

Case No. 09-0446

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**

POST-SUBMISSION BRIEF

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

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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. A motion for rehearing en banc was filed and denied on April 13, 2009. On March 25, 2010 oral argument was heard by this Court. No decision has yet been rendered. During oral argument the Court asked the question whether the determination of due diligence of service in serving the Chapter 74 expert report is a question of law for the Court or fact for the jury.

ISSUES PRESENTED

Is “due diligence” for service of an expert report under Chapter 74.351, made as a matter of law or is such determination an issue for the jury?

SUMMARY OF THE ARGUMENT

This Court should hold that a determination of whether plaintiff exercised due diligence in serving the expert report pursuant to Chapter 74.351 is a question of law for the court to decide. The decision on whether a plaintiff's report complies with Chapter 74.351 is reviewed under an abuse of discretion standard. *See Davis v. Webb*, 246 S.W.3d 768, 771 (Tex.App.—Houston [14th Dist.] 2008, no writ). Therefore, it follows that the derivative issue of whether plaintiff exercises due diligence in serving said report should also be reviewed under the same standard.

ARGUMENT

Article I, Section 15 provides the right to a jury trial for those actions or analogous actions which were tried by a jury when the Texas Constitution was adopted in 1876. *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 636 (Tex. 1996). Therefore, Article I, Section 15 only applies if, in 1876, a jury would have been allowed to try the action or analogous action. *Id.* The expert report requirement under chapter 74.351(a) Texas Civil Practice and Remedies Code was not a defense or cause in existence in 1876. Furthermore, there is no common law action that was in existence in 1876 that is analogous to the Chapter 74 expert report requirement. The statutory provisions mandating service of an expert report and the determination of due diligence in serving the expert report are in derogation of the common law. Therefore, the right to a jury trial does not exist on the issue of whether “due diligence” was exercised in serving the expert report under Chapter 74.351(a).

Furthermore, a jury trial on the procedural requirement of Chapter 74 would create needless litigation and additional expense. A challenge to service of the expert report would need to be filed very early in the litigation. It would be impossible to leave such a question until the trial on the merits since the Chapter 74 report requirement is a preliminary procedural hurdle. Thus, a jury trial requirement relating to due diligence in serving the report would likely lead to two trials in those medical negligence cases where such a challenge is raised and defeated.

This Court should hold that a determination of whether plaintiff exercised due diligence in serving the expert report is a question of law for the court to decide. The decision on whether a plaintiff's report complies with Chapter 74.351 is reviewed under an abuse of discretion standard. *See Davis v. Webb*, 246 S.W.3d 768, 771 (Tex.App.—Houston [14th Dist.] 2008, no writ). Therefore, it follows that the derivative issue of whether plaintiff exercises due diligence in serving said report should also be reviewed under the same standard.

PRAYER

Wherefore, Premises Considered, Petitioner prays this Court 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 7th day of April 2010, 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