PRE- AND POST-SUIT NOTICE: MEDICAL AUTHORIZATIONS & THE 120-DAY EXPERT REPORT

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Texas requires that medical malpractice plaintiffs provide notice of their claim both before and after they file their petition.[1] At least sixty days before filing the petition, a plaintiff must send, via certified mail, return receipt requested, notice of her health care claim along with a medical authorization pursuant to Texas Civil Practice and Remedies Code Chapter 74 to the potential defendant(s).[2] Then, no later than "the 120th day after the date each defendant's original answer is filed," a plaintiff must serve expert report(s) and curriculum vitae(s) substantiating her theory of liability on each defendant.[3]

This Article explores both forms of notice. In the first Part of the Article, we discuss the pre-suit notice requirement, with a focus on the medical authorization form that must accompany the notice and the challenges associated with providing a valid authorization. In the second Part, we explore the basic operation of the 120-day expert report statute, the required substance of the report, and the right of interlocutory appeal afforded to the defendant. This Part includes an analysis of the courts of appeals cases addressing the expert-report requirement between 2013 and 2018 to

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1. TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a) (West 2017).
2. *Id.* § 74.051–.052.
3. *Id.* § 74.351(a).

determine whether these interlocutory appeals burden the appellate docket and delay otherwise meritorious cases.

I. PRE-SUIT NOTICE

A person asserting a health care liability claim in Texas must give written notice of her 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."[4] The notice must be accompanied by a medical authorization form releasing certain parts of the claimant's protected health information to the health care provider receiving the notice.[5] The language of the required medical authorization form is incorporated into Texas Civil Practice and Remedies Code § 74.052(c).[6]

Requiring a potential claimant to disclose her protected health information sixty days before filing suit gives health care providers an opportunity "to investigate claims and possibly settle those with merit at an early stage."[7] If the authorization is not provided along with the notice, any proceedings against the health care provider shall be abated for sixty days following receipt by the provider of the authorization, thus giving health care providers the intended investigation period early in the case in instances where pre-suit notice was not given.[8]

Giving notice in the form outlined by § 74.051 tolls the statute of limitations for a period of seventy-five days beyond the two-year statute of limitations.[9] The tolling of the statute of limitations applies to "all parties and potential parties," even if some of such providers did not receive notice.[10] The required authorization form must accompany the notice in order for the tolling of the statute of limitations to apply.[11]

A health care provider receiving notice accompanied by the required authorization form is obligated to provide the claimant with a complete copy of the provider's medical records pertaining to the claimant within forty-five days of receiving the notice and an accompanying "written request for such

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4. *Id.* § 74.051(a).

5. *Id.* § 74.052(a). The medical authorization requirement was added to the notice section, effective September 1, 2003, when Texas Civil Statute Article 4590i was replaced with § 74.051 of the Civil Practice and Remedies Code. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.051, 2003 Tex. Gen. Laws 847, 866–67, 899 (codified at CIV. PRAC. & REM. 74.051).

6. CIV. PRAC. & REM. § 74.052(c).

7. *In re* Collins, 286 S.W.3d 911, 916–17 (Tex. 2009).

8. CIV. PRAC. & REM. § 74.052(a).

9. *Id.* § 74.051(c).

10. *Id.*; *see* Thompson v. Cmty. Health Inv. Corp., 923 S.W.2d 569, 572 (Tex. 1996).

11. Jose Carreras, M.D., P.A. v. Marroquin, 339 S.W.3d 68, 74 (Tex. 2011); *see also* Mitchell v. Methodist Hosp., 376 S.W.3d 833, 837 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that a plaintiff who provided HIPAA-compliant authorization form with notice rather than the statutorily required authorization form was not entitled to seventy-five-day tolling provision).

records."[12] However, there is no express enforcement provision contained in Chapter 74 if a provider fails to produce the records.[13]

One option for a party seeking to enforce § 74.052(c) is to file suit and quickly seek discovery sanctions for the failure to produce the records pursuant to § 74.052(c). The Texas Supreme Court hinted at such a remedy in *Garcia v. Gomez*.[14] There, the Court addressed the issue of attorneys' fees and costs for the failure to serve a Chapter 74 expert report.[15] The plaintiff argued that the defendant should be denied attorneys' fees because he failed to produce the appropriate medical records within the forty-five days allotted by § 74.051(d).[16] The defendant argued that he did not withhold any records and the Texas Supreme Court concluded "[a]lthough we can imagine a case in which discovery sanctions might offset an award of fees and costs under section 74.351(b), this is not such a case because the trial court has made no finding of discovery abuse."[17] Under this view, the notice and authorization are a form of pre-trial discovery subject to sanctions under Rule 215.3 of the Texas Rules of Civil Procedure.[18] However, the plaintiff should "seek the trial court's assistance [and] obtain a finding of discovery abuse."[19]

Despite this possibility, discovery sanctions are a hollow remedy because it would be difficult, if not impossible, to produce the expert report required by Chapter 74 without the defendant's medical records. A plaintiff who is forced to file suit, await the defendant's answer, and then seek discovery sanctions in an attempt to obtain her own medical records has lost precious time in her efforts to procure a timely expert report.

The protected health information that a claimant is required to release pursuant to the statutory medical authorization falls into two categories: (1) health information and billing records for physicians or health care providers who have examined, evaluated, or treated the claimant "in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim"; and (2) health information and billing records for physicians or health care providers who have examined, evaluated, or treated the claimant "during a period commencing five years prior to the incident made the basis of the accompanying Notice of Health Care Claim."[20] Claimants may also list

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12. CIV. PRAC. & REM. § 74.051(d).
13. *Id.*
14. *See generally* Garcia v. Gomez, 319 S.W.3d 638 (Tex. 2010).
15. *Id.* at 640.
16. *Id.* at 643.
17. *Id.*
18. TEX. R. CIV. P. 215.3.
19. Sprute v. Levey, No. 04-14-00358-CV, 2015 WL 4638298, at *5 (Tex. App.—San Antonio July 15, 2015, no pet.); *see* Ramirez v. Doctors Hosp. at Renaissance, Ltd., 336 S.W.3d 352, 354–55 (Tex. App.—Corpus Christi 2011, no pet.).
20. TEX. CIV. PRAC. & REM. CODE ANN. § 74.052(c) (West 2017). In addition to the claimant's health information, the authorization form also requires the claimant to list her name, address, telephone

providers who they contend should be excluded from the authorization because the health care provided by those persons "is not relevant to the damages being claimed or to the physical, mental, or emotional condition of [the claimant] arising out of the claim made the basis of the accompanying Notice of Health Care Claim."[21] Claimants listing excluded providers must also list "the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure."[22]

Many claimants may find it difficult to recall every health care provider who has treated them for the five years prior to the incident that made the basis of the claim. This is particularly true in claims involving a wrongful death, where the decedent's family members are the ones compiling the decedent's health care provider lists for the statutory authorization.[23] These claimants will have a particularly difficult time compiling a comprehensive list of providers. Yet, courts have held that claimants who fail to provide complete health care provider lists in the statutory authorization or whose statutory authorization forms are otherwise deficient have not complied with the statute and, therefore, are not entitled to the seventy-five-day tolling of the statute of limitations.[24]

For example, in *Johnson v. PHCC-Westwood Rehabilitation and Health Care Center*, one Houston court of appeals held that a plaintiff who provided the required statutory authorization was not entitled to the tolling of her statute of limitations because the authorization was deficient.[25] The court relied on two factors in its determination that the form was deficient: (1) the fact that some of the plaintiff's providers were omitted from the lists required by the authorization; and (2) the fact that the person who signed the authorization, the daughter of the injured party, held a general power of attorney for her mother as opposed to a medical power of attorney.[26] *Davenport v. Adu-Lartey* followed the lead of the *Johnson* court, holding that a statutory authorization that failed to list relevant health care providers interfered with the defendants' ability to conduct a pre-suit investigation and, thus, failed to toll the limitations period under § 74.051(c).[27] Similarly, in *Borowski v. Ayers*, the Waco Court of Appeals held that an authorization form releasing the health information from "all heath [sic] care providers

number, email address, and her place of birth. *Id.* The authors have yet to understand the logic behind requiring the claimant to disclose her place of birth, but not her date of birth.

21. *Id.*

22. *Id.*

23. *See* Davenport v. Adu-Lartey, 526 S.W.3d 544, 553–54 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); Borowski v. Ayers, 524 S.W.3d 292, 306 (Tex. App.—Waco 2016, pet. denied); Johnson v. PHCC-Westwood Rehab. & Health Care Ctr., LLC, 501 S.W.3d 245, 252 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

24. *See Davenport*, 526 S.W.3d at 553–54; *Borowski*, 524 S.W.3d at 306; *Johnson*, 501 S.W.3d at 252.

25. *Johnson*, 501 S.W.3d at 252.

26. *Id.* at 250–51.

27. *Davenport*, 526 S.W.3d at 553–54.

providing care/treatment" to the injured party, rather than listing specific health care providers, did not substantially comply with § 74.051 and, thus, did not entitle the plaintiff to the tolling of limitations.[28]

This line of cases raises a host of potential pitfalls for claimants in medical malpractice cases. Will a court deem a plaintiff's statutory authorization deficient if she inadvertently forgets to list a single provider who treated her five years ago for an entirely unrelated and fleeting medical concern? If she fails to list a radiologist she never met in person, but who reviewed a film as a part of her treatment, will that render her authorization ineffective? These pitfalls make it very risky for plaintiffs to rely on the seventy-five-day tolling period the Texas Legislature intended to give them.[29] A plaintiff who is faced with potential dismissal of her case due to a deficient authorization should argue for an opportunity to modify her authorization and accept a sixty-day abatement of her case pursuant to Texas Civil Practice and Remedies Code § 74.052(b).[30]

II. THE 120-DAY EXPERT REPORT

Texas law requires that a medical malpractice plaintiff serve on each defendant an expert report within 120 days of the defendant's answer:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.[31]

The report must be served on a "party."[32] The Texas Supreme Court defines "party" as "someone named in a lawsuit."[33] An expert report need only be served in a "health care liability claim," as defined by Texas Civil Practice and Remedies Code § 74.001(13), and Texas courts take an expansive view of the definition.[34] Many times, the courts have come to conflicting opinions

28. *Borowski*, 524 S.W.3d at 306 (alteration in original).
29. TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(c) (West 2017).
30. *Id.* § 74.052(b).
31. *Id.* § 74.351(a).
32. *Id.*
33. Zanchi v. Lane, 408 S.W.3d 373, 378–79 (Tex. 2013).
34. CIV. PRAC. & REM. § 74.001(a)(13); *e.g.*, Rio Grande Valley Vein Clinic, P.A. v. Guerrero, 431 S.W.3d 64, 67 (Tex. 2014) (per curiam) (holding that claims regarding burns from laser hair removal are

in this area.[35] For example, a Houston court found that a patient, who had suffered a miscarriage, had a health care liability claim when she sued the hospital for providing her an amputated toe instead of fetal remains for burial.[36] In contrast, the Corpus Christi Court of Appeals found no health care liability claim where fetal remains were disposed of when they were supposed to have been delivered to a funeral home.[37] For a full discussion of cases that address the definition of a health care liability claim, please see Article VI, *Definitions Under Chapter 74*, by Paula Sweeney.[38]

A. Basic Operation of § 74.351

The expert report must be served on the party not later than the 120th day after the party answers.[39] In *Hebner v. Reddy*, the plaintiffs served their expert report six months prior to filing suit.[40] After filing suit, plaintiffs mistakenly served another (inapplicable) report on defendant.[41] The

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health care liability claims); Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 192–93 (Tex. 2012) (holding that an employee's claim against a psychiatric hospital for a patient attack is a health care liability claim); Omaha Healthcare Ctr., LLC v. Johnson, 344 S.W.3d 392, 395 (Tex. 2011) (holding that a negligent failure to exterminate spiders is a health care liability claim); Harris Methodist Fort Worth v. Ollie, 342 S.W.3d 525, 527 (Tex. 2011) (per curiam) (holding that a slip-and-fall claim is a health care liability claim); Yamada v. Friend, 335 S.W.3d 192, 198 (Tex. 2010) (holding that a physician providing negligent advice to a water park regarding its safety procedures constitutes a health care liability claim); Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 849 (Tex. 2005) (holding that claims of rape and assault against nursing home patients amount to health care liability claims). The courts have imposed some limits on the definition of health care liability claim. *See* Drewery v. Adventist Health Sys./Tex., Inc., 344 S.W.3d 498, 499 (Tex. App.—Austin 2011, pet. denied). While you are unconscious, if your nurse paints your fingernails and toenails with pink nail polish, writes on the bottoms of your feet "Barb was here" and "Kris was here," and wraps your thumb with tape, you may not have to produce an expert report when suing for assault. *Id.* at 499, 505. Similarly, if you are a bicyclist who gets hit on a public street by a doctor who is backing his car out onto the street, you may not have to produce an expert report. Reddy v. Veedell, 509 S.W.3d 435, 438 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

35. *See* McAllen Hosps., L.P. v. Ontiveros, No. 13-11-00512-CV, 2012 WL 3761981, at *3–4 (Tex. App.—Corpus Christi Aug. 30, 2012, pet. denied); CHCA Bayshore, L.P. v. Ramos, 388 S.W.3d 741, 747 (Tex. App.—Houston [1st Dist.] 2012, no pet.); Paula Sweeney, *Definitions Under Chapter 74*, 51 TEX. TECH L. REV. 745 (2019).

36. *CHCA Bayshore, L.P.*, 388 S.W.3d at 747.

37. *McAllen Hosps., L.P.*, 2012 WL 3761981, at *3–4.

38. *See generally* Sweeney, *supra* note 35.

39. *See* CIV. PRAC. & REM. § 74.351(a). The 83rd legislature, in House Bill 658, amended § 74.351(a) in 2013. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 870, § 2, 2013 Tex. Gen. Laws 2217, 2217 (codified at CIV. PRAC. & REM. § 74.351(a)). The section enacted in 2005 required service of the report within 120 days "after the date the original petition was filed." Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590, *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 870, § 2, 2013 Tex. Gen. Laws 2217, 2217. The change became effective on September 1, 2013. Act of May 24, 2013, 83d Leg., R.S., ch. 870, § 2, 2013 Tex. Gen. Laws 2217, 2217. Cases prior to that date may refer to the service deadline as 120 days after filing suit. *See, e.g.*, Badiga v. Lopez, 274 S.W.3d 681, 682 (Tex. 2009).

40. Hebner v. Reddy, 498 S.W.3d 37, 38 (Tex. 2016). In the interest of disclosure, author Michelle Cheng and authors' law partner, Chip Brees, represented the plaintiffs for the appeal of this case.

41. *See id.*

defendant moved to dismiss.[42] The Texas Supreme Court held that a plaintiff can satisfy the expert-report requirement through pre-suit service of an otherwise satisfactory expert report.[43] The Court in *Hebner* overruled some courts of appeal cases.[44] If the party fails to answer and a default judgment is taken, no report needs to be served.[45] However, should the defendant set the default judgment aside, the period of default tolls the 120-day deadline.[46]

An expert report served pursuant to § 74.351 is not admissible and cannot be referenced by any party during the remainder of the lawsuit.[47] However, the plaintiff may waive that right by using the report "in the course of the action for any purpose other than to meet the [120-day] service requirement."[48]

If the plaintiff fails to serve an expert report within the period prescribed by Chapter 74, the defendant may move to dismiss the claim and seek attorneys' fees.[49] A defendant who prevails on such a motion is entitled to attorneys' fees from the plaintiff, not the plaintiff's attorney.[50] The courts have interpreted "no report" to include both those instances where no report at all was served on the defendant[51] and those instances where the "document [was] utterly devoid of substantive content."[52] The Texas Supreme Court has held that "a document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit."[53] The report may not need to identify the negligent provider by name as long as it specifically identifies the responsible party by function.[54]

If the plaintiff serves a report, the defendant has twenty-one days to object to any deficiencies.[55] Any objections not raised are deemed waived.[56]

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42. *See id.*
43. *See id.* at 39.
44. *See, e.g.*, St. Luke's Episcopal Hosp. v. Poland, 288 S.W.3d 38, 40 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).
45. *See* Gardner v. U.S. Imaging, Inc., 274 S.W.3d 669, 671 (Tex. 2008) (per curiam).
46. *See id.*
47. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(k) (West 2017).
48. *Id.* § 74.351(t).
49. *See id.* § 74.351(b).
50. *See* Robinson v. Garcia, 398 S.W.3d 297, 301–02 (Tex. App.—Corpus Christi 2012, pet. denied).
51. *See* Badiga v. Lopez, 274 S.W.3d 681, 685 (Tex. 2009).
52. Scoresby v. Santillan, 346 S.W.3d 546, 549 (Tex. 2011).
53. *Id.*
54. Mangin v. Wendt, 480 S.W.3d 701, 711–13 (Tex. App.—Houston [1st Dist.] 2015, no pet.). *But cf.* Laredo Tex. Hosp. Co. v. Gonzalez, 363 S.W.3d 255, 258–59 (Tex. App.—San Antonio 2012, no pet.) (holding a report deficient for the failure to name the defendant). *Mangin v. Wendt* examined this case and others and reasoned, "[i]n each of these cases, however, the absence of the defendant's name was not the sole reason for finding that his or her conduct was not implicated by the report." *Mangin*, 480 S.W.3d at 713 (referencing cases discussed by Texas courts of appeals that provide multiple reasons for lack of implication by reports).
55. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West 2017).
56. *See id.*

A court should grant an objection challenging an expert report under this rule only if, after a hearing, the report is not "an *objective good faith* effort to comply with the [meaning of] an expert report."[57] A good-faith effort informs the defendant of the specific conduct called into question and provides a basis for the trial court to conclude the claims have merit.[58] The purpose of the expert-report requirement is not to dispose of the plaintiffs' claims regardless of their merits.[59]

Even if the court finds deficiencies in the report, the court can grant a one-time, thirty-day extension to cure those problems.[60] Trial courts should be lenient in granting thirty-day extensions and "should err on the side of granting the additional time."[61] In addition, courts *must* grant an extension if deficiencies in an expert report *can* be cured within the thirty-day period.[62] Appellate courts should review a trial court's decision on the matter under an abuse-of-discretion standard.[63]

B. The Substance of the Expert Report

A report may meet the good-faith, expert-report requirement without using "magical words."[64] So, for example, courts have denied a defendant's objection to a report because the report did not name a particular defendant specifically where that defendant's liability vicariously flowed from named employees.[65] But an expert report should explain how and why the breach of the standard of care caused injury to the plaintiff.[66] The report should consider and comment on the patient's medical records.[67] And recently, the Texas Supreme Court held, "with respect to causation, the court's role is to determine whether the expert has explained how the negligent conduct caused the injury. Whether this explanation is believable should be litigated at a later stage of the proceedings."[68]

Only a physician is qualified as an expert on causation in a health care liability claim.[69] Regarding whether a physician breached the standard of

57. *See id.* § 74.351(*l*) (emphasis added).
58. *See* Baty v. Futrell, 543 S.W.3d 689, 693–94 (Tex. 2018).
59. *See id.* at 692.
60. Scoresby v. Santillan, 346 S.W.3d 546, 549 (Tex. 2011); *see* CIV. PRAC. & REM. § 74.351(c).
61. *Scoresby*, 346 S.W.3d at 549 (citation omitted).
62. *Id.* at 554.
63. Jelinek v. Casas, 328 S.W.3d 526, 539 (Tex. 2010) (quoting Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 51–52 (Tex. 2002) (per curiam)).
64. *Id.* at 540.
65. Univ. of Tex. Sw. Med. Ctr. v. Dale, 188 S.W.3d 877, 878 (Tex. App.—Dallas 2006, no pet.); *see also In re* Stacy K. Boone, P.A., 223 S.W.3d 398, 404–05 (Tex. App.—Amarillo 2006, no pet.) (holding a doctor eligible to testify because the Professional Association Act imputed liability to other parties for which the doctor could testify as an expert).
66. Columbia Valley Healthcare Sys., L.P. v. Zamarripa, 526 S.W.3d 453, 460 (Tex. 2017).
67. Loaisiga v. Cerda, 379 S.W.3d 248, 261 (Tex. 2012).
68. Abshire v. Christus Health Se. Tex., 563 S.W.3d 219, 226 (Tex. 2018) (per curiam).
69. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(C) (West 2017).

care, the expert must meet the requirements of § 74.401.[70] Those requirements include knowledge of the accepted standards, having a medical practice at the time of testimony or at the time the claim arose, and training or experience in those standards.[71] To give testimony about the standard of care of a health care provider, the expert must be qualified under § 74.402.[72] While the qualifications are similar to § 74.401, this expert may also qualify by training health care providers in the defendant's field.[73] So, a doctor may be qualified to opine on the standards applicable to nurses,[74] health care administration,[75] or nursing home policies.[76] And an orthopedic surgeon may be qualified to opine on the standards of a podiatrist,[77] but a cardiovascular surgeon may not.[78]

If there are multiple theories of liability against a single defendant, the expert report does not have to address each theory.[79] The Texas Supreme Court expounded on this point in *Certified EMS, Inc. v. Potts*.[80] In *Certified EMS*, after being admitted to the hospital for a kidney infection, Cherrie Potts claimed that she was sexually and verbally assaulted by a contracted nurse employed by Certified EMS.[81] Ms. Potts sued the hospital, the nurse, and Certified EMS.[82] Ms. Potts argued that Certified EMS was directly liable for failure to supervise and train, and was vicariously liable for the nurse's conduct.[83] While her report addressed vicarious liability, Certified EMS objected to Potts's report's failure to address direct liability for the nurse's conduct.[84] At the Texas Supreme Court, Certified EMS argued that if a report

70. *Id.* § 74.351(r)(5)(A) (referring to § 74.401).
71. *Id.* § 74.401(a).
72. *Id.* § 74.351(r)(5)(B) (referring to § 74.402).
73. *Id.* § 74.402(a)(1).
74. Baylor Med. Ctr. at Waxahachie v. Wallace, 278 S.W.3d 552, 559 (Tex. App.—Dallas 2009, no pet.); *see* Doctors Hosp. v. Hernandez, No. 01-10-00270-CV, 2010 WL 4121678, at *6–8 (Tex. App.—Houston [1st Dist.] Oct. 21, 2010, no pet.); Heritage Gardens Healthcare Ctr. v. Pearson, No. 05-07-00772-CV, 2008 WL 3984053, at *6 (Tex. App.—Dallas Aug. 29, 2008, no pet.); *In re* Stacy K. Boone, P.A., 223 S.W.3d 398, 403 (Tex. App.—Amarillo 2006, no pet.); Manor Care Health Servs., Inc. v. Ragan, 187 S.W.3d 556, 562 (Tex. App.—Houston [14th Dist.] 2006, pet. granted, judgm't vacated w.r.m.).
75. *E.g.*, Navarro Hosp., L.P. v. Washington, No. 10-13-00248-CV, 2014 WL 1882763, at *6 (Tex. App.—Waco May 8, 2014, pet. denied).
76. Gracy Woods I Nursing Home v. Mahan, 520 S.W.3d 171, 184 (Tex. App.—Austin 2017, no pet.).
77. Grindstaff v. Michie, 242 S.W.3d 536, 542–43 (Tex. App.—El Paso 2007, no pet.).
78. Foster v. Zavala, 214 S.W.3d 106, 113–14 (Tex. App.—Eastland 2006, pet. denied).
79. *See* TTHR Ltd. P'ship v. Moreno, 401 S.W.3d 41, 45 (Tex. 2013); Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 627–28 (Tex. 2013).
80. *Certified EMS, Inc.*, 392 S.W.3d at 627–31.
81. *Id.* at 626.
82. *Id.*
83. *Id.* at 626–27.
84. *Id.* at 627.

does not address each theory of liability in the complaint, those unaddressed theories should be dismissed.[85]

The Texas Supreme Court reasoned that the expert report need not address every theory of liability.[86] Section 74.351(a) requires the plaintiff serve an "expert report," which is defined as

> a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding 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.[87]

An expert report that addresses at least one viable theory of liability accomplishes the goals set forth in the statute.[88] The law's purpose is to weed out frivolous claims, not to address the merits of the lawsuit.[89] The Texas Supreme Court affirmed this holding in *TTHR Ltd. Partnership v. Moreno*.[90]

In the 84th Regular Session, the Texas Legislature considered two bills that would have overridden the Texas Supreme Court's holdings in *TTHR* and *Certified EMS*: Senate Bill 1521 (S.B. 1521) and House Bill 1403 (H.B. 1403).[91] S.B. 1521 would have amended § 74.351(a) to require that a plaintiff's expert report(s) to "address at least one theory of direct liability asserted against each physician or health care provider if a direct theory of liability is asserted."[92] S.B. 1521 died during senate committee.[93] The operative language was appended to H.B. 1403 during house committee consideration.[94] However, H.B. 1403 was amended on the floor, striking the operative language.[95] The amendment striking the language was unanimously accepted by the house.[96] Because the operative language overturning *TTHR*

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85. *Id.* at 629.
86. *Id.* at 630–31.
87. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) (West 2017).
88. *Certified EMS, Inc.*, 392 S.W.3d at 631.
89. Scoresby v. Santillan, 346 S.W.3d 546, 554 (Tex. 2011).
90. TTHR Ltd. P'ship v. Moreno, 401 S.W.3d 41, 45 (Tex. 2013) (reaffirming the Court's holding in *Certified EMS*).
91. Tex. S.B. 1521, 84th Leg., R.S. (2015); Tex. H.B. 1403, 84th Leg., R.S. (2015).
92. Tex. S.B. 1521. H.B. 1403 was amended in a house committee to include the same language. *See* H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1403, 84th Leg., R.S. (2015).
93. *Bill Stages: Tex. S.B. 1521*, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/billstages.aspx?LegSess=84R&Bill=SB1521 (last visited Apr. 19, 2019) (explaining that S.B. 1521 was filed but never left Stage 2).
94. H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1403, 84th Leg., R.S. (2015).
95. H.J. of Tex., 84th Leg., R.S. 3200 (2015) (striking the language on the theory of direct liability).
96. *84th Legislative Session – Part 2 of 2*, TEX. HOUSE REPRESENTATIVES (May 12, 2015), http://tlchouse.granicus.com/MediaPlayer.php?view_id=38&clip_id=11182 (timestamp at 2:27:30).

and *Certified EMS* never became law, those cases remain binding authority on Texas courts and are now ratified by legislative intent.[97]

C. The Right to Interlocutory Appeal

Texas Civil Practice and Remedies Code § 51.014(a)(9) creates a right of interlocutory appeal when a trial court "denies all or part of the relief sought by a motion under Section 74.351(b)."[98] (Subsection (b) affords a party remedies where no report has been served.)[99] When a report is deemed not served because it is deficient, the trial court may grant a thirty-day extension to the plaintiff to cure her report.[100] Parties have no right to appeal the decision to grant a thirty-day extension.[101] However, if a plaintiff actually fails to serve a report and the court grants a thirty-day extension, the defendant is entitled to an interlocutory appeal.[102]

Whereas the text of the statute grants an interlocutory appeal "[i]f an expert report has not been served," in 2008 the Texas Supreme Court in *Lewis v. Funderburk* interpreted the statute to give "the court[s] of appeals . . . jurisdiction to consider the alleged inadequacy" of a plaintiff's expert reports.[103] This resulted in a slew of interlocutory appeals regarding allegedly deficient reports. In 2011, the Court narrowed the circumstances under which interlocutory appeal is available by expanding the circumstances under which a (non-appealable) thirty-day extension to cure a deficient report will be granted.[104] But, as will be shown below, appellate courts continue to see a significant body of interlocutory expert-report appeals.[105]

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97. Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 490 (5th Cir. 1999) ("[T]he rejection of this amendment establishes the clear legislative intent . . . ."); Tahoe Reg'l Planning Agency v. McKay, 769 F.2d 534, 538 (9th Cir. 1985) ("We recognize that it is well-settled that the rejection of amendments offered in the course of enactment is often probative in ascertaining legislative intent."); Williams v. Trail Dust Steak House, Inc., 727 S.W.2d 812, 814 (Tex. App.—Fort Worth 1987, no writ) (same).

98. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West 2017).

99. *See id.* §§ 51.014(a)(9), 74.351(b).

100. Ogletree v. Matthews, 262 S.W.3d 316, 320–21 (Tex. 2007).

101. CIV. PRAC. & REM. § 51.014(a)(9); *Ogletree*, 262 S.W.3d at 320–21. In *Ogletree*, the defendant argued that plaintiff's expert was not qualified to opine on the standard of care applicable to defendant's subspecialty. *See Ogletree*, 262 S.W.3d at 319. The trial court granted a thirty-day extension, and the defendant filed his interlocutory appeal. *Id.* at 318. The Texas Supreme Court held that the courts had no jurisdiction to hear this appeal. *Id.* at 322.

102. Badiga v. Lopez, 274 S.W.3d 681, 682 (Tex. 2009).

103. Lewis v. Funderburk, 253 S.W.3d 204, 207–08 (Tex. 2008) (emphasis in original omitted).

104. Scoresby v. Santillan, 346 S.W.3d 546, 557 (Tex. 2011) ("[A] thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated. We recognize that this is a minimal standard, but we think it is necessary if multiple interlocutory appeals are to be avoided . . . .").

105. *See, e.g.*, Stephanie M. Philipp, P.A. v. McCreedy, 298 S.W.3d 682, 684 (Tex. App.—San Antonio 2009, no pet.) (noting that the court had already seen numerous expert-report issues on appeal that year).

A frivolous motion to dismiss based on the alleged inadequacy of an expert report delays the lawsuit and clogs the courts while the interlocutory appeal is pending.[106] Since *Lewis*, Texas courts have complained of the unnecessary appellate workload.[107] One court of appeals remarked:

> There is no doubt that Chapter 74 has spawned a cottage industry of expert report litigation; this court alone has addressed issues relating to preliminary expert reports under Chapter 74 of the Civil Practice and Remedies Code multiple times within the past year. Once again we address this contentious issue in medical negligence litigation.[108]

The Texas Supreme Court also grappled with this issue in *Scoresby v. Santillan*, where defendants objected that a neurologist's report on the conduct of a surgeon was no report at all for the purposes of Chapter 74.[109] The Court held that the fact that the author was not a surgeon did not make the report "so deficient it does not qualify as an expert report."[110] After remanding the case for a ruling from the trial court, the Court commented: "Whatever the ruling, another appeal will undoubtedly follow. Our holding today will all but eliminate the first, wasteful appeal."[111]

In light of *Lewis* opening the floodgates of appellate litigation to allow the courts of appeal to consider deficient reports, and *Scoresby* attempting to narrow those floodgates, one might wonder how Chapter 74 expert-report interlocutory appeals currently affect appellate dockets.[112]

A *Westlaw* search of all cases citing § 74.351 since it was last amended finds 281 health care liability appeals related to the failure to serve an expert report or allegedly deficient expert reports.[113] Of those, 240 were health care liability claims.[114] An examination of interlocutory health care liability claim appeals found that reports were served on the defendant in the overwhelming majority of these appeals (95.72%).[115] And of all 281 appeals, plaintiffs won

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106. *See id.*

107. *See, e.g.*, *id.* (discussing how the court had already seen multiple issues with expert reports).

108. *Id.*

109. *Scoresby*, 346 S.W.3d at 556.

110. *Id.* at 557.

111. *Id.* at 558.

112. *See generally id.* (discussing its holding in *Lewis*); Lewis v. Funderburk, 253 S.W.3d 204 (Tex. 2008) (marking the beginning of expert-report litigation).

113. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2017). The Texas Legislature's last amendment to § 74.351 of the Texas Civil Practice and Remedies Code became effective on September 1, 2013. Act of May 24, 2013, 83d Leg., R.S., ch. 870, § 2, 2013 Tex. Gen. Laws 2217, 2217. The dataset in this Article spans September 1, 2013, to August 26, 2018. *See infra* Appendix B (discussing methodology in collecting cases).

114. *See infra* Appendix A: Figure 1 (illustrating the percentage of appeals for health care liability claims). The others were held to be outside the scope of Chapter 74 because they were not health care liability claims. *See infra* Appendix A: Figure 1.

115. *See infra* Appendix A: Figure 2 (illustrating the percentage of interlocutory appeals in which an expert report is served).

59.79% of the cases.[116] When narrowed to only interlocutory appeals, plaintiffs won 63.47% of appeals.[117] In the eyes of § 74.351, these cases are not frivolous and should proceed.[118] Yet, a full merits determination by a jury was delayed while the cases were on appeal.[119] In the years since *Scoresby*, perhaps some frivolous appeals were eliminated, but the instant study demonstrates that the liberal interpretation of the no-report rule continues to burden Texas appellate dockets.[120]

Another study examining Texas courts of appeals' cases between September 1, 2010, and August 31, 2011, found that interlocutory appeals in health care liability cases make up the majority of appeals filed by personal injury defendants.[121] And, as the present study demonstrates, only a minority are true no-report appeals.[122] Further, the trial court's decision is left intact in over 61% of these cases.[123] This is approximately the same batting average for all civil appeals in Texas.[124]

Should the Texas Legislature wish to address this burgeoning workload in the appellate courts, a modest change in law that would allow interlocutory appeals only in those cases where the plaintiff failed to serve a report at all should be enacted. This change would significantly reduce the work load of the appellate courts.

III. CONCLUSION

As illustrated by this Article, the pre- and post-suit notice requirements imposed on plaintiffs in medical malpractice cases present a challenging set of hurdles for a plaintiff asserting a claim and for the courts interpreting the law.[125] The time and expense associated with retaining one or more physicians to author an expert report is unlikely to be borne by the average plaintiff herself, and a medical malpractice lawyer has every incentive not to incur that expense unless she is confident that the case has merit and is likely to yield a recovery. For these reasons, a change in the law allowing interlocutory appeals only in cases where the plaintiff failed to serve a report at all is unlikely to result in additional litigation and will remove a significant burden from Texas's appellate courts.

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116. *See infra* Appendix A: Figure 4 (illustrating all appeal results).
117. *See infra* Appendix A: Figure 3 (illustrating interlocutory appeal composition by party).
118. *See generally* CIV. PRAC. & REM. § 74.351.
119. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 995, 1019 (2012).
120. *Id.*; *see also* Scoresby v. Santillan, 346 S.W.3d 546, 554 (Tex. 2011) (stating the purpose of § 74.351 is to weed out frivolous claims).
121. Liberato & Rutter, *supra* note 119.
122. *See infra* Appendix A: Figure 2 (illustrating the percentage of interlocutory appeals in which an expert report is served).
123. *See infra* Appendix A: Figure 5 (illustrating the percentage the trial courts are overturned).
124. Liberato & Rutter, *supra* note 119, at 997 ("The statewide reversal rate in civil cases is 36%.").
125. *See supra* Parts I, II (discussing the pre- and post-suit requirements, respectively).

APPENDIX A: FIGURES

Figure 1

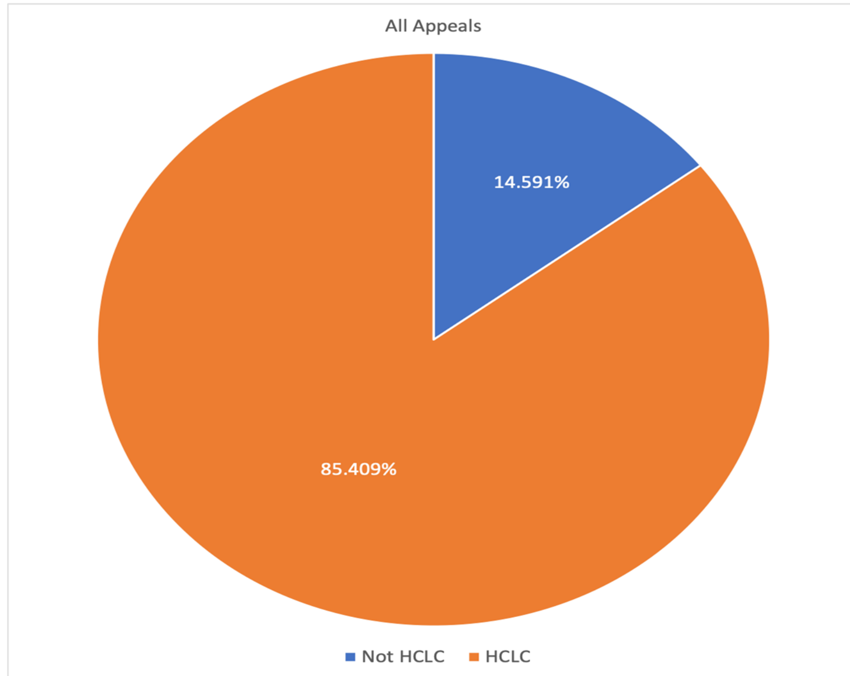


Figure 2

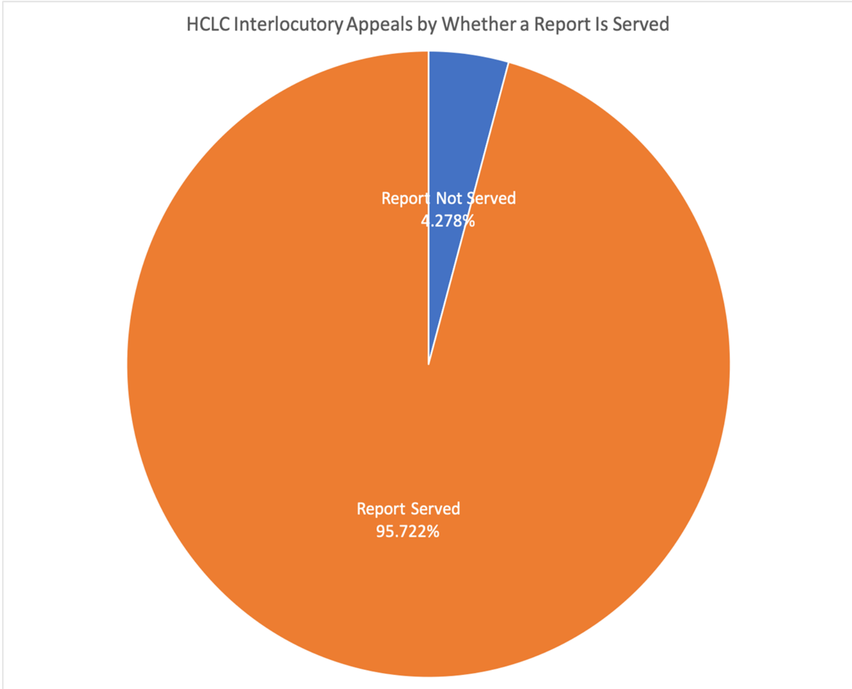


Figure 3

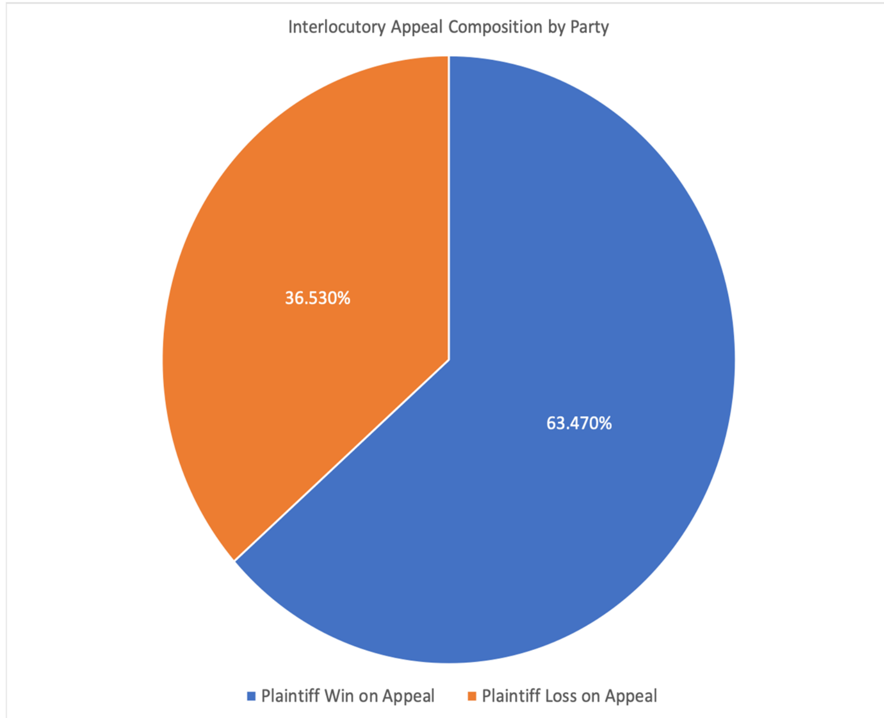


Figure 4

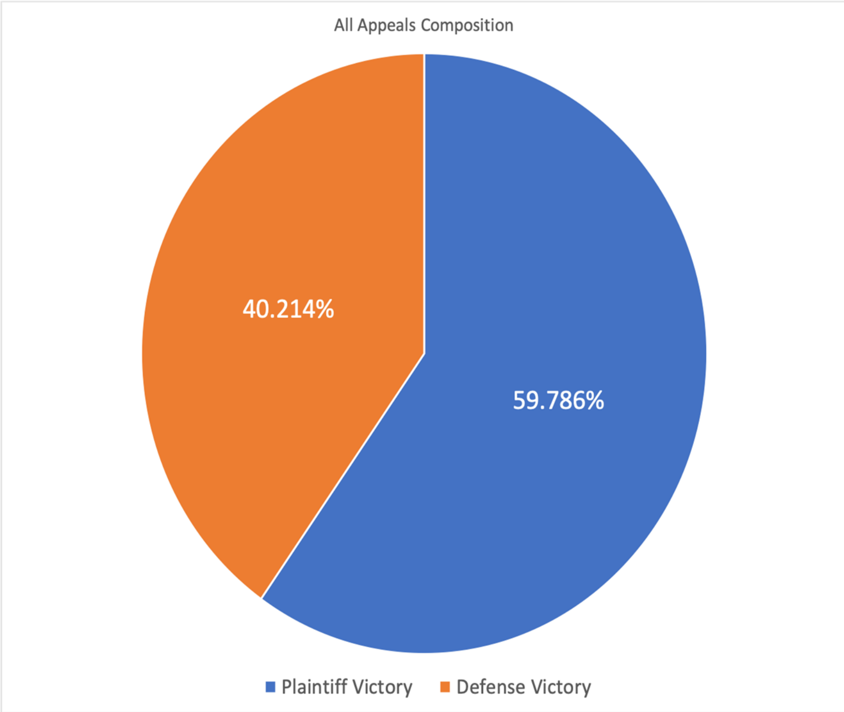
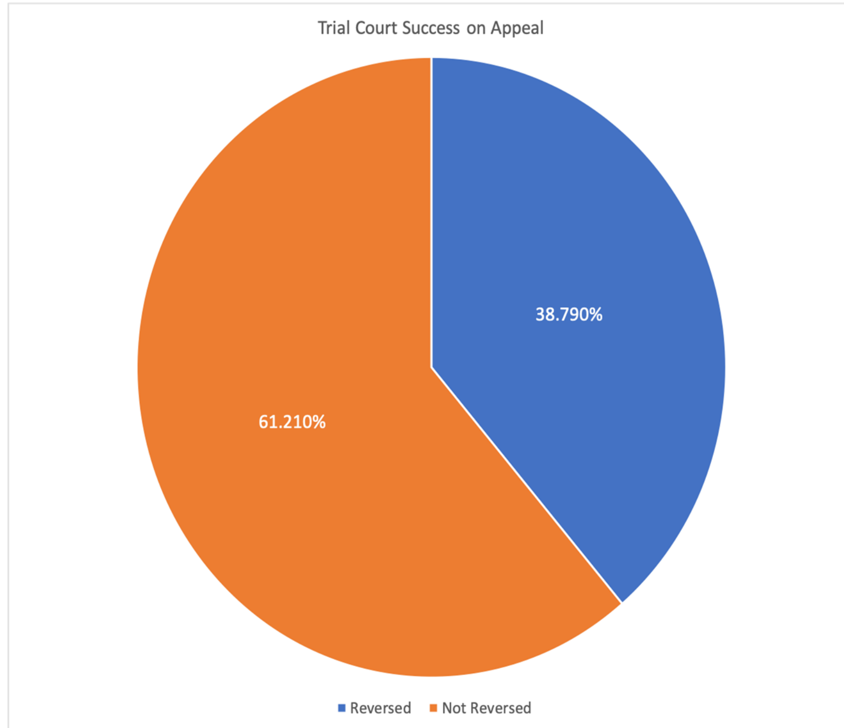


Figure 5



APPENDIX B: METHODOLOGY

This survey examined medical malpractice, Texas courts of appeals cases citing Texas Civil Practice and Remedies Code § 74.351 between September 1, 2013, and August 26, 2018.[126] The set of cases was narrowed to those addressing the issue of either the plaintiff's failure to provide an expert report or the sufficiency of the report, leaving 281 cases in the dataset.

Each case was categorized for trial court action: whether the trial court denied the relief the defendant requested or whether the trial court granted the relief the defendant requested. In those situations where the trial court granted a thirty-day extension, it was considered a denial of the relief sought.[127] From this data, each case was determined to be an interlocutory appeal or traditional appeal.

Each case was also categorized for appellate court action and tagged as affirming the trial court, reversing the trial court, or holding that the court had no jurisdiction to hear the appeal. An affirmance in part, reversal in part was considered a reversal of the trial court decision.[128] Each case was analyzed to determine whether a report had been served on the defendant[129] or whether no report had been served on the defendant.[130] Finally, each case was analyzed to determine whether, either by admission or court finding, the case was a health care liability claim.[131] If the Texas Supreme Court granted review, the High Court's holding controlled.[132]

126. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2017).

127. *E.g.*, Mann v. Merritt, No. 14-18-00482-CV, 2018 WL 3652821, at *1 (Tex. App.—Houston [14th Dist.] Aug. 2, 2018, no pet.).

128. *E.g.*, Clavijo v. Fomby, No. 01-17-00120-CV, 2018 WL 2976116, at *1 (Tex. App.—Houston [1st Dist.] June 14, 2018, pet. denied).

129. *E.g.*, *id.*

130. *E.g.*, Lopez v. Osuna, 453 S.W.3d 60 (Tex. App.—San Antonio 2014, no pet.).

131. *E.g.*, Reddy v. Veedell, 509 S.W.3d 435 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

132. *E.g.*, Mem'l Hermann Hosp. Sys. v. Galvan, 434 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2014), *rev'd*, 476 S.W.3d 429 (Tex. 2015).