

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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**RESPONDENTS' RESPONSE TO PETITIONER'S BRIEF**

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April 12, 2010

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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;

Fernando Mancias, Law Office of Fernando G. Mancias, 4955 S. Jackson Road, Edinburg, Texas 78539; and

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### **Defendant/Petitioner and Counsel**

Jose Carreras, M.D., P.A., c/o Hole & Alvarez, L.L.P., 612 W. Nolana, Suite 370, P.O. Box 720547, McAllen, Texas 78504; and

Ronald G. Hole and I. Cecilia Garza, Hole & Alvarez, L.L.P., 612 W. Nolana, Suite 370, P.O. Box 720547, McAllen, Texas 78504.

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## **SUMMARY OF THE ARGUMENT**

The Thirteenth Court of Appeals properly affirmed the trial court's denial of Petitioner's Motion for Summary Judgment. The Thirteenth Court of Appeals properly followed the rules of statutory construction. Carreras v. Marroquin, 297 S.W. 3d 420 (Tex. App. – Corpus Christi, Edinburg 2009).

The Marroquin Respondents properly complied with a health care claim notice to avail themselves of the seventy-five day tolling period. Their lawsuit was timely filed. See Tex. Civ. Prac. & Rem. §74.051 and 74.052 (Vernon 2003).

## **ARGUMENT**

### **Marroquin Respondents Properly Availed Themselves of the Seventy-Five Day Tolling Provisions Under Sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code.**

Whether this Honorable Supreme Court grants review is a matter of judicial discretion. Rule 56.1(a), Texas Rules of Appellate Procedure. The Court should exercise its discretion and deny Petitioner's Petition for Review.

Whether or not there is a conflict between different courts of appeals on the statutory construction of Sections 74.051 and 74.052 of the Texas

Civil Practice & Remedies Code, the Thirteenth Court of Appeals used proper statutory construction rules to affirm the trial court's denial of Petitioner's Motion for Summary Judgment.

The Thirteenth Court of Appeals correctly decided that . . . "The plain language of the statute makes the notice requirement independent from the medical authorization requirement. In drafting this legislation, the Legislature crafted a different remedy for the failure to comply with each requirement." Carreras v. Marroquin, 297 S.W. 3d at 421.

Section 74.051 of the Texas Civil Practice & Remedies Code provides for written notice asserting a health care liability claim. That written notice was sent to Petitioner and he was put on notice of fair warning of claim with the opportunity to negotiate and evaluate the claim. This carries out, and does not thwart, the legislative intent associated with enacting 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.) Schepps v. Presbyterian Hosp. of Dallas, 652 S.W. 2d 934 (Tex. 1983). (discussing the intent associated with providing notices).

The medical authorization form that is part of Section 74.051 of the Texas Civil Practice & Remedies Code is a separate form and a different remedy is fashioned for failure to include the authorization. The remedy

for failure to include the medical authorization is a sixty-day abatement. See Tex. Civ. Prac & Rem. Code § 74.052(a).

Petitioner incorrectly takes the position that the “must” language regarding the medical authorization in Section 74.051 of the Texas Civil Practice & Remedies Code makes it mandatory that failure to do so does not trigger the seventy-day tolling period. “Must” is given a mandatory meaning when followed with a noncompliance penalty. See Helena Chemicals v. Wilkins, 47 S.W. 3d 486 (Tex. 2001). In this case, there is no clear and unambiguous language that failure to include the medical authorization with the pre-suit notice will not trigger the seventy-five day tolling period. To so hold involves proper construction of statutory language. *Id.*

Petitioner reliance on Nicholson v. Shinn, 2009 WL 3152111 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2009, no pet.) is misplaced. The Court goes into great detail to describe how the medical authorizations are defective for failure to include the patient’s treating physicians for the last five years and for serving the medical authorization on an insurance carrier. In that case, there is a discussion that the pre-suit notice did not include the medical authorization. If the Petitioner’s analysis is correct, the Nicholson court would have concluded the discussion there to affirm the

trial court's granting of the summary judgment on limitations. It did not. There is considerable discussion on the defect in the substance of the forms and the improper service of the forms. Nicholson, 2009 WL 3152111 at 16. All of that is lacking in the instant case. There is no dispute the medical authorization forms contained the required information.

In this instant case, Petitioner asked for and received a sixty-day abatement. That is the remedy when a medical authorization is not included in the pre-suit notice. See Tex. Civ. Prac. & Rem. Code § 74.052(a).

### **CONCLUSION**

The Marroquin Respondents properly availed themselves of the seventy-five days tolling period. The Marroquin Respondents timely filed their suit.

The Thirteenth Court of Appeals engaged in proper statutory construction when it held that the medical authorization form is separate from the pre-suit notice because the legislature has fashioned a different remedy for noncompliance in not including the medical authorization with the pre-suit notice.

**PRAYER**

The Marroquin Respondents pray that this Court deny Petitioner's Petition for Review, affirm the trial Court's denial of Petitioner's Motion for Summary Judgment, affirm the Thirteenth Court of Appeals affirmance of the trial court's ruling, allow this case to proceed to trial and for any other relief to which the Marroquin Respondents' may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, FERNANDO G. MANCÍAS, hereby certify that on this the 12th day of April, 2010, a true and correct copy of the above and foregoing Respondents' Response to Petitioner's Brief was served upon the following counsel of record as indicated below:

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