

CASE NO. 09-0857

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

PETITIONER'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Plaintiffs/Respondents and Counsel

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STATEMENT OF THE CASE

The underlying case is a medical negligence cause of action, filed pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code. Petitioner filed a Motion for Summary Judgment based upon the statute of limitations. (C.R. 30-65). Judge Rose Guerra Reyna, presiding Judge of the 206th Judicial District Court, Hidalgo County, entered an Order Denying Defendant Jose R. Carreras, M.D.'s Motion for Summary Judgment. (C.R. 132, 135-36). Judge Reyna 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).¹

Accordingly, Petitioner filed his interlocutory appeal of the Order Denying Defendant's Motion for Summary Judgment to the Thirteenth Court of Appeals. The parties in the Court of Appeals 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, 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 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).

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 the parties agree that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction over this proceeding pursuant to §22.225(c) of the Texas Government Code because the Thirteenth Court of Appeals' Opinion holds differently from a prior decision of the Eighth Court of Appeals. Additionally, the First Court of Appeals has since issued an Opinion conflicting with the instant case. Accordingly, a conflict now exists between the First, Third, Eighth and Thirteenth 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

Is a Plaintiff Required to Provide Pre-suit Notice *and* an Authorization, as Required by Sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code, in Order to Benefit from the 75-day Statute of Limitations Tolling Provision?

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 (citing former Article 4590i) 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-year statute of limitations.

ARGUMENT

Respondents Cannot Benefit From the Section 74.051 75-day Tolling Provision Because they Failed 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 Petitioner Has Not Been Addressed by this Court, Which Has Resulted in a Lack of Uniformity Between the Courts of Appeals

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 a 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

four courts of appeals. Additionally, Rule 56.1(a) of the Texas Rules of Appellate Procedure contains at least four 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 *Carreras v. Marroquin*, 2009 WL 2596079; *Nicholson v. Shinn*, 2009 WL 3152111 (Tex.App.--Houston [1st Dist] 2009, no pet.); *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.). See TEX.R.APP.P. 56.1(a)(2)(3)(Vernon 2003).

Furthermore, 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 when the required authorization is not provided. Such intent is widely recognized in this state's jurisprudence. *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934 (Tex. 1983). However, the Thirteenth Court of Appeals' Opinion strays from the unambiguous legislative intent, resulting in an erroneous application of the statute.

Finally, this case 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*

Summary judgements are reviewed *de novo* and according to well settled standards. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex.2005). Additionally, 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). Because the Order Denying Defendant Jose Carreras, M.D.’s Motion for Summary Judgment specifically relies upon the applicability/inapplicability 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 provides that “[a]ny legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.” TEX.CIV.PRAC. & REM. §74.001(b)(Vernon 2003); see also *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.

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)(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)(emphasis added). This Court has held that the notice requirement is mandatory. *Schepps*, 652 S.W.2d at 938. Additionally, at least one court of appeals has held that Section 74.052 is also mandatory. *Nicholson*, 2009 WL 3152111.

Because the Thirteenth Court of Appeals agreed with the rationale in *Hill*, 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.

It is undisputed that the 2003 amendments to the medical malpractice statute added the 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 could hold that “[t]he plain language of the statute makes the notice requirement independent from the medical authorization requirement.” *Carreras*, 2009 WL 2596079.

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.

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 clearly appears within the text of the statute. See TEX.CIV.PRAC. & REM. §§ 74.051 & 74.052.

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

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 upon the strict statutory requirements, Respondents were not entitled to a seventy-five day tolling period.

Health care liability claims are subject to an absolute two-year statute of limitations, 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).

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 (an Article 4590i notice letter.)(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). In fact, Respondents agreed to an abatement of sixty days following the receipt of a proper authorization, as required by Section 74.052. (C.R. 111-112). Such authorization was not provided until September 10, 2004. (C.R. 123-128). Given the statutory

language, as well as the guidance provided by the First and Eighth Courts of Appeals, Respondents are not entitled to a seventy-five day tolling period, as “notice” was not given as provided in Chapter 74.

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). “The purpose of the authorization form is to assist the defendant in facilitating the investigation of the plaintiff’s health care claim and in facilitating the defense of any litigation arising out of the claim.” *Nicholson*, 2009 WL 3152111. The notice and authorization “encourage[s] pre-suit negotiations so as to avoid excessive cost of litigation. . . .” *Schepps*, 652 S.W.2d at 938.

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 investigation and 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 contained within the *amended* notice provision.

The First Court of Appeals considered this amendment in *Nicholson*. In *Nicholson*, the trial court granted defendant's motion for summary judgment based on the statute of limitations because the two-year statute of limitations was not tolled as a result of the plaintiffs' failure to provide proper pre-suit notice, namely the Chapter 74.052 medical authorization. *Id.* In *Nicholson*, the cause of action accrued on March 17, 2004 and the First Court of Appeals acknowledged that proper pre-suit notice would have tolled the statute of limitations for 75 days. *Id.* However, the notice letter provided to Defendant within the two-year limitations period did not include the medical authorization form required by Sections 74.051 and 74.052. *Id.* Also, the subsequent "medical authorization release form" that was provided neglected to include information on defendant's physicians for the past five years as required by Section 74.052. *Id.* The plaintiff then sent another authorization form to the defendant's insurance carrier on June 23, 2005. *Id.* However, this form did not contain the sections identifying her treating physicians or the section authorizing the physician to obtain and disclose her health care information. *Id.*

The plaintiff subsequently filed suit on May 4, 2006, more than two years after the claim accrued. *Id.* The First Court of Appeals held that, without the required information, *Nicholson* failed to substantially comply with Sections 74.051 and 74.052. *Id.* The Court held that "[s]pecifically, *Nicholson's* failure to list her treating physicians for the past five years essentially rendered *Nicholson's* authorizations meaningless because such an omission discouraged defendants from undertaking

an investigation to evaluate Nicholson’s claim.” *Id.* Thus, the First Court of Appeals affirmed the summary judgment based on limitations. *Id.*

When the Austin Court of Appeals decided this issue contrary to Petitioner’s position and the position advanced in *Nicholson*, it improperly relied on *De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935 (Tex. 1993) and *Schepps* in its faulty conclusion that “[t]he legislature did not state that the authorization was a *part* of the notice document or that 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.). In *Hill*, the Austin Court of Appeals held that “the authorization form is a separate document from the required ‘notice’ that triggers tolling under 74.051(c). . . .” *Id.* at 358. The Court further noted that, had the legislature intended for the notice to include an authorization in order to toll the statute of limitations, “it easily could have written that intention into the statute, and we will not read such language into the statute, which would require us to ignore the legislature’s use of ‘notice’ in the statute as distinct from the ‘authorization form.’” *Id.* at 360.

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).* This language was absent from former Article 4590i. However, the Austin Court of Appeals relied heavily on the former Article 4590i notice requirement in its Opinion,

thus straying 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. This rationale should not have been adopted by the Thirteenth Court of Appeals.

In *Hill*, the Austin Court of Appeals held 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, abatement is an available remedy in instances where the cause of action was brought within the two-year limitations period. The *Schepps* case, on which the Austin Court of Appeals relies, involved a summary judgment due to the plaintiff’s failure to provide pre-suit notice, not the affirmative defense of limitations. *Schepps*, 652 S.W.2d at 935. In *Schepps*, this Court held that the legislative intent to encourage pre-suit negotiations, so as to avoid the excessive costs of litigation, could be accomplished through abatement. *Id.* at 938. However, in *Schepps*, the plaintiff filed their medical negligence cause of action within the two-year limitations, it was just filed without pre-suit notice. *Id.* at 935.

De Checa is also distinguishable in that the plaintiff in *De Checa* provided pre-suit notice to other health care providers within two years of accrual. *De Checa*, 852 S.W.2d at 937. The issue in *De Checa* was whether notice to one health care defendant tolled the limitations period as to all. This Court answered that question

in the affirmative. *Id.* However, where proper and complete pre-suit notice is not provided to any health care provider, reliance on *De Checa* is misplaced.

The 75-day tolling provision allows a plaintiff an opportunity to provide the required pre-suit notice without running afoul of the two-year statute of limitations. Accordingly, the abatement of a timely filed lawsuit would certainly accomplish the legislature's goals. However, abatement of a claim clearly barred by the statute of limitations does not encourage prompt resolution. In fact, in *De Checa* this Court held that "[n]otice cannot toll a limitations period that has already elapsed." *Id.* at 938. Under the facts of this case, where complete pre-suit notice (including a properly executed authorization which would enable Petitioner to obtain relevant records to fully evaluate the claim) was not provided within the limitations period, abatement is meaningless and the claimant is not entitled to toll the statute of limitations. Extending the limitations period would serve no legitimate purpose, and would actually reward the plaintiff for failing to comply with the statutory mandates.

Accordingly, the Thirteenth Court of Appeals should have looked to the El Paso Court of Appeals for guidance and a more well-reasoned opinion regarding the authorization requirement. See *Rabatin*, 281 S.W.3d at 562. In *Rabatin*, the El Paso Court of Appeals distinguishes a missing authorization from a defective authorization. *Id.* 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*.)

In *Rabatin*, appellants sent a notice letter with a medical authorization to one defendant doctor within the two year statute of limitations period. *Id.* at 560. However, the authorization excluded the names of the doctors that were listed as having treated the plaintiff in the five years prior to the treatment at issue and did not provide the dates of treatment. *Id.* The plaintiff subsequently provided another authorization to all defendants, over two months later, but still within the limitations period, which also excluded the same information in addition to failing to identify who could access the records. *Id.* The trial court held the subsequent authorization form was statutorily non-compliant. *Id.* However, one of the defendants was able to use the subsequent authorization to obtain records. *Id.* Because notice to one defendant tolls the statute of limitations as to all defendants, and because one defendant was able to obtain records using the “defective” authorization, the El Paso Court believed that the Legislature’s intent was carried out. *Id.* at 562.

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 authorization. *Id.* at 560. However, in the instant case, without the required authorization, the relevant medical records could not be obtained and the intent of the Legislature was thwarted. Another significant difference from *Rabatin* is that, in the instant case, Respondents also failed to provide Defendant Mission Hospital, (which is no longer a Defendant in this lawsuit), with proper notice. (See C.R. 22-23). Accordingly, it

cannot be argued that notice to Mission Hospital tolled the statute of limitations period as to Petitioner, as Mission Hospital's "notice" also failed to contain the required authorization for the release of medical records.

The position advanced by Petitioner, as well as the Opinion from the First Court of Appeals in *Nicholson*, fall squarely within this Court's holdings in *Schepps* and *De Checa*, and advance the legislative intent more fully than the Opinion of the Thirteenth Court of Appeals.

E. Petitioner Established that Respondents' Claims are Barred by the Statute of Limitations

"If the [defendant] establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations." *Diversicare Gen. Partner, Inc. v Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). In his motion for summary judgment, Defendant provided summary judgment evidence which established that Plaintiffs' counsel did not provide the required authorization during the two year limitations period and prior to filing suit. (C.R. 41-45; 62-63). Accordingly, it was incumbent upon the Plaintiffs to provide competent summary judgment evidence to raise a fact issue. See *Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 846. However, in Plaintiffs' response to Defendant's motion for summary judgment, Plaintiffs agreed that "complete presuit notice was not given to Jose M. Carreras, M.D., P.A." (C.R. 67). Plaintiffs also acknowledged that proper notice was not given until September 7, 2004, well outside of the limitations period. (C.R. 68). Rather than providing any evidence to

raise a fact issue, Plaintiffs merely argued that improper and incomplete notice provided within the limitations period was sufficient to toll the statute of limitations. (C.R.70-71). Accordingly, the trial court should have granted Defendant's motion for summary judgment.

F. Conclusions

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. Respondents' defective notice letter² was not accompanied by the required authorization for the release of protected health information. Thus, the notice letter alone could not toll the absolute two year statute of limitations. Respondents admitted their non-compliance. (C.R. 67). The trial court acknowledged the non-compliance. (C.R. 111-12). Accordingly, pursuant to the plain statutory language, Respondents 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 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

² No notice was ever given under §74.051, only pursuant to Article 4590i.

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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CERTIFICATE OF SERVICE

I, Ronald G. Hole, hereby certify that a true and correct copy of the above Petition for Review has, on this **12th** day of **March 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:

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