggett. Furthermore, counsel forwarded a copy of a video showing the severe permanent injuries to William Stockton caused by Dr. Offenbach's negligence. On April 26, 2006, Mr. Culberson called Mr. Baggett after sending the report to discuss whether Stinnett, Thiebaud & Remington, LLP was successful in locating Dr. Offenbach. Mr. Baggett responded that no progress had been made. (CR 100-101). As early as April 7, 2006, Plaintiffs' counsel had obtained a compliant Chapter 74 Expert Report.

F. **June 8, 2006 – Letter faxed to Mr. Steve Baggett, The Medical Protective Company, 1252 Cross Creek Drive, Kennedale, Texas 76060 inquiry of the whereabouts of Dr. Howard A. Offenbach and Mr. Baggett's results of locating Dr. Offenbach (CR 106)**

Again, Mr. Culberson tries to contact Mr. Baggett to inquire regarding the whereabouts of Dr. Offenbach and mentions that efforts were still being made on Plaintiffs' behalf to locate Dr. Offenbach. No response was received.

G. **September 25, 2006 – The Rule 202 action in Cause No. 06-00132 was set for DWOP since the medical records issue had been resolved.**

H. **March 19, 2007 – Vacation letter was filed by Mr. Thiebaud in Cause. No. 06-00132 (CR 166)**

This letter (which Appellants cite as evidence of Appellee's awareness of Dr. Offenbach's counsel in this matter) did not state who Mr. Thiebaud represented. It was filed in a case where Dr. Offenbach was not a party.

I. **April 17, 2007 – search on PublicData.com resulted in finding Texas Voter Detail for Howard Offenbach listing address of 8650 Southwestern, #3215, Dallas, Texas 75206-8201 with a registration date of Oct 20, 2004. (CR 107) However, this is the address from The Lakes Apartments where he was evicted on April 14, 2005.**

William Stockton's counsel also consulted a private investigator and reached a dead end. (CR 100-101) Therefore, after allowing for additional time for Stinnett, Thiebaud, & Remington and Mr. Steve Baggett to try and locate Dr. Offenbach, counsel for William Stockton attempted additional public data searches to find him.

J. **April 17, 2007 – search on PublicData.com resulted in finding a Texas Dallas County Evictions Detail for Howard Offenbach at 8650 Southwestern, #3215, Dallas, Texas 75206 and a Judgment date of 4/14/05 (CR 108)**

This confirmed that Dr. Offenbach had once lived at this address but was evicted and no further forwarding information could be found.

K. **June 7, 2007 – Requested PCP Research (Professional Civil Process Research), 4425 Three Creek Trail, Spicewood, Texas 78669 to run a skip trace to find Howard Allan Offenbach (CR 109)**

L. **June 8, 2007 – Report received from PCP Research, 4425 Three Creek Trail, Spicewood, Texas 78669 showing Howard Allan Offenbach's last known address as 7204 Winedale Drive, Dallas, Texas 75231 (CR 110)**

M. **June 11, 2007- search on PublicData.com resulted in finding a Texas Driver Detail for Howard Allan Offenbach with address 7204 Winedale Drive, Dallas, Texas 75231 – last transaction date August 8, 2003 (CR 111)**

All public records and investigations pointed to the 7204 Winedale Drive address as the last known address.

N. **June 13, 2007 – William Stockton files his Original Petition with Accompanying Chapter 74 Report against Dr. Howard Offenbach (CR 112-131)**

O. **June 26, 2007 – Bryant Miller, Tx License# SC-1955, attempts personal service of the Original Petition AND Chapter 74 Expert Report at 7204 Winedale Drive, Dallas, Texas 75231 – Defendants LAST KNOWN ADDRESS – A Declaration of Not Found (Due and Diligent Search) was sworn to by Bryant Miller (CR 132)**

In an attempt to serve Dr. Offenbach with the original citation and the Chapter 74 report, a process server, Mr. Bryant Miller, went personally to Defendant's last known address to serve a copy of the Chapter 74 report. However, Dr. Offenbach had left this address and did not provide any forwarding information. Mr. Miller even spoke with neighbors to try and discover any leads as to Defendant's whereabouts. But he discovered that Dr. Offenbach had not lived at this address for years. Dr. Offenbach's trail has been cold for years. Not even his own insurance company could find him.

P. **July 24, 2007 – Plaintiffs filed a Verified Motion for Substitute Service Under Rule 109 (CR 27-28).**

Just over one month after Plaintiffs filed their Original Petition, Plaintiffs requested the trial court for relief under Rule 109 to serve Dr. Offenbach by publication. In their sworn motion, Plaintiffs informed the court of the process server's inability to serve Dr. Offenbach at his last known address and the inability to locate Dr. Offenbach after diligent efforts had been made (CR 27-28). Also, a sworn affidavit from the process server was attached indicating that the officer had determined that Dr. Offenbach had moved out and had not lived there in years. Contrary to Respondant's claim that no efforts were made during the pending motion for substitute of service, Between July 24, 2007 and November 2007, the office of counsel for Plaintiffs repeatedly called the trial court clerk to obtain a hearing date to accomplish substitute service (CR 109). Finally, in November 2007 (after 120 days had lapsed from the filing of the petition and expert report), the trial clerk informed Plaintiffs' counsel's office that a supplemental motion would need to be filed before the court would sign the order (CR 109).

Q. **November 13, 2007 – Mr. Theibaud inexplicably files an incorrectly dated vacation letter for vacation days already expired (CR 31).**

Five months after the original petition was filed in this matter, Mr. Thiebaud, files a vacation letter that is useless. The vacation dates are expired, he does not indicate who he represents, and the date on the letter is wrong.

R. **November 20, 2007 – Letter to Mr. Thiebaud inquiring if he would accept service on behalf of Dr. Offenbach (CR 133)**

After receiving the confusing vacation letter from Mr. Thiebaud, Plaintiff's counsel tried contacting Mr. Thiebaud by letter to clarify his involvement. (CR 133) Mr. Thiebaud called in response to this letter. But he informed Mr. Culberson that he had no authority to accept service of the Chapter 74 report and petition since Dr. Offenbach could not be found to give his consent to allow Mr. Thiebaud to act on his behalf. (CR 100-101). Without this authority, it was apparent that Mr. Thiebaud did not represent Dr. Offenbach

in this matter. Respondent did not dispute this fact at any time during the proceedings at the trial court below.

S. November 28, 2007 – Plaintiffs file Supplemental Motion for Substitute Service Under Rule 109

As soon as Plaintiffs learned from the court clerk that a supplemental motion needed to be filed per the court's request, they complied with the Court and filed the supplemental motion on November 28, 2007.

After service of the petition by publication was completed on April 28, 2008, Mr. Thiebaud somehow miraculously received authority to represent Dr. Offenbach. Plaintiff received an answer on Defendant's behalf identifying Mr. Thiebaud as counsel of record on May 5, 2008. This was the first time any official appearance was made by Respondant's counsel in this matter. **Two days later**, Plaintiffs served a copy of their Chapter 74 expert report by certified mail on Mr. Thiebaud as counsel for Defendant. (CR 134).

The facts above are undisputed. Respondent filed no evidence to contradict Petitioner's evidence.

SUMMARY OF THE ARGUMENT

The 5th Court of Appeals' errors in reversing the trial court's denial of Respondent's motion to dismiss allows a physician whose license has been revoked due to a long history of drug abuse escape liability because his own lifestyle has made it impossible for William Stockton and his mother to serve him with their Chapter 74 expert

report. There are three reasons why this honorable Court must exercise its discretion and grant review to correct this injustice. First, the manner in which appellate courts have statutorily construed Chapter 74.351(a) by engrafting TRCP 21(a) into the statute requires that Rule 21(a)'s "due diligence" doctrine also be applied in this case. Second, the Court of Appeals failed to apply an abuse of discretion standard of review in disagreeing with the trial court's sound view of the indisputable evidence. And third, the Court of Appeals erred by ignoring the overwhelming evidence showing Petitioner could not possibly comply with 74.351(a)'s service requirement stripping her of her due process rights under the open courts provision of the Texas Constitution.

ARGUMENT

The Court of Appeals erred in reversing the trial court's sound judgment and determining that Petitioner did not comply with Section 74.351(a) in spite of Petitioner's exhaustive attempts to serve her expert report on a drug-addicted physician whose medical license was revoked by this state due to repeated drug abuse.

A. The Texas Supreme Court Should Exercise Its Discretion

This Court should exercise its discretion to hear this case because it involves an unconstitutional application of Chapter 74.351(a) of the Texas Civil Practice and Remedies Code – resulting in a miscarriage of justice which is of great importance to the state's jurisprudence that needs to be corrected. *See* TRAP 56.1(a)(3)-(5).

The trial court's determination of the unconstitutionality of Chapter 74.351(a), as applied to these facts, was reversed by the 5th Court of Appeals in error, without reason or analysis. The unconstitutional application of 74.351(a) to these facts is at the heart of the

trial court's proper denial of Respondent's Motion to Dismiss below. Therefore, this court should grant review of this constitutional issue.

Also, the 5th Court of Appeals' opinion has broad implications on medical malpractice jurisprudence and creates an incentive for future potential defendants to subversively avoid service of the Chapter 74 expert report. Any defendant could then cite to this court of appeals opinion which places an insurmountable evidentiary burden to obtain relief through our state's open courts constitutional protection. Such a scenario is foreseeable unless this honorable Court exercises its discretion to hear this case and correct this error of great importance to our state's jurisprudence.

B. **Proper Standard of Review is Abuse of Discretion**

Courts of appeals apply an abuse of discretion standard for reviewing a trial court's decision on a motion to dismiss in which a defendant claims that the report was untimely served. *Park v. Lynch*, 194 S.W.3d 95, 97-8 (Tex.App.- Dallas 2006, no writ). Under an abuse of discretion standard, the appellate court may not reverse the trial court for an abuse of discretion because it disagrees with the trial court's decision so long as that decision is within the trial court's discretionary authority. *IKB Industries v. Pro-Line Corp.*, 938 S.W.2d 440, 445 (Tex. 1997). An abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence supports the trial court's decision. *Id.* Furthermore, an abuse of discretion does not exist if some evidence in the record shows the trial court followed guiding rules and statutes. *Id.*

Here, the 5th Court of Appeals appears to have applied a *de novo* review of the facts presented to the trial court and replaced the trial court's discretion with its own. This was in error. Not only did the trial court base its decision on "some evidence", all the evidence before the court supported its decision. A proper review of the trial court's decision shows it was well within its discretion to deny Respondent's motion to dismiss on constitutional grounds as stated below.

C. "Due Diligence" Under TRCP 21 Applies to Service of Report Under 74.351(a)

The Court of Appeals erred in opining that they were not permitted to engraft exceptions to the clear language in an unambiguous statute no matter how desirable the exceptions may seem. Chapter 74.351(a) is actually silent as to "how" an expert report is to be served on a "party or the party's attorney." Courts have had to engraft language into the statute to clarify "service" of an expert report. *See Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 459 (Tex.App.—Austin 2006, no pet.). Courts have concluded that "service" under this statute should comply with Rule 21(a) of the Texas Rules of Civil Procedure. *Id.* Therefore, it only follows that the "due diligence" doctrine that has been traditionally applied with Rule 21(a) should extend to the Chapter 74.351(a) "service" requirement of an expert report. There is no reason to separate the "due diligence" doctrine from TRCP 21 when applying it to the service requirement under 74.351(a).

Otherwise, it would be all too easy for negligent actors to avoid all liability for the damages they cause, merely by temporarily avoiding service. Without a reasonable "due

diligence" exception to serving an expert report on a non-party potential defendant, plaintiff could obtain a sufficient expert report, attach it to his petition when filing and serving it--in other words, the statute's policy imperatives have been entirely fulfilled—and yet the provider need only be out of state or difficult to serve for one 120-day window, and accountability will be forever avoided. This is a problem that this legislature did not foresee. What happens when a claim is **filed** but service of process cannot be accomplished within 120 days due to no fault of the claimant? Should the evading defendant be rewarded? Has the pendulum of influence swung so far in favor of insurance companies and physicians that all common sense has vanished? The trial court below properly ruled on this injustice. In the same way that courts have made the rule that due diligence in the service of process can interrupt the running of a statute of limitations, so too can this Court affirm that due diligence applies in the service of the expert report to interrupt the running of the statutory 120-day expert report deadline when the defendant cannot be found. *See Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007); *Ricker v. Shoemaker*, 81 Tex. 22, 16 S.W. 645, 646 (1891). If courts have the authority to require reason in the application of limitations, it has the authority to do the same when it comes to the 120-day deadline.

Respondent has incorrectly argued that the application of the well-recognized "due diligence" tolling exception conflicts with 74.351 of the Texas Civil Practice and Remedies Code. Both Section 74.351(a) and Rule 21(a) clearly use the term "party" in the plain language of the statutes. A "party" to a lawsuit is commonly known as a person

or entity that has answered and made an appearance in a lawsuit. Clearly, during the time in which Appellant argues the 120-day deadline was running, he was not a "party" to the suit, even though the suit was "filed". The plain language of both Section 74.351 and Rule 21a shows that the legislature did not contemplate or address the situation presented here. Therefore, the proper application of the statute is to utilize the due diligence exception when a potential defendant has been named in a petition, but has yet to become a party. Since Appellant only became a "party" when he answered on May 1, 2008 any due diligence tolling of the 120-day deadline while the repeated attempts were made at finding and serving Appellant with the petition, citation, and Chapter 74 report cannot possibly conflict with Section 74.351's service requirements regarding parties.

Applying the "due diligence" tolling exception to these facts and harmonizing the language of Section 74.351, the actual 120-day deadline would begin to run the date the claim was "filed." However, since the 120-day deadline expired before Appellant was served due to no fault of Appellee, a report still complies with Chapter 74.351 if served on Appellant within a reasonable time period after he becomes a "party." In this case, the expert report was served on counsel for Appellant **6 days** after he officially made an appearance in the lawsuit and the identity of his counsel was confirmed in writing and only **two days** after Appellee received a copy of the answer and appearance. This is certainly a reasonable time period from when Respondant first became a "party" so that the Chapter 74 report could be properly served on his attorney.

D. <u>Application of 74.351(a) to Petitioner Violates Open Courts Guarantee in Our Texas Constitution</u>

Petitioner recognizes the two-pronged test required to bring a successful open courts challenge as established in *Sax v. Votteler*, 648, S.W.2d 661 (Tex.1983). The first prong is met since a medical negligence claim is a well-recognized common law cause of action. *See Nelson v. Krusen*, 678 S.W.2d 918, 927 (Tex.1984). Since there is no real dispute with this first prong, the only issue under the open courts analysis is the second which is discussed below.

The second prong of the open courts test is whether the statute, as applied to Petitioner, is unreasonable or arbitrary when balanced with the purpose and basis of the statute. *Id.* Once the impossibility of complying with a statute's requirements is established, the unreasonableness or arbitrariness of the statute, when balanced with the purpose and basis of the statute, is also established. *See Moreno v. Sterling Drug, Inc.*, 787 S.W. 2d 348, 355 (Tex.1990)(the "open courts" provision is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an <u>impossible</u> condition)(emphasis added). For what is more unreasonable or arbitrary than an impossible condition to attain a common-law remedy?

Contrary to the 5th Court of Appeals' opinion, Petitioner presented to the trial court below more than sufficient evidence on which the trial court properly ruled it was impossible for Petitioner to comply with the "service" requirement of 74.351(a) of the Texas Civil Practice and Remedies Code. The 5th Court of Appeals erred in summarily concluding that Petitioner "did not produce evidence that it was impossible to serve

Offenbach [Respondent] within the 120 days even if she had obtained a timely order granting substituted service." The 5th Court of Appeals spent most of its opinion citing the following undisputed sworn facts (detailed above) demonstrating all of the unsuccessful efforts to serve the expert report: searching of public records, consulting private investigators, contacting the insurance carrier, sending an officer to the last known address, receiving returned certified letters, requesting voluntary acceptance of service from his last known attorney (who then later came out from behind the log after the 120 days expired to represent his drug-addicted client in this matter), and filing a motion for substitute service with the trial court which order was delayed for months in spite of Petitioner's repeated calls to the clerk. Yet, in the very next paragraph, without explaining why the undisputed evidence of impossibility was inadequate, the 5th Court of Appeals summarily dismissed the evidence as not satisfying the requirement to show the statute, as applied to Petitioner, was unreasonable and arbitrary when balanced against the purpose of the statute.

The definition of "impossible" according to Webster is "incapable of occurring." The trial court concluded that Petitioner took every reasonable step to accomplish service on Respondent. These steps failed due to no fault of Petitioner. Therefore, the only reasonable conclusion that can be drawn is that Petitioner was incapable of serving Respondent within 120 days – the very definition of impossible.

The only clue as to the 5th Court of Appeals rationale for its opinion is this statement: "[Petitioner] did not produce evidence that it was impossible to serve Offenbach within

the 120 days *even if she had obtained a timely order granting substituted service*"(emphasis added). The court seems to imply that Petitioner was under a burden to show it would have been impossible to serve Dr. Offenbach if substitute service was granted within 120 days. Petitioner filed its motion for substitute service well within the 120 day period. Yet, the sworn undisputed facts establish that it was the trial court's extended 4-month delay in granting an order for substitute service that prevented Petitioner from serving Respondent by publication (even assuming for the sake of argument that a Chapter 74 report can be served by publication). Petitioner contacted the clerk of the court on numerous occasions over the four months inquiring as to when the order would be signed. Petitioner was essentially at the mercy of the trial court. So it is an unreasonable and arbitrary burden to place on Petitioner to present evidence of impossibility on a contingent that never happened through no fault of Petitioner. The impossibility analysis under the open courts doctrine rests on only those options available to Petitioner, not on contingencies beyond her control. If the Court of Appeals' rationale were taken to its logical conclusion, Petitioner would also have to prove that it was impossible to serve the expert report even if Petitioner had found Respondent, or even if his former attorney had agreed to accept service of the report as previously requested. This of course would be an "impossible" burden to meet. In essence, the Court of Appeals is requiring Petitioner to prove something is impossible even if it were possible.

As in *Sax v. Votteler*, 648, S.W.2d 661 (Tex.1983), the instant case involves a minor plaintiff whose rights to an open court have been effectively cut off by statute. The

minor plaintiff in *Sax* was not required to prove that every conceivable contingency to bring suit before the age of majority was impossible before he could prevail – a burden placed on Petitioner by the 5th Court of Appeals. Certainly, it was shown in *Sax* that the parents could have brought suit – a possibility. However, this Court correctly saw the unreasonableness of holding the minor responsible if the parents failed to take action within the statute of limitations. Implicit in this decision is the equitable principle of not penalizing a person for something beyond their control.

Similar to *Sax*, the facts of this case show that Petitioner was left with no reasonable alternatives to comply with Chapter 74.351(a). Petitioner utilized every reasonable option to serve Respondent with the expert report. This report was obtained over a year before it was filed with the original petition. Every reasonable step was also taken to provide the trial court with the report to demonstrate William Stockton's medical negligence case has merit. Is that not the purpose behind Chapter 74.351(a)?

The real concern before this Court is not whether the underlying claims have merit. Because certainly the expert report timely filed with the trial court demonstrates the merits. But rather, is this Court to allow a physician, whose license has been revoked due to a long history of drug abuse, escape liability because his own lifestyle has made it impossible for William Stockton and his mother to serve him with this report?

PRAYER

Wherefore, Premises Considered, Petitioner prays this Court grant its petition for review, and after consideration, reverse the judgment of the court of appeals, affirm the

trial court's denial of Respondent's motion to dismiss and for such further relief as this Court deems proper.

Respectfully submitted,

The Talaska Law Firm P.L.L.C.

____

Robert J. Talaska
SBN: 19613600
Timothy L. Culberson
SBN: 24012484
1415 North Loop West, Suite 200
Houston, TX 77008
Telephone: 713.869.1240
Facsimile: 713.869.1465

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

This certifies that on the 27th day of May 2009, a true and correct copy of Petitioners' Petition for Review was served by certified mail, return receipt requested on the following counsel listed below:

Michael Yanof
Stan Thiebaud
Stinnett Thiebaud & Remington, L.L.P.
4800 Fountain Place
1445 Ross Ave.
Dallas, TX 75202

APPENDIX