CROSSING THE THRESHOLD

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I. VICARIOUS V. DIRECT LIABILITY CLAIMS

In *University of Texas Southwestern Medical Center v. Dale,* 188 S.W.3d 877 (Tex. App.-Dallas, 2006, no pet. h.) the Dallas Court of Appeals held that in cases of pure vicarious liability, an expert report is not required. See also *Gardner v. U.S. Imaging, Inc*. 274 S.W.3d 669 (Tex. 2008) where the Supreme Court confirms that when a party's alleged healthcare liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient to fulfill the expert report requirement.

In *Methodist Charlton Medical Center v. Steele*, 274 S.W.3d 47 (Tex. App.-Dallas 2008 pet. denied) the Dallas Court of Appeals reversed the trial court's order denying the defendant's motion to dismiss plaintiffs claims against the hospital for negligent hiring, supervision, training and retention and rendered judgment dismissing those claims. Plaintiffs filed their original petition September 21, 2006 alleging that the hospital's employee, Taylor, R.N., failed to properly assess, triage and treat Ms. Steele in the emergency room. The plaintiffs alleged that the hospital was *vicariously* liable for Taylor's negligence. The plaintiffs timely served expert reports regarding the claims presented in their original petition.

Plaintiffs later amended their petition adding *direct* liability claims against the hospital for negligent hiring, supervision, training and retention. An expert report addressing *the direct liability* claims was not served. Since direct liability claims require service of an expert report and no report was served, the direct liability claims were dismissed.

II. NEW THEORIES MAY BE DEVELOPED AFTER CROSSING THE THRESHOLD

In *Schmidt v. Dubose*, 259 S.W.3d 213 (Tex. App.-Beaumont 2008, no pet. h.) the defendants complained that the plaintiffs' Chapter 74 report expressed a different opinion regarding breach of the standard of care than his expert report designation for trial purposes. The Beaumont Court held that "a sufficient expert report in a healthcare liability claim is not required to marshal and present all of plaintiffs' proof and is generally not admissible into evidence by any party; cannot be used in a deposition, trial or other proceedings; and shall not be referred to by any party during the course of the action for any purpose unless the expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Section 74.351(a)...Once a claimant uses the report for other purposes, which apparently happened in this case, the issue is no longer Section 74.351(a)'s threshold requirement, but one of compliance with discovery rules...No discovery rules complaint could be presented in this appeal...appellants sought dismissal with prejudice of **only that portion of plaintiffs' claims asserting an additional allegation that defendant was negligent in ways not specified in the original report....**The statute defines an expert report as a written report by an expert that provides a fair summary of the expert's report **as of the date of the report** regarding applicable standards of care...Thus, the plain language of the statute contemplates the expert's opinions **may be amended or supplemented as discovery is completed in the lawsuit**. Here, appellants concede the appellee has a claim sufficient to survive a motion to dismiss, but seeks to limit her claims to the theories described in the original report. **Once the trial court has performed its gatekeeper function under Section 74.351..., subsequent expert reports and opinions are governed by the rules of discovery set forth generally in the Texas Rules of Civil Procedure, e.g., a party's duty to amend and supplement written discovery about a retained testifying expert as governed by 193.5."** *Schmidt v. Dubose* 259 S.W.3d 213 (Tex. App.-Beaumont 2008, no pet. h.)

The same result was reached in *Pedroza v. Toscano* 293 S.W.3d 665 (Tex. App.-San Antonio, 2009, no pet. h.) where the plaintiffs timely served the expert report of Dr. Zeitlin. Plaintiffs subsequently filed their designation of expert witnesses and produced a report by Dr. Lachs, their testifying expert. Dr. Lachs' criticisms of the defendant doctor did not match the criticisms contained in the report offered by Dr. Zeitlin. The defendants filed an interlocutory appeal following the trial court's denial of their motion to dismiss. Citing *Schmidt v. Dubose,* supra, the San Antonio Court held that once the "threshold" requirement of the Section 74.351 expert report requirement has been met, subsequent expert reports and opinions are governed by the rules of discovery. In this case, as in *Schmidt,* Dr. Lachs was not asserting a different cause of action, only a different negligence theory.

The court in *Pedroza* distinguished *Steele* because "no new cause of action was alleged" by Toscano and Martinez.

III. ADDING NEW DEFENDANTS STARTS A NEW 120-DAY CLOCK WHEN AN AMENDED PETITION IS FILED

In *Osonma v. Smith* ____ S.W.3d ___ (Tex. App.-San Antonio, pet. denied) plaintiffs sued two healthcare providers and served expert reports within 120 as to those two defendants. Dr. Osonma and another healthcare provider were added by amended petition. Plaintiff thereafter served Dr. Osanma with an expert report within 120 days of **filing the amended petition, but not within 120 days of filing the original petition.** As to Dr. Osanma, the 120 day period began to run when the plaintiff filed an amended petition naming Dr. Osanma as a defendant. The Texas Supreme Court denied the petition for review on November 20, 2009 and denied the motion for rehearing on January 15, 2010.