

CASE NO. _____

THE SUPREME COURT OF TEXAS

JOSE CARRERAS, M.D., P.A.,
Petitioner

v.

CARLOS FRANCISCO MARROQUIN, ET AL,
Respondents

ON APPEAL FROM THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI-EDINBURG
CASE NO.13-09-156-CV

PETITION FOR REVIEW

I. Cecilia Garza
State Bar No. 24041627

Ronald G. Hole
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October 8, 2009

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IDENTITY OF PARTIES AND COUNSEL

Plaintiffs/Respondents and Counsel

Carlos Francisco Marroquin, and Cynthia Isabel Marroquin, Individually and on Behalf of the Estate of Priscilla Ann Marroquin, c/o Fernando Mancias, 4955 S. Jackson Road, Edinburg, Texas 78539; and

Fernando Mancias, 4955 S. Jackson Road, Edinburg, Texas 78539.

Defendant/Petitioner and Counsel

Jose Carreras, M.D., P.A., c/o Hole & Alvarez, L.L.P., P.O. Box 720547, McAllen, Texas 78504; and

I. Cecilia Garza and Ronald G. Hole, Hole & Alvarez, L.L.P., Water Tower Centre, P.O. Box 720547, McAllen, Texas 78504.

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STATEMENT OF THE CASE

The underlying case is a suit for damages alleging medical negligence, filed on February 26, 2004 by Carlos Francisco Marroquin and Cynthia Isabel Marroquin, Individually and on Behalf of the Estate of Priscilla Ann Marroquin, against Jose Carreras, M.D., P.A., among others. (C.R. 13-23). Defendant Carreras subsequently filed a Motion for Summary Judgment asserting that, because Plaintiffs failed to provide proper pre-suit notice, Plaintiffs' claims were not timely filed. (C.R. 30-65). Defendant's motion was denied. (C.R. 132, 135-36; App. 1). The trial court subsequently entered an Order Allowing Interlocutory Appeal, pursuant to Section 51.014(c) of the Texas Civil Practice and Remedies Code. (C.R. 133-34; App. 2).¹

Accordingly, Petitioner filed his interlocutory appeal of the trial court's denial of Defendant's motion for summary judgment to the Thirteenth Court of Appeals. The parties in the Court of Appeals, Thirteenth Judicial District of Texas, Corpus Christi–Edinburg, were Jose Carreras, M.D., P.A., a Defendant in the case below; and Carlos Francisco Marroquin and Cynthia Isabel Marroquin, Individually and on Behalf of the Estate of Priscilla Ann Marroquin, the Plaintiffs in the case below.

On August 25, 2009, the Thirteenth Court of Appeals affirmed the judgment of the trial court. The Opinion was authored by Justice Vela, and Justices Rodriguez

¹ The parties agree that the issue raised in Defendant's motion for summary judgment presents a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

and Garza participated in the decision. The opinion can be found on Westlaw® at 2009 WL 2596079 (Tex.App.–Corpus Christi-Edinburg, August 25, 2009).

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction over this proceeding pursuant to §22.225(c) of the Texas Government Code because this case presents a conflict between several courts of appeals regarding the interpretation and application of the Chapter 74 notice and statute of limitations tolling provisions – Sections 74.051 & 74.052 of the Texas Civil Practice and Remedies Code.

ISSUE PRESENTED

Can a Plaintiff Benefit from the Section 74.051 Tolling Provision if the Plaintiff Fails to Provide the Pre-suit Notice *and* Authorization Required by Sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code?

STATEMENT OF FACTS

Petitioner affirms that the Court of Appeals correctly stated the nature of the case.

SUMMARY OF THE ARGUMENT

In its Opinion, the Thirteenth Court of Appeals ignored the clear and unambiguous language of Sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code in its conclusion that “the medical authorization requirement in section 74.052 is independent from the notice requirement set forth in section 74.051.” *Carreras v. Marroquin*, 2009 WL 2596079 (Tex.App.–Corpus Christi, Edinburg, August 25, 2009).

Pursuant to the rules of statutory construction, pursuant to the plain and unambiguous language of Sections 74.051 and 74.052, and pursuant to the legislative intent, proper pre-suit notice requires both a notice letter and an authorization for the release of protected health information. See TEX.CIV.PRAC. & REM. §§ 74.051, 74.052 (Vernon 2003). In amending the statute in 2003, the Legislature mandated that a health care liability defendant be given the opportunity to obtain a claimant’s medical records in order to facilitate investigation as well as pre-suit negotiations. In doing so, the Legislature created an additional notice requirement, not found in previous versions of the medical malpractice statute. The

Legislature also retained the availability of a seventy-five day statute of limitations tolling period, provided that a claimant complied with the new notice requirements.

Respondents admittedly failed to do so. Although a notice letter, which was defective on its face, was sent to Petitioner within the limitations period, such letter was not accompanied by the required authorization. Accordingly, since the required pre-suit notice was not timely provided, pursuant to the clear statutory language, Respondents were not entitled to benefit from a seventy-five day tolling period. Thus, Plaintiffs' Original Petition was not timely filed and it was incumbent on the trial court to grant Defendant's Motion for Summary Judgment, based upon the absolute two (2) year statute of limitations.

ARGUMENT

A Claimant Cannot Benefit From the Section 74.051 Tolling Provision if the Claimant Fails to Provide Complete Pre-suit Notice as Required by Sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code.

- A. The Issue Raised by this Petition for Review Requires this Court's Attention and Guidance and this Court Should Exercise its Discretion to Hear this Case.

This Court should exercise its discretion and grant Jose Carreras, M.D., P.A.'s Petition for Review, as the issue of whether a plaintiff's failure to include the Section 74.052 medical authorization with his/her notice of a health care liability claim bars the tolling of the statute of limitations has been disparately determined by at least

three courts of appeals. Additionally, Rule 56.1(a) of the Texas Rules of Appellate Procedure contains at least three factors which are applicable to this case.

First and foremost, this case involves a conflict between the courts of appeals as to the statutory construction of Sections 74.051 and 74.052 of the Texas Civil Practice & Remedies Code. See *Rabatin v. Kidd*, 281 S.W.3d 558 (Tex.App.–El Paso 2008, no pet.); *Hill v. Russell*, 247 S.W.3d 356 (Tex.App.–Austin 2008, no pet.). Accordingly, the issue presented in this petition clearly involves the construction of a statute – specifically Section 74.051 of the Texas Civil Practice & Remedies Code.

Also, the Thirteenth Court of Appeals has committed an error of law, that is of utmost significance to this state’s jurisprudence, such that it requires correction. The legislative intent of Section 74.051 was to encourage pre-suit negotiations, and such negotiations are frustrated without an executed authorization. Such intent is widely recognized in this state’s jurisprudence. However, the Thirteenth Court of Appeals’ Opinion strays from the unambiguous legislative intent resulting in an erroneous application of the statute, which leads to absurd results. Accordingly, this petition involves an important question of state law that has not been, but should be addressed by this Court so as to provide guidance to Texas trial and appellate courts.

B. The Denial of Defendant's Motion for Summary Judgment is Reviewed *de novo*.

Statutory construction presents a question of law which is reviewed *de novo*. See *Yilmaz v. McGregor*, 265 S.W.3d 631, 636 (Tex.App.–Houston [1st Dist] 2008, pet. denied). A trial court’s summary judgment order concerning statutory construction is reviewed *de novo*. *Kimbrell v. Molinet*, 288 S.W.3d 464 (Tex.App.–San Antonio 2008, pet. filed). Because the Order Denying Defendant Jose Carreras, M.D.’s Motion for Summary Judgment specifically depends upon the applicability of the Section 74.051 tolling provision to a plaintiff that admittedly failed to fully comply with the statutory requirements, this Court should review such denial *de novo*.

C. The Unambiguous Statutory Language of Sections 74.051 and 74.052 Mandate the Inclusion of an Authorization as Part of the Notice Requirement.

“It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose.” *Cameron v. Terrell & Garrett*, 618 S.W.2d 535, 540 (Tex. 1981). Statutes must be construed as written and the legislative intent must be ascertained from the statute’s plain language. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Additionally, Section 74.001(b) of the Texas Civil Practice and Remedies Code restates the rules of statutory construction that terms in a statute are to be given their plain meaning. *Kendrick v. Garcia*, 171 S.W.3d 698, 704 (Tex.App.–Eastland 2005, pet. denied). Although the Thirteenth Court of Appeals acknowledges that “[i]f the statute is

unambiguous, we generally adopt the interpretation supported by the plain meaning of the statute's language," its Opinion completely ignores the clear and direct language contained in Section 74.051 – the notice and tolling provision. *Carreras v. Marroquin*, 2009 WL 2596079 (App. 3).

Section 74.051 of the Texas Civil Practice and Remedies Code provides, in pertinent part:

(a) Any person or his authorized agent asserting a health care liability claim *shall* give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. *The notice **must** be accompanied by the authorization form for release of protected health information as required under Section 74.052.*

...

(c) Notice given *as provided in this chapter* shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

TEX.CIV.PRAC. & REM. § 74.051(a)(c)(Vernon 2003)(App. 4)(emphasis added).

Furthermore, Section 74.052 of the Texas Civil Practice and Remedies Code states, in pertinent part:

(a) Notice of a health care claim under Section 74.051 ***must** be accompanied by a medical authorization in the form specified by this section.* Failure to provide this authorization along with the notice of a health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

TEX.CIV.PRAC. & REM. § 74.052(a)(Vernon 2003)(App. 5)(emphasis added). It is of utmost importance to note that the former Article 4590i notice provision did not include an authorization requirement, but instead merely provided, in pertinent part:

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

TEX.REV.CIV.STAT.ANN. art. 4590i, §4.01(repealed 2003).

“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Alpert v. Ripley*, 274 S.W.3d 277, 292 (Tex.App.–Houston [1st Dist] 2008, pet. denied)(quoting *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995)). It is well-settled that “[e]very word excluded from a statute must be presumed to have been excluded for a reason.” *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985). Conversely, language *added* to a statute must be presumed to have been added for a reason.

Undoubtedly, the 2003 amendments to the medical malpractice statute added an authorization requirement. See TEX.CIV.PRAC. & REM. §§ 74.051(a), 74.052(a)(Vernon 2003). In such amendment, the Legislature plainly stated that “the notice **must** be accompanied by the authorization form for release of protected health information as required under Section 74.052.” *Id.* Accordingly, it is incomprehensible to Petitioner how the Thirteenth Court of Appeals can hold that

“[t]he plain language of the statute makes the notice requirement independent from the medical authorization requirement.” *Carreras*, 2009 WL 2596079; (App. 3).

Pursuant to the Code Construction Act, “‘must’ creates or recognizes a condition precedent.” TEX.GOV.CODE § 311.016(3)(Vernon 1997). “While Texas courts have not interpreted ‘must’ as often as ‘shall’, both terms are generally recognized as mandatory, creating a duty or obligation.” *Helena Chemical Co.*, 47 S.W.3d at 493. “If a statute uses a term with a particular meaning or assigns particular meaning to a term, we are bound by the statutory language.” *Springer v. Johnson*, 280 S.W.3d 322, 326 (Tex.App.–Amarillo 2008, no pet.). Clearly, the Thirteenth Court of Appeals ignored the statute’s mandatory language.

D. Plaintiffs' Non-compliance with the Notice Requirement Renders the Statute of Limitations Tolling Provision Inapplicable.

Unlike former Article 4590i, the current statute “clearly requires that the notice must be accompanied by a medical authorization form in order to toll the limitations period.” *Rabatin v. Kidd*, 281 S.W.3d 558, 562 (Tex.App.–El Paso 2008, no pet.). This language appears plainly within the text of the statute. See TEX.CIV.PRAC. & REM.§§ 74.051 & 74.052. (App. 4 & 5). It is undisputed that Respondents’ “notice letter” did not include the statutorily required authorization for release of protected health information. (C.R. 28-29, 41-42, 56-57, 62-63, 67, 85-86). In fact, Respondents specifically agreed that “complete pre-suit notice was not given to Jose M. Carreras, M.D., P.A.” (C.R. 67). Accordingly, based on the strict statutory requirements, Respondents were not entitled to a seventy-five day tolling period.

There is an absolute two-year statute of limitations on health care liability claims, which begins at the occurrence of the breach or tort, or from the date the medical or health care treatment that is the subject of the claim, or the hospitalization for which the claim is made, is completed. TEX.CIV.PRAC. & REM § 74.251 (Vernon 2003). If the Section 74.051 notice requirements, including an authorization, are met, the two year statute of limitations period is tolled for seventy-five days. TEX.CIV.PRAC. & REM § 74.051 (Vernon 2003)(App. 4).

In the instant case, Plaintiffs' Original Petition was not filed within the limitations period. (C.R. 13-23). However, Respondents argue that the statute of limitations was tolled by the December 17, 2003 notice letter purportedly sent pursuant to Section 4.01 of the Texas Medical Liability Insurance Improvement Act. (C.R. 70). It is undisputed that such letter was not accompanied by the authorization required by Section 74.052 of the Texas Civil Practice and Remedies Code. (C.R. 28-29, 41-42, 56-57, 62-63, 67, 85-86). Given the statutory language, as well as the guidance provided by the El Paso Court of Appeals, Respondents are not entitled to a seventy-five day tolling period, as "notice" was not given as provided in Chapter 74.

Section 74.051(c) provides that "notice given as provided in this chapter shall toll the applicable statute of limitations" for seventy-five days. TEX.CIV.PRAC. & REM § 74.051(c)(Vernon 2003)(App. 4). Chapter 74 defines notice to include a Section 74.052 authorization. *Id.*; TEX.CIV.PRAC. & REM § 74.052 (Vernon 2003)(App. 5). In

including this additional requirement, the Legislature altered the prior statutory scheme, and therefore there is no precedential value to the case law interpreting the effect of, or remedy for, failing to give notice under former Article 4590i.

The 2003 amendments require that an authorization for the release of protected health information accompany a claimant's notice letter, so that the defendant health care provider may obtain the claimant's medical records "to facilitate the investigation and evaluation of the health care claim" or for the "defense of any litigation arising out of the claim". TEX.CIV.PRAC. & REM § 74.052(Vernon 2003)(App. 5). It is well established that the Legislature's intent in enacting the Section 74.051 notice provision was "to encourage pre-suit negotiations so as to avoid excessive cost of litigation. . . ." *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983).

Whereas this stated purpose was established with prior versions of the Chapter 74, such versions did not include the mandatory authorization requirement. Obviously, the Legislature determined that, in order to more effectively facilitate such negotiations, a health care liability defendant must be provided with the ability to obtain the plaintiff's medical records **prior** to suit. By failing to furnish Petitioner with the required Section 74.052 authorization, Respondents thwarted the legislative intent of the *amended* notice provision. Since the notice requirement has been substantially altered, cases interpreting Section 4.01 of former Article 4590i are no longer instructive and have no precedential value.

When the Austin Court of Appeals decided this issue contrary to Petitioner's position, it improperly relied on *De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935 (Tex. 1993) and *Schepps*, in its faulty determination that "the legislature did not state that the authorization was a part of the notice document or that the tolling was not triggered in the absence of the authorization." *Hill v. Russell*, 247 S.W.3d 356, 359 (Tex.App.–Austin 2008, no pet.). However, such an erroneous conclusion blatantly ignores the plain and unambiguous mandatory statutory language – *the notice **must** be accompanied by the authorization form for release of protected health information as required under Section 74.052. TEX.CIV.PRAC. & REM. § 74.051(a)(Vernon 2003)(emphasis added).*

In *Hill*, the Austin Court of Appeals continued that "allowing tolling when a plaintiff sends notice without the authorization form gives the health care provider fair warning of an imminent claim and then allows the provider to obtain an abatement for negotiations and evaluation of the claim." *Hill*, 247 S.W.3d at 359. However, such holding strays from the legislative intent that a health care liability defendant be provided with the opportunity to obtain medical records necessary to properly and promptly evaluate the claim prior to litigation, and this rationale should not have been adopted by the Thirteenth Court of Appeals.

In an opinion that is more well-reasoned than the decision in *Hill*, the El Paso Court of Appeals also distinguishes a missing authorization from a defective authorization. *Rabatin*, 281 S.W.3d at 562. The El Paso Court of Appeals held that

a defective authorization tolled the limitations period, under the facts of that case. *Id.* However, the complete failure to provide the required authorization would not. *Id.* (disagreeing with *Hill.*). A significant difference between *Rabatin* and the instant case is that in *Rabatin*, although the authorization was defective, defendant's counsel was still able to obtain the records relevant to the claim, even with the defective affidavit. *Id.* Accordingly, the goals of the Legislature were still accomplished. However, in the instant case, without the required authorization, the intent of the Legislature was thwarted.

Since Respondents did not file their Original Petition within two years of the allegedly negligent treatment, Respondents' medical negligence claims are barred by the applicable statute of limitations, unless the Section 74.051 seventy-five day tolling provision applies. Since the notice letter was not in accordance with the statute (it did not contain the required authorization for release of protected health information), it did not toll the absolute two year statute of limitations². Respondents have even admitted their non-compliance. Accordingly, they cannot benefit from the tolling provision and their claims are barred by the statute of limitations.

PRAYER

Petitioner Jose Carreras, M.D., P.A. prays that this Court grant its Petition for Review; and after consideration, reverse the trial court's Order Denying Defendant

² The statute is quite clear, . . . "notice given as provided in this chapter . . ." tolls the statute of limitation. Nothing less.

Jose Carreras, M.D.'s Motion for Summary Judgment and render an order that dismisses Respondents' claims against Petitioner with prejudice; and that this Court grant Petitioner such other and further relief, at law or in equity, which it may be justly entitled to receive.

Respectfully submitted,

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By: /s/

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Ronald G. Hole
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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 **8th** day of **October 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:

Attorneys for Respondents

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CMRRR #7008 0150 0002 7711 8700

/s/

I. Cecilia Garza

Appendix

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