

CASE NO. 09-0857

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THE SUPREME COURT OF TEXAS

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

v.

CARLOS FRANCISCO MARROQUIN, ET AL,  
*Respondents*

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

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**PETITIONER'S REPLY TO RESPONSE TO PETITION FOR REVIEW**

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January 8, 2010

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**REPLY ISSUE PRESENTED**

**Does a Plaintiff's Failure to Provide an Authorization Pursuant to Section 74.052, with His Pre-Suit Notice, Bar a Plaintiff from Relying on the Section 74.051 Statute of Limitations Tolling Provision?**

## REPLY

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

Since the filing of Jose R. Carreras, M.D., P.A.'s Petition for Review, the First Court of Appeals has considered this exact issue and opined differently from the Thirteenth Court of Appeals. See *Nicholson v. Shinn*, 2009 WL 3152111 (Tex.App.–Houston [1<sup>st</sup> Dist.] October 1, 2009, no pet. hist.). However, Respondents failed to include the *Nicholson* opinion in their Response to Petition for Review. Because the First Court of Appeals has now issued an opinion directly conflicting with the instant case, Petitioner files this his Reply to the Response to Petition for Review.

In *Nicholson*, the First Court of Appeals affirmed an order granting summary judgment based on the statute of limitations. *Id.* As in the instant case, the plaintiff in *Nicholson* argued that he substantially complied with the notice requirement by providing a notice letter within the two-year limitations period. *Id.* However, it was conceded that the letter was not accompanied by the medical authorization form required by statute. *Id.* Within the two-year limitations period, the plaintiff provided Shinn with a “medical authorization release form” and subsequently provided Shinn’s insurance carrier with an “authorization form for release of protected health information” prescribed by section 74.052. *Id.* However, the First Court of Appeals

held that the one authorizations did not contain the required information on Nicholson's health care providers for the past five years as required by Section 74.052(c); and the other authorization did not contain the sections identifying her treating physicians or the section authorizing the physician or other health care provider to obtain and disclose her health care information. *Id.*

The First Court of Appeals held that Nicholson's failure to strictly comply with the Section 74.052 authorization requirements within the two-year limitations period barred the plaintiff from taking advantage of the 75-day tolling provision. *Id.* In the discussion, Chief Justice Radak noted that Sections 74.051 and 74.052 are mandatory. *Id.* The Chief Justice also noted that the purpose of the pre-suit notice and authorization requirements is to provide "*potential defendants* a 60-day *pre-suit* window to gather information, determine whether the claims have merit, and resolve the dispute without the excessive cost of litigation." *Id.* (*quoting Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983))(emphasis added).

Following the holding in *Nicholson*, Respondents' argument that "Respondent [sic] could, and did, obtain an abatement for sixty days to negotiate and evaluate the claim" must fail. The purpose of *pre-suit* notice is to evaluate the claims *before* litigation ensues. In the instant case, Respondents filed their Original Petition on February 26, 2004, but did not provide the Section 74.052 authorization until September 10, 2004. *Carreras v. Marroquin*, 297 S.W.3d 420, 421

(Tex.App.–Corpus Christi-Edinburg 2009, pet. filed)(Petition for Review App. 3). Obviously, at that time “pre-suit” negotiations were impossible.

Petitioner acknowledges that the Austin Court of Appeals has held differently. See *Hill v. Russell*, 247 S.W.3d 356 (Tex.App.–Austin 2008, no pet.). It appears that the Austin Court of Appeals would agree with the arguments advanced by the plaintiff in *Nicholson* and the Thirteenth Court of Appeals in the instant case by holding 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, the Third and Thirteenth Courts of Appeals are wrong, as both such opinions ignore the plain statutory text and the legislative intent.

Clearly, this petition involves an important question of state law of which at least four courts of appeals have tried to interpret. See *Nicholson*, 2009 WL 3152111; *Carreras*, 297 S.W.3d 420; *Rabatin v. Kidd*, 281 S.W.3d 558 (Tex.App.–El Paso 2008, no pet.); *Hill*, 247 S.W.3d 356. Accordingly, this issue should be addressed by this Court.

### **PRAYER**

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

I. Cecilia Garza  
State Bar I.D. No. 24041627  
Ronald G. Hole  
State Bar I.D. No. 09834200

### **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 **January 2010**, 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

Fernando G. Mancias  
Law Office of Fernando G. Mancias  
4955 S. Jackson Road  
Edinburg, Texas 78539  
**CMRRR #7008 0150 0002 7711 8137**

/s/

I. Cecilia Garza

# Appendix

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