EXPERT REPORTS IN HEALTH CARE LIABILITY CLAIMS

Justice Peter Kelly[*]

I. OVERVIEW

Chapter 74 of the Civil Practice and Remedies Code requires that, in any case including a health care liability claim, the plaintiff provide, early in the litigation, an expert report setting forth the applicable standard of care, how the standard of care was breached, and how that breach caused the injuries at issue.[1] The legislature first adopted the expert report requirement, rather ineffectually, in 1993 during the first wave of tort reform and amended it to resemble its current form in 1995.[2] In 2003, it was again amended—allegedly nonsubstantially—and codified in Chapter 74.[3]

The plaintiff's bar initially greeted the expert report requirement with trepidation but soon found it salutary. By being put to some measure of proof early in the process, before engaging in intensive discovery, claimants could get a preview of how the trial court would treat a defendant's summary judgment motion.[4] Plaintiff attorneys were forced to screen their cases more carefully and develop theories of liability before filing suit. While the number

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1. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2017).

2. *See* Act of May 25, 1993, 73d Leg., R.S., ch. 625, § 3, sec. 13.01, 1993 Tex. Gen. Laws 2347, 2347, *amended by* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 985–87.

3. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.351, 2003 Tex. Gen. Laws 847, 875 (codified at CIV. PRAC. & REM. § 74.351).

4. *See generally* CIV. PRAC. & REM. § 74.351.

of frivolous cases has always been overblown, the expert report requirement served to reduce the number of risky, more speculative cases.[5]

The expert report requirement, standing alone, did not have a dramatic impact on the availability of remedies for health care liability claims. But, in conjunction with the other changes enacted in 2003, the requirement helped close the courthouse door to deserving claimants. Most cases require more than one expert report (for instance, one for the nurses and another for the doctor), and the going rate for a report, based on an informal survey, is about $10,000.[6] In cases involving the very old or the very young, in which there are no economic damages and the noneconomic damages are capped at $250,000,[7] the expert report requirement can be cost-prohibitive.

In addition to preventing many valid claims from being brought at all, the expert report requirement has led to meritorious claims being dismissed. The Texas Supreme Court has long emphasized that expert reports need only make a threshold showing.[8] Nonetheless, defendants routinely challenge virtually every report, and the courts of appeals in many instances have sustained the challenges. Those courts, though, have gone too far, and apply a too stringent evidentiary test, requiring summary-judgment levels of proof—an almost impossibly high burden given that the reports must be served before the parties have conducted discovery.[9] Recently, though, the Texas Supreme Court has reiterated that "the purpose of the expert report requirement is to weed out frivolous malpractice claims in the early stages of litigation, not to dispose of potentially meritorious claims," and that "the trial court need only find that the report constitutes a 'good faith effort' to comply with the statutory requirements."[10] It remains to be seen whether the courts of appeals will follow the Supreme Court's lead and review expert report challenges under a proper reasonable standard.

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5. *See* Abshire v. Christus Health Se. Tex., 563 S.W.3d 219, 223 (Tex. 2018) (per curiam).

6. JAMES J. MANGRAVITI, JR. ET AL., SEAK, INC., SURVEY OF EXPERT WITNESS FEES 6 (2014), https://www.seak.com/wp-content/uploads/2015/07/2014-SEAK-Survey-of-Expert-Witness-Fees-sample-pages.pdf.

7. CIV. PRAC. & REM. § 74.301.

8. *See, e.g.*, Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 877 (Tex. 2001); *see* Loaisiga v. Cerda, 379 S.W.3d 248, 258 (Tex. 2012).

9. *See generally* Fortner v. Hosp. of the Sw., LLP, 399 S.W.3d 373 (Tex. App.—Dallas 2013, no pet.); Lockhart v. Guyden, No. 01-08-00983-CV, 2009 WL 2050983 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.).

10. *Abshire*, 563 S.W.3d at 223 (quoting CIV. PRAC. & REM. § 74.351(*l*)); *see* Baty v. Futrell, 543 S.W.3d 689, 693–94 (Tex. 2018).

II. HOUSE BILL 4'S SPECIFIC CHANGES TO THE EXPERT REPORT REQUIREMENT

A. Discovery Stay

Subsection 74.351(s) stays discovery in health care liability claims until a compliant expert report has been served.[11]

> Significantly, the only types of discovery not excepted from the stay in subsection 74.351(s) are the oral depositions of parties and pre-suit depositions. Subsection 74.351(s) expressly lifts the stay with respect to requests for disclosure, requests for production, interrogatories, requests for admission, depositions on written questions, and oral depositions of non-parties. The only limitations on the permissible forms of discovery for each claimant established by subsection 74.351(s) are those provided by the rules specifically referenced in that subsection, including, for example, rule 205's limitation of discovery from a non-party to a deposition on written questions, a request for production of documents with an oral examination, and a request for production without deposition.[12]

In 2008, the Texas Supreme Court held that the discovery stay applied to pre-suit depositions under Rule 202 of the Texas Rules of Civil Procedure, under the theory that the stay operated to protect potential defendants.[13] Recently, the Dallas Court of Appeals applied *In re Jorden* in a health care liability action in which the plaintiff sought to depose a potentially liable doctor to investigate whether that doctor should be added as a defendant, and sought the deposition without first providing an expert report.[14] The plaintiff in that case argued that the potential deponent was a nonparty under Rule 205 and, therefore, the deposition of that deponent fell under one of the exceptions to the Chapter 74 discovery stay.[15] The Dallas court held that the potential deponent was not a "nonparty"[16] under Rule 205 because the plaintiff's stated reason for seeking discovery from Dr. Sandate was "to determine whether or not to sue him. Accordingly, Dr. Sandate [was] 'not [a] "nonpart[y]" from whom depositions were allowed by Rule 205.'"[17] The Dallas court reiterated the Texas Supreme Court's analysis in *Jorden* that "[t]he statute distinguishes between 'third parties to a dispute and those directly threatened by it'" and "[t]hose who are directly threatened by a

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11. CIV. PRAC. & REM. § 74.351(s).

12. *In re* Huag, 175 S.W.3d 449, 456 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see* CIV. PRAC. & REM. § 74.351; TEX. R. CIV. P. 192.7, 205.

13. *See In re* Jorden, 249 S.W.3d 416, 421–22 (Tex. 2008).

14. *In re* Sandate, 544 S.W.3d 9, 11–14 (Tex. App.—Dallas 2017, no pet.).

15. *Id.*; *see* CIV. PRAC. & REM. § 74.351(s) (providing that discovery from nonparties under Rule 205 is permitted).

16. *In re Sandate*, 544 S.W.3d at 13.

17. *Id.* (quoting *In re Jorden*, 249 S.W.3d at 422).

lawsuit are 'not "nonparties" from whom depositions were allowed by Rule 205.'"[18] In so doing, though, the Dallas court ignored the plain language of the statute, which explicitly allows, without limitation, Rule 205 depositions.[19]

B. Report Must Be "Served," Rather than "Furnished"

Article 4590i of the Texas Civil Statutes, the predecessor to Chapter 74 of the Texas Civil Practice and Remedies Code, required that the expert report be "furnished" to opposing counsel within 180 days of filing suit, but Chapter 74 shortened the deadline to 120 days and now requires the claimant to "serve" (rather than "furnish") the expert report on each "party or the party's attorney."[20] The Texas Supreme Court has interpreted "the Legislature's use of the word 'serve' to require compliance with Texas Rule of Civil Procedure 21a."[21] Claimants who "furnished" expert reports under Article 4590i were able to satisfy the statutory requirements of §13.01(d) of Article 4590i by mailing the reports via regular mail.[22] Rule 21a, though,

> authorizes service by one of four methods: (1) in person, by agent, or by courier receipted delivery, (2) by certified or registered mail to the party's last known address, (3) by telephonic document transfer to the recipient's current telecopier number, or (4) by such other manner as the court in its discretion may direct.[23]

C. Elimination of Extension of Time by Exercise of Due Diligence

In *Stockton ex rel. Stockton v. Offenbach*, the Texas Supreme Court discussed a defendant-doctor's argument that: "Chapter 74's 120-day deadline may be extended under only two circumstances: (1) 'by written agreement of the affected parties' or (2) by a court order, which permits the claimant to cure a deficient, but otherwise timely served, expert report."[24] The defendant-doctor further argued that: "[A] comparison of Chapter 74 to its predecessor, article 4590i, confirms the Legislature's intent to limit trial

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18. *Id.* at 14 (quoting *In re Jorden*, 249 S.W.3d at 422).

19. *See* TEX. R. CIV. P. 205.

20. *Compare* CIV. PRAC. & REM. § 74.351(a) (requiring a party to serve an expert report within 120 days), *with* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01(d), 1995 Tex. Gen. Laws 985, 986 (requiring a party to furnish an expert report within 180 days), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

21. Stockton *ex rel.* Stockton v. Offenbach, 336 S.W.3d 610, 615 (Tex. 2011); *see* TEX. R. CIV. P. 21(a).

22. Salazar v. Canales, 85 S.W.3d 859, 863–64 (Tex. App.—Corpus Christi 2002, no pet.).

23. *Stockton*, 336 S.W.3d at 615; *see* TEX. R. CIV. P. 21(a).

24. *Stockton*, 336 S.W.3d at 615; *see* CIV. PRAC. & REM. §§ 74.351(a), (c).

court discretion over the expert report deadline because the predecessor statute was more lenient in extending that deadline."[25]

One of the stated goals of the legislature was to impose a "hard-and-fast" deadline, even though there was no demonstration of rampant undue delay under 4590i.[26]

> Under [A]rticle 4590i, a plaintiff could obtain an extension, even when no report was provided by the deadline, if the plaintiff could show an "accident or mistake" in failing to furnish a timely report. Chapter 74 eliminated this provision, and Offenbach submits that the only basis for obtaining a court-ordered extension under the current statute is through a motion to cure a timely served, but deficient, expert report.[27]

D. Sanctions Survive Nonsuit

Under the Article 4590i statute, "a plaintiff was required to file an expert report within 180 days of filing suit or to nonsuit the claim voluntarily."[28] In *Crites v. Collins*, the Texas Supreme Court noted that courts have determined that the rule

> created a "'race to the courthouse' between the plaintiff to file a nonsuit and the defendant to file a motion [for sanctions]." Chapter 74, however, does not contain a similar provision allowing a plaintiff to choose between voluntarily nonsuiting and filing an expert report by the deadline. The Legislature removed the reference to the option of filing a nonsuit, yet the statute continues to provide mandatory sanctions if a plaintiff fails to file an expert report by the statutory deadline.[29]

E. Sanctions Assessed Against Claimant or Claimant's Attorney

Chapter 74 provides:

> if a health care liability claimant does not timely serve an expert medical report, the trial court must "enter an order that . . . awards to the affected physician or health care provider reasonable attorney's fees and costs of court." The current version of the statute does not specify whether the claimant, the claimant's attorney, or both are potentially liable for attorney's fees; however, the previous version of the statute stated that the order for

25. *Stockton*, 336 S.W.3d at 616.
26. *See id.* at 618.
27. *See id.* at 616 (citations omitted).
28. Crites v. Collins, 284 S.W.3d 839, 843 (Tex. 2009) (per curiam); *see* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01(a), (d), 1995 Tex. Gen. Laws 985, 985–86 (repealed 2003).
29. *Crites*, 284 S.W.3d at 843 (citations omitted).

> attorney's fees must be entered "against the claimant or the claimant's attorney."[30]

The issue remains unresolved by the Supreme Court.[31]

F. Ruling on Expert Report Reviewable by Interlocutory Appeal

Under 4590i, an order relating to an expert report was reviewable only by mandamus.[32]

> [A]s part of House Bill 4, the Legislature amended section 51.014 of the Texas Civil Practice and Remedies Code to provide for an interlocutory appeal if a trial court refuses to dismiss a health care liability claim when an expert's statement does not meet the statutory standards. This is another unmistakable statement of public policy that the Legislature does not want health care liability cases to proceed through the legal system if the threshold requirement of an expert report has not been met.[33]

30. Salinas v. Dimas, 310 S.W.3d 106, 111 (Tex. App.—Corpus Christi 2010, pet. denied) (citations omitted).

31. *See generally Salinas*, 310 S.W.3d at 106.

32. *See In re* Woman's Hosp. of Tex., Inc., 141 S.W.3d 144, 148, 150 (Tex. 2004) (Owen, J., concurring) (mem.).

33. *Id.* at 148 (footnote omitted).