

No. 08-667

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In the Supreme Court of Texas

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**EBERHARD SAMLOWSKI, M.D.,**

**Petitioner,**

**VS.**

**CAROL WOOTEN**

**Respondent .**

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**ON APPEAL FROM THE 413<sup>TH</sup> JUDICIAL DISTRICT COURT  
OF JOHNSON COUNTY, TEXAS,  
THE HONORABLE WILLIAM C. BOSWORTH, JR. , PRESIDING**

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**BRIEF ON THE MERITS**

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**Kay E. Ellington  
State Bar No. 06532500**

**Law Offices of Kay Ellington. P.C.  
211 N. Record, Suite 550, LB 12  
Dallas, Texas 75202  
214/ 580-1111  
FAX No. 214/ 580-1114**

**ATTORNEY FOR PETITIONER,  
EBERHARD SAMLOWSKI, M.D.**

**ORAL ARGUMENT REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 53.2(a) of the Texas Rules of Appellate Procedure, the following is a list of all parties and counsel to the trial court's order, including a designation of trial and appellate counsel:

1. **Carol Wooten**, Respondent herein, Appellant and Plaintiff below.
2. **Barney L. McCoy**, 815 Hawthorne, Houston, TX 77006. Mr. McCoy is lead appellate counsel for Respondent and acted as her trial counsel in the trial court below.
3. **Michael W. Cramer**, 16225 Park Ten Place Dr., Suite 500, Houston, TX 77084. Mr. Cramer Co-counsel for Respondent in the appellate and trial court below.
4. **Eberhard Samlowski, M.D.**, Petitioner herein, and Appellee and Defendant below.
5. **Kay Ellington**, Law Offices of Kay Ellington, P.C., 211 North Record Street, Suite 550, Dallas, TX 75202 . Ms. Ellington is appellate and trial counsel for Petitioner herein, and in the court below.

**TABLE OF CONTENTS**

**IDENTITY OF PARTIES AND COUNSEL.....ii.**  
**INDEX OF AUTHORITIES .....iv.**  
**STATEMENT OF THE CASE.....viii.**  
**STATEMENT OF JURISDICTION.....viii.**  
**ISSUE PRESENTED.....viii.**

**ISSUE PRESENTED**

**Did the Trial Court abuse its discretion in denying Plaintiff’s request for a thirty (30) day extension under the provisions of Section 74.351 ( c ) of the Texas Civil Practice & Remedies Code and dismissing this case because the report did not represent an objective “good faith” effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code?.....viii**

**STATEMENT OF FACTS.....1**  
**SUMMARY OF THE ARGUMENT.....3**  
**ARGUMENT AND AUTHORITIES.....5**  
**PRAYER.....13**  
**CERTIFICATE OF SERVICE.....13**  
**APPENDIX.....14**

## INDEX OF AUTHORITIES

### Cases

<i>American Transitional Care Ctrs., Inc. v. Palacios</i> , 40 S.W.3d 873 (Tex 2001).....	7,8
<i>Apodaca v. Russo</i> ; 228 S.W.3d 252 (Tex.App - Austin 2007, no writ hist.).....	8
<i>Bogar v. Esparza</i> 2007 CA3 03-07-00037-062807,( Tex. App.- Austin, 2007, no writ hist.); .....	8
<i>Bosch v Wilbarger</i> , 2006 S.W. 3d (LWC-3316 (Tex Civ. App. - Amarillo, 2006).....	8
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238, 241-2 (Tex. 1985) .....	7
<i>Hardy v. Marsh Jr.</i> , 170 S.W.3d (Tex. App - Texarkana, 2006, no pet.); .....	8
<i>Jernigan v. Langley</i> , 195 S.W.3d 91(Tex 2006) ; .....	8
<i>Kendrick v. Garcia</i> , 171 S.W.3d 698 , (Tex. App - Eastland 2005, pet. denied).....	7
<i>Ledesma v. Shashoua</i> , 2007 TXCA3 03-05-00454-080307 .....	8
<i>McMenemy v. Holden</i> , 2007 TXCA 14 14-07-00365-110107 ( Tex. App.- 14 Dist.);.....	8
<i>Roberts v. Med. City Dallas Hosp., Inc.</i> , 998 S.W.2d 398, 402 (Tex. App.–Texarkana 1999, pet.denied); .....	8,9
<i>Walker v. Gutierrez</i> , 111 S.W.3d 56 (Tex. 2003).....	7
<i>Walker v. Packer</i> , 827 S.W.2d 833,839(Tex. 1992).....	7
<i>Weldon v. Weldon</i> , 968 S.W. 2d 398, 402 (Tex. App. – Texarkana 1998, no pet.) .....	8
<i>Wooten v. Samlowski</i> ; 2008 TX-Iw080527454.....	viii.

### Statutes

TEX.GOV'T CODE ANN. § 22.001(a)(1).....	viii.
---	-------

TEX. GOV'T CODE ANN. §22.001(A)(6).....	viii.
TEX. GOV'T CODE ANN. §311.016.....	9
TEX. GOV'T. CODE ANN. §312.002.....	9
TEX. CIV. PRAC. & REM. CODE § 74.351.....	vii,viii
TEX. CIV. PRAC. & REM. CODE § 74.351(a).....	vii,viii
TEX. CIV. PRAC. & REM. CODE § 74.351(b).....	vii,viii,5,6,12
TEX. CIV. PRAC. & REM. CODE § 74.351( c).....	vii,viii,2,5,6,12
TEX. CIV. PRAC. & REM. CODE § 74.351.(l).....	vii,viii,6
TEX. CIV. PRAC. & REM. CODE § 74.351.(r)(6).....	vii,viii,2,5,6,8,12
TEX. REV. CIV. STAT. §13.01(r)(6).....	8

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THE HONORABLE WILLIAM C. BOSWORTH, JR. , PRESIDING**

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**BRIEF ON THE MERITS**

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

NOW COMES Eberhard Samlowski, M.D. , Petitioner in the above-styled and numbered appeal, and Appellee and Defendant below, seeking reversal of the order of the Court of Appeals for the Tenth District of Texas at Waco, reversing the order of the trial court which dismissed the case for failure to provide an adequate expert report in support of the health care liability claims alleged and remanding the case back to the trial court to grant one thirty day extension (30) to Carol Wooten, Plaintiff and Appellant below, to cure deficiencies in the expert report, and in support of his petition would respectfully show the Court the following:

## STATEMENT OF THE CASE

This is an appeal from an order of the Tenth Court of Appeals reversing and remanding an order of the trial court dismissing this case for failure of Ms. Wooten to serve Dr. Samlowski with an expert report in compliance with the requirements of Section 74.351(r)(6) of the Texas Civil Practice and Remedies Code [Appendix A] . The 413<sup>th</sup> District Court of Johnson County , the Honorable William C. Bosworth, Jr. Presiding, signed the order of dismissal on August 30, 2007. [CR 80][Appendix B].

This is a health care liability claim against Dr. Samlowski. In support of her claim, Ms. Wooten timely served the expert report and *curriculum vitae* of R. Don Patton, M.D. [Appendix C] , in accordance with Section 74.351(a) of the Texas Civil Practice and Remedies Code [Appendix D]. Pursuant to Section 74.351 (l) of the Code, Dr. Samlowski timely objected to the legal adequacy of Dr. Patton's report as failing to comply with the statutory requirements of Section 74.351(r)(6) and moved to dismiss the claims of Ms. Wooten with prejudice , pursuant to Section 74.351(b) [Appendix E ] . Ms. Wooten responded and requested a 30 day extension to cure any alleged defects pursuant to Tex. Civ. Prac. & Rem. Code § 74.351 (c) [Appendix F]. After conducting a hearing , the trial court sustained the objections and granted the motion to dismiss with prejudice. [CR 80] [ Appendix B] Said order implicitly denied Ms. Wooten's request for a 30 day extension to cure the deficiencies in Dr. Patton's report pursuant to Section 74.351 (c)

On or about October 3, 2008, Ms. Wooten filed her appeal of the order of dismissal with the Tenth Court of Appeals. On May 21, 2008, a panel of the court of appeals consisting of Chief Justice Gray and Justices Vance and Reyna issued an opinion written by Justice Vance with a dissenting opinion written by Chief Justice Gray. [Appendix G ] . Said opinion was published as a

slip opinion as *Wooten v. Samlowski*; 2008 TX- Iw080527454. On June 9 , 2008, Dr. Samlowski filed his motion for rehearing [ Appendix H ] which was denied by the Court of appeals on July 9, 2008 [Appendix I] with a dissenting opinion written by Chief Justice Gray [Appendix J]. Given the dissenting opinion by Chief Justice Gray, Dr. Samlowski petitions this court for review of the order of the Court of Appeals.

### **STATEMENT OF JURISDICTION**

The Supreme Court has jurisdiction over this appeal under Government Code §22.001(a)(1) because the justices of the court of appeals disagree on a question of law material to the decision. In addition, the Supreme Court has jurisdiction over this appeal under Government Code § 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state’s jurisprudence that it should be corrected.

### **ISSUE PRESENTED**

**Did the Trial Court abuse its discretion in denying Plaintiff’s request for a thirty (30) day extension under the provisions of Section 74.351 ( c ) of the Texas Civil Practice & Remedies Code and dismissing this case because the expert report of Dr. R. Patman did not represent an objective “good faith” effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code ?**

### **STATEMENT OF FACTS**

The opinion of the court of appeals correctly states the nature of the case. The court, however, omitted some facts relied on by the Petitioner. Thus the Petitioner presents this summary of facts.

Dr. Samlowski initially treated Plaintiff on November 17, 2004 at Walls Regional Hospital for abdominal pain. Dr. Samlowski performed laparoscopic gall bladder surgery on Ms. Wooten in the location of the upper outer right quadrant of the abdomen. [C.R. 5] [Appendix J] Following the surgery, Ms. Wooten developed symptoms which indicated reexploration of the abdomen.[C.R. 5][Appendix J] Said surgery revealed a bowel obstruction with perforations in the pelvic region which were not in the area of the initial surgery performed by Dr. Samlowski. [C.R.5] [Appendix J] Said obstruction and perforations were surgically repaired by Dr. Samlowski.[C.R. 5][Appendix J] Due to continued symptoms and complications, Ms. Wooten was transferred to Huguley Memorial Medical Center in Burleson, Texas and was subsequently treated by other physicians. [C.R. 5] [Appendix J]

Ms. Wooten filed suit against Dr. Samlowski alleging that Dr. Samlowski was negligent in his care and treatment of M. Wooten which proximately caused injury to Plaintiff. [C.R. 5][Appendix J]

Pursuant to Texas Civil Practice & Remedies Code §74.351, Ms. Wooten timely filed an expert report by R. Don Patman, M.D. [Appendix C ] Dr. Samlowski timely filed his objections to the report of Dr. Patman as failing to meet the requirements of TCPRC §74.351 because it failed to provide opinions directly establishing that the alleged negligent acts of Dr. Samlowski proximately caused injury to Ms. Wooten. [C.R. 39][Appendix K] Dr. Samlowski subsequently filed his Motion to Dismiss pursuant to TCPRC §74.351 on the same basis as his previously filed

objections. [C.R. 44] {Appendix L} Ms. Wooten responded and requested a 30 day extension to cure any alleged defect pursuant to 74.351 (c).

Following a hearing on Dr. Samlowski's Motion to Dismiss, the trial court entered an order which held that Dr. Patman's report "does not represent an objective good faith effort to comply with the definition of an expert report as required by law and that the Motion of Dr. Samlowski challenging the sufficiency of the Chapter 74 report should be, in all things GRANTED" [C.R. 80] [Appendix B] Said ruling implicitly denied Ms. Wooten's request for a 30 day extension.

On November 28, 2007, Wooten filed her appeal with the Tenth Court of Appeals. Plaintiff appealed on two issues which are as follows:

1. The trial court erred in dismissing Plaintiff's cause of action because Dr. Patman's report represented an objective "good faith" effort to comply with the definition of an expert witness report pursuant to Article 74.351 ( r)(6) of the Texas Civil Practice & Remedies Code.
2. The trial court erred in not granting Plaintiff's request for a thirty (30) day extension under the provisions of Article 74.351 ( c) of the Texas Civil Practice & Remedies Code.

The Tenth Court of Appeals found that the trial court abused its discretion in dismissing the case and reversed the Trial Court Order of Dismissal and remanded the case back to the trial court to allow a 30 day extension for plaintiff to cure the deficiencies in Dr. Patman's expert report with a dissenting opinion by Chief Justice Gray [Appendix G]. The majority opinion agreed that the report was deficient because it was not a " good faith effort" to comply with the statutory requires for an expert report. However, the majority further found that the report was a "good faith attempt". The Tenth Court of Appeals subsequently denied Samlowski's motion for rehearing [Appendix H] with

a dissenting opinion on the motion for rehearing by Chief Justice Gray[ Appendix I ]

### **SUMMARY OF THE ARGUMENT**

As a medical malpractice case, this matter is governed by Texas Civil Practice & Remedies Code Chapter 74. Pursuant to Tex. Civ. Prac. & Rem. Code Chapter 74, Carol Wooten was required, within 120 days of filing suit, to serve upon Dr. Samlowski an “expert report” with a curriculum vitae as defined by the statute. As properly held by the trial court, although Ms. Wooten timely filed the expert report and C.V. of R. Don Patman, M.D., the report was deficient and did not represent a “good faith effort” to comply with the statute by failing to establish any proximate cause link between the alleged acts of negligence of Dr. Samlowski and the alleged injuries to Ms. Wooten. As such, the trial court properly dismissed the case and implicitly denied Ms. Wooten’s request for a 30 day extension to remedy the deficiencies of the report.

. The 10<sup>th</sup> Court of Appeals rightly found that the trial court did not abuse its discretion in finding that the expert report of Dr. Patman did not represent a “good faith effort” to summarize the causal relationship between Dr. Samlowski’s alleged negligence and Wooten’s injuries. However, the 10<sup>th</sup> Court of Appeals inexplicably held that the trial court did abuse its discretion in failing to grant a 30 day extension because the report could only be described as a “good faith attempt” to comply with the [statute]. The court of appeals improperly reversed the trial court’s order of dismissal and improperly remanded the case back to the trial court to allow for a 30 day extension to Ms. Wooten to cure the deficiencies of the expert report of Dr. Patman. As stated in the Chief Justice’s dissent, the distinction that could make what is not a good-faith effort nevertheless be a good-faith attempt is incapable of determination. As set forth in the statute, the trial court “may” grant a 30 day

extension which is clearly discretionary. The court of appeals sets forth no basis for its opinion that the trial court abused its discretion and indeed agreed with the trial court that the report did not represent a good faith effort to comply with the [statute]. To subsequently hold that the trial court abused its discretion by denying a 30 day extension because it was a good faith attempt is truly a distinction without a difference. The court of appeals incorrectly concluded in its opinion that the report's deficiency was a mere technicality which could be easily remedied because the report on its face completely lacks any causal connection between the alleged negligence of Dr. Samlowski and the injury to Ms. Wooten. In addition, the alleged acts of negligence against Dr. Samlowski are not factually related to the alleged injuries to Ms. Wooten to the extent that the report is incapable of being cured of its lack of proximate cause. Therefore, the report is so deficient as to constitute no report.

## **ARGUMENT AND AUTHORITIES**

**Did the Trial Court abuse its discretion in denying Plaintiff's request for a thirty (30) day extension under the provisions of Section 74.351 ( c ) of the Texas Civil Practice & Remedies Code and dismissing the case because the expert report of Dr. R. Patman did not represent an objective "good faith" effort to comply with the definition of an expert report pursuant to Section 74.351 (r)(6) of the Texas Civil Practice & Remedies Code?**

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As a medical malpractice case, this matter is governed by Texas Civil Practice & Remedies Code Chapter 74. Pursuant to Tex. Civ. Prac. & Rem. Code Chapter 74, Plaintiff was required, within 120 days of filing suit, to "serve on each party of the party's attorney one or more expert reports with a curriculum vitae of each expert listed in the report and for each physician or health care provider against whom a liability claim is asserted". See Tex. Civ. Prac. & Rem. Code Section 74. 351(a). In this regard, the term "expert report" means:

A written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding the applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards and **the causal relationship between that failure and the injury, harm, or damages claimed.**

*Id.* at 74.351( r)(6). (Emphasis added)

Texas Civil Practice & Remedies Code §74.351 (b) provides that if, as to a Defendant physician or healthcare provider, an expert report has not been served within the period specified subsection (a)(120 days), the Court, on the Motion of the affected physician or health care provider, shall, subject to subsection (c) enter an order that:

1. Awards the affected physician or healthcare provider reasonable attorneys' fees and

costs of Court incurred by the physician or healthcare provider; and

2. Dismisses the claim with respect to the physician or healthcare provider, with prejudice to the refiling or the claim.

Tex. Civ. Prac & Rem. Code §74.351 (l) provides the following:

A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6)

The Tenth Court of Appeals **agreed** with the trial court that the expert report of Dr. R. Don Patman did **not** represent an objective good faith effort to comply with the definition of an expert report as contemplated by statute. More specifically, the Tenth Court of Appeals agreed that the expert report of Dr. Patman lacked any language of causal connection between the alleged negligence of Dr. Samlowski and the alleged injuries to Ms. Wooten. Therefore, according to the statutory language of Tex.Civ.Prac.& Rem. Code §§ 74.351 (b) and (l), dismissal with prejudice is mandated. However, the Tenth Court of Appeals, with the Chief Justice dissenting, found that the trial court abused its discretion by failing to grant a 30 day extension to Ms. Wooten in order to allow her to cure the deficiencies in Dr. Patman's report.

Tex. Civ. Prac. & Rem. Code § 74.351 ( c ) states that the court "may" allow a 30 day extension to the claimant in order to cure the deficiencies in an expert report. This extension is not a right and is totally discretionary on the part of the Trial Court. *Ledesma v. Shashoua*, 2007 TXCA3 03-05-00454-080307 (Tex. App.- Austin, 2007).

The appellate standard of review with regard to evaluating a trial court's granting of a Motion to Dismiss under Tex. Civ. Prac. & Rem. Code § 74.351 or denial of a motion for an extension of

time under §74.351 ( c) is abuse of discretion. *American Transitional Care Ctrs., Inc. v. Palacios*, 40 S.W.3d 873,875 (Tex 2001); *Kendrick v. Garcia*, 171 S.W.3d 698,702 (Tex. App - Eastland 2005, pet. denied) In determining if the Trial Court has abused its discretion, the role of the Court of Appeals is not to substitute its judgment for that of the Trial Court and it is not enough that the Court of Appeals might have decided the issue differently. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003); *Walker v. Packer*, 827 S.W.2d 833,839(Tex. 1992) A trial court only abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-2 (Tex. 1985)

Although the 10<sup>th</sup> Court of Appeals **agrees** that the expert report of Dr. R. Don Patton does not constitute a good faith effort to comply with the statutory requirements, the Court of Appeals has apparently come up with its own standard regarding whether the court abuses its discretion in failing to grant a 30 day extension to cure deficiencies in an expert report under Tex. Rev. Civ. Stat. §74.351. This standard is described as the “good faith attempt” standard. Quoting Chief Justice Gray in his dissenting opinion on Samlowski’s Motion for Rehearing, he states “my mind is not capable of determining the niceties of the distinction that could make was *not* a good-faith *effort* nevertheless be a good-faith *attempt*.”

This “good faith attempt “ standard has no basis in statutory language or case law and is a standard entirely created by the Tenth Court of Appeals. The appellate court has simply substituted its own judgment for the trial court’s judgment which is contrary to the foundation of the “abuse of discretion” standard.

The Texas Supreme Court has held that when an expert report omits at least one of the three specifically enumerated requirements of Section 13.01(r)(6) [predecessor of Tex.Civ.Prac. & Rem. Code §74.351 (r)(6)], it cannot constitute a good faith effort to meet the statutory requirements and the trial court has no discretion but to conclude that the plaintiff's claims against the defendant physician must be dismissed. *Jernigan v. Langley*, 195 S.W.3d 91(Tex 2006) ; *Palacios*, 46 S.W.3d at 879.

Numerous Courts of Appeals have evaluated the trial court's denial of a motion for a 30 day extension under Tex.Civ.Prac. & Rem, Code § 74.351(c)and found that the court did not abuse its discretion in denying the requested extension. *Apodaca v. Russo*; 228 S.W.3d 252 (Tex.App - Austin 2007, no writ hist.);*Bogar v. Esparza* 2007 CA3 03-07-00037-062807,( Tex. App.- Austin, 2007, no writ hist.); *Hardy v. Marsh Jr.* , 170 S.W.3d (Tex. App - Texarkana, 2006, no pet.); *Ledesma v. Shashoua*, 2007 TXCA3 03-05-00454-080307; (Tex.App. - Austin, 2007); *McMenemy v. Holden*, 2007 TXCA 14 14-07-00365-110107 ( Tex. App.- 14 Dist.)): *Bosch v Wilbarger*, 2006 S.W. 3d (LWC-3316 (Tex Civ. App. - Amarillo, 2006) In each of these cases, the court found that the trial court did not abuse its discretion in denying the requested extension . As pointed out by the courts of appeals, the use of the word “may” in a statute shows that the provision is discretionary and not mandatory. *Roberts v. Med. City Dallas Hosp., Inc.*, 998 S.W.2d 398, 402 (Tex. App.–Texarkana 1999, pet.denied); *Weldon v. Weldon*, 968 S.W. 2d 398, 402 (Tex. App. – Texarkana 1998, no pet.) When a trial court's function is discretionary and not mandatory, the reviewing court should give deference and wide latitude to the decision of the trial court. *Roberts*, 988 S.W.2d at 402. The word “may”creates discretionary authority. *See* Tex. Gov't Code Ann §311.016. By using the word “may”, Section 74.351 ( c) plainly vests the trial court with discretion to grant an extension. *See* Tex.

Gov't Code Ann §312.002 (Vernon 2005). In each of these cases, the court found that no evidence was presented that would indicate that the plaintiff did not have ample opportunity to obtain a sufficient expert report.

Setting aside the impropriety of the Tenth Court of Appeals' application of its own judgment and proceeding to an evaluation of the basis of the Appellate Court's opinion, it is imperative to carefully evaluate the deficiencies of Dr. Patman's report. The Appellate Court appears to be of the erroneous opinion that the deficiencies of the report are a mere technicality. However, review of the report shows a complete lack of a causal connection between the alleged acts of negligence and the alleged injuries to Ms. Wooten. The specific language of Dr. Patton's report dealing with causation is as follows:

Therefore, after a careful review of the medical records available,. It is my opinion, based upon reasonable medical probability, that the breaches in the applicable standard of care by the multiple acts of omission as described in detail above during the care and management of Carol Wooten by Eberhard Samlowski, M.D., constituted negligence and such negligence were proximate causes Ms. Wooten's developing multiple life-threatening complications that required resultant multiple but avoidable operations, multiple organ failure with permanent damage, and the multiple hospitalization admissions of prolonged duration. (Cr. 25)[Appendix C]

The specific acts of negligence in Dr. Patman's report are summarized by Dr. Patman as follows: (Cr 19-20)[Appendix C]

1. Failure to obtain a complete and comprehensive history, specifically regarding the history of sarcoidosis, the significant comorbidity of diabetes mellitus , and the nature of the previous two exploratory laparotomies stated to be due to "abdominal tumors" as well as the indications requiring a total abdominal hysterectomy.

2. Failure to perform a complete physical examination in a patient with abdominal pain, specifically failure to perform a rectal and pelvic exam.

3. Failure to evaluation (sic) all significant complaints and findings identified by appropriate tests, examinations, and consultations that might increase operative risk, adversely influence recovery

and future well-being, specifically, but not limited to sarcoidosis and the treatment of this disease in the past, preoperative pulmonary status, diabetes, and nature and extent of the two prior abdominal operations stated to be due to “abdominal tumor.”

The report of Dr. Patman further discusses breaches in the standard of care in more detail. (Cr25)[Appendix

However, this further detail again exclusively involves the preoperative evaluation by Defendant .

The alleged injuries to Plaintiff as set forth in Dr. Patman’s report are development of multiple life-threatening complications that required resultant multiple but avoidable operations, multiple organ failure with permanent damage, and the multiple but avoidable operations, multiple organ failure with permanent damages and the multiple hospital admissions of prolonged duration (Cr25).[appendix C].

Nowhere in Dr. Patman’s report does he connect the preoperative evaluation with the subsequent injuries to Plaintiff. Although he criticizes the pre-operative evaluation, it cannot be inferred that the surgery performed by Defendant would not have been performed. In addition, Dr. Patman does not state in his report that the surgery performed by Defendant was done incorrectly or that the injuries suffered by Plaintiff were caused by a negligently performed surgery. The bottom line is that there is simply no language in the report which states specifically that any action which Dr. Patman states should have been taken would have prevented any of the alleged injuries to Plaintiff. Indeed, Dr. Patman does not state anywhere in his report specifically what alleged injuries are being claimed other than the broad language stated above, nor does he state what he contends caused the alleged injuries in question or the basis of those opinions.

There is a crystal clear reason for the lack of any such causation language in the report of Dr. Patman. As set forth in the narrative of Dr. Patman, the subsequent surgery on Ms. Wooten showed

complications in her pelvic area which was not even in the surgical field (upper outer right quadrant) of the initial surgery by Dr. Samlowski. (Cr. 21)[Appendix C] Therefore, even if Dr. Patman were allowed to “revise” his report to meet the statutory requirements of proximate cause, there would be no factual basis for any opinion that surgery done by Dr. Samlowski in a bodily location that was not related to the area of the subsequent alleged injury. In other words, the report is incapable of being cured of its deficiencies.

The opinion of the 10<sup>th</sup> Court of Appeals that the deficiencies in the report were a mere technicality and could be easily remedied reveals that the court of appeals indulged in multiple inferences that are simply unsupported by the report. This court specifically disapproved of such actions in *Jernigan at 94*. The court of appeals has inferred that if the preoperative evaluation of Dr. Samlowski had included the vague list of “additional” evaluations set forth in the report, it would have somehow eliminated the subsequent vague description of the alleged damages of development of multiple life-threatening complications that required resultant multiple but avoidable operations, multiple organ failure with permanent damage, and the multiple but avoidable operations, multiple organ failure with permanent damages and the multiple hospital admissions of prolonged duration. This inference is not supported by the language of the report.

Regardless of whether the Tenth Court of Appeals agrees with this analysis, the court did agree that the report was deficient and that it did not constitute a “good faith effort” to comply with the statutory requirements of Tex.Civ.Prac & Rem. Code § 74.351(r)(6) Therefore, the requirements of both Tex.Civ.Prac. & Rem Code, §74.351(b) **and** (c) are met. These findings by the Trial Court, which was affirmed by the 10<sup>th</sup> Court of Appeals certainly forms a sufficient basis for the Trial

Court's decision to deny a 30 day extension to cure a report which is incurable. The sole responsibility of the Appellate Court is not to agree to with the trial court's opinion, but to determine if the trial court's decision has any rational basis. The precise language of the report itself shows that the alleged negligent acts are not causally connected with the alleged injuries. In addition, it is precisely this situation of an absence of a causal connection between the alleged negligence and the alleged injuries which the Texas Legislature was attempting to address in passing legislation to confront the Medical Malpractice Insurance Crisis.

The establishment of the new "good faith attempt" standard is not supported by the statutory language of Tex.Civ. Prac & Rem Code §74.351. As state by Chief Justice Gray, this case is "another in a series of proceedings in which the majority refuses to apply the medical malpractice statute". Therefore , it is imperative for the Supreme Court to reestablish the deference to the trial court in the absence of any evidence of abuse of discretion and the specific language and intent of the Tex Rev. Civ. Prac., & Rem. Code § 74.351.

## **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Petitioner Eberhard Samlowski, M.D. .  
prays that the opinion of the Tenth Court of Appeals be reversed and that the dismissal with  
prejudice of the Trial Court be reinstated and that all costs of appeal be taxed against the  
Respondant.

Respectfully submitted,

By: \_\_\_\_\_ /s/  
Kay E. Ellington  
State Bar No. 06532500  
211 N. Record, Suite 550, LB 12  
Dallas, Texas 75202  
214/ 580-1111  
FAX No. 214/ 580-1114  
ATTORNEY FOR PETITIONER,  
EBERHARD SAMLOWSKI, M.D.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been  
forwarded to all counsel of record on this the 6<sup>th</sup> day of February  
— ,  
2009.

\_\_\_\_\_/s/  
KAY E. ELLINGTON

No. **08-667**

**In the Supreme Court of Texas**

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**EBERHARD SAMLOWSKI, M.D.,**

**Petitioner,**

**VS.**

**CAROL WOOTEN**

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**ON APPEAL FROM THE 413<sup>TH</sup> JUDICIAL DISTRICT COURT  
OF JOHNSON COUNTY, TEXAS,  
THE HONORABLE WILLIAM C. BOSWORTH, JR. , PRESIDING**

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**APPENDIX**

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- A. TEX. CIV. PRAC. & REM. CODE § 74.351 (r)(6)
- B. Order Granting Defendants’s Motion to Dismiss with Prejudice
- C. Expert report of Dr. R. Don Patman dated April 15, 2007.
- D. TEX. CIV. PRAC. & REM. CODE § 74.351 (a)
- E. TEX. CIV. PRAC. & REM. CODE § 74.351 (b)
- F. TEX. CIV. PRAC. & REM. CODE § 74.351 ( c ) & (l)
- G. *Wooten v. Samlowski*, 2008 TX - Iw080527454
- H. Denial of Appellee’s Motion for Rehearing dated July 9, 2008
- I. Dissent to Denial of Motion for Rehearing Dated July 9, 2008

- J. Plaintiff's Original Petition
- K. Defendant's Objection to Expert Report
- L. Defendant's Motion to Dismiss