Expert Report Cases 2008-2009
Supplement to How To Bulletproof Your Expert Report"

If direct liability is based on a legal principal rather than a medical standard of care, an expert report is not required.

Obstetrical and Gynecological Association v. McCoy 283 SW3d 96 (Tex. App.-Houston [14th Dist.] 2009, pet. filed). McCoy sued individual healthcare providers employed by OGA. McCoy alleged that OGA was vicariously liable for the conduct of the individuals and as provided by the Texas Professional Association Act. Although expert reports were served as to the individual healthcare providers, no expert report was served that specifically addressed OGA's conduct. After OGA's Motion to Dismiss for failing to file an expert report as to it, this interlocutory appeal was taken. OGA argued that since McCoy alleged direct liability claims against it, in addition to the vicarious liability claims, an expert report was required.

The court of appeals reviewed the *Battaglia v. Alexander* 177 SW3d 893, 902 (Tex. App.-2005) where the Texas Supreme Court holds that a professional association has direct liability for the actions of its physician-principal under the Professional Association Act. *Direct liability.* The court of appeals held that if direct liability is based on a legal principal rather than a medical standard of care, an expert report is not required. The court reasoned that if the legal consequences to the professional association are based solely on the doctor's conduct, *and no allegation is made that the professional association itself is negligent in some way, then a separate expert report addressing the professional association's conduct would appear to be unnecessary.*

The Texas 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. *Gardner v. U.S. Imaging, Inc.* 274 SW3d 669 (Tex. 2008).

Tolling of the 120 Day Report Requirement

In *Gardner v. U.S. Imaging, Inc.* 274 SW3d 669 (Tex. 2008) the Texas Supreme Court holds that when a defendant fails to timely answer suit by the Monday following the expiration of 20 days after it is served, the statutory period for serving the expert report is tolled until such time as the defendant makes an appearance. Here, Defendant SADI was served with the petition filed August 24, 2006, but failed to answer. A default judgment was rendered December 14, 2006. On February 8. 2007 the court granted an agreed motion for new trial and set aside the default judgment. SADI filed an answer on February 12 and the Gardner's served it with an expert report on March 20. Once the defendant filed its answer on February 12, the tolling ended and the Gardner's had 120 days remaining. Therefore, by serving its expert report on March 20, they were well within the remaining statutory period of time to serve the report.

Once the Threshold Expert Report Requirement is Satisfied, New Theories of Liability May be Advanced, But Not New Causes of Action

In Methodist Charlton Medical Center v. Steele 274 SW3d 47 (Tex. App.-Dallas 2009, pet filed) the Dallas Court held that where plaintiff in their original petition alleged vicarious liability on the part of the hospital for the negligence of its employees, that their amended petition 236 days later adding direct liability claims for negligent hiring, supervision, training and retention were required to be dismissed for failure to serve an expert report on the direct liability claims within 120 days of filing the original petition. *Pedroza v. Toscano* __SW3d ___ (Tex. Civ. App.-San Antonio 2009, ___) distinguishes *Steele*. In *Pedroza*, plaintiffs timely served the expert report of Dr. Zeitlin. Plaintiffs subsequently filed their designation of expert witnesses and produced a report by Dr. Lachs, who was identified as their testifying expert. Dr. Lachs' criticisms of the defendant doctors did not match the criticisms contained in the report offered by Dr. Zeitlin. The defendant's filed an interlocutory appeal following the trial court's denial of their motion to dismiss. Citing *Schmidt v. Dubose*, 259 SW3d 213 (Tex. App.-Beaumont 2008, no pet.) 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.

1. You cannot avoid sanctions with a non-suit. *Crites v. Collins*, Texas Supreme Court May 15, 2009.

8-18-05: Suit filed.

12-16-05: 120 days.

12.30.05:

No reports

Non-suit filed.

1-3-06: Motion for Sanctions filed.

1-19-06: Order of non-suit signed.

2-24-06: Hearing on motion for sanctions - denied.

Court of Appeals: Since the non-suit was filed before sanctions, there are no sanctions.

Texas Supreme Court reverses, holding that a non-suit does not affect the trial court's power to grant sanctions so long as the court's plenary power has not expired.

Unlike Article 4590i, there is no option of serving reports or taking a non-suit.

COMMENT: Although the notice of non-suit was filed after 120 days, there is nothing in the *Crites* opinion that a different result would have been reached if the non-suit had been filed before 120 days. My opinion is that if you file a medical malpractice lawsuit without an adequate expert report, you are probably going to get sanctioned, even if you non-suit before 120 days.

2. All discovery is stayed in a medical malpractice case during interlocutory appeal by the defendant following denial of a motion to dismiss.

In re: Lumsden - 14th Court of Appeals May 21, 2009.

In this malpractice case, there are multiple defendants. All defendants were served with expert reports. All defendants filed motions to dismiss. All motions to dismiss were denied.

Only one defendant filed an interlocutory appeal. This defendant filed a motion to stay discovery pending the appeal. The trial court denied the motion the stay discovery pending the outcome of interlocutory appeal.

The 14th Court of Appeals holds that all discovery is stayed until the court of appeals has determined whether the expert report is adequate or not.

Furthermore, the stay on discovery is as to all defendants, even those not appealing.

Even though TRAP 51.014(b) does not stay discovery during interlocutory appeals on denials of motions to dismiss for adequacy of reports, Chapter 74 trumps TRAP 51.014(b).

3. Expert reports must be served on the defendant or the defendant's attorney within 120 days of filing the lawsuit ***even if you cannot find the defendant to serve him with the petition. Offenbach v Stockton Dallas COA March 2009***

June 13, 2007. Petition seeking to recover damages for birth trauma was filed against Dr. Offenbach. Attached to the petition was a report and curriculum vitae. This same report and curriculum vitae had been sent pre-suit to Dr. Offenbach's insurance company.

Dr. Offenbach was a cocaine addict who had had his license taken away. He was a transient individual and could not be located.

Plaintiff filed a motion for substituted service within one month of filing the lawsuit. However, the order for substituted service was not signed until day 149.

The Dallas Court of Appeals reversed the trial court's denial of the motion to dismiss. The failure to serve within 120 days is fatal in all cases.

4. Once the Chapter 74 report threshold is crossed, a plaintiff in a medical case is not limited to the theory of negligence in the Chapter 74 report.

Pedroza v. Toscano, San Antonio Court of Appeals May 20, 2009.

The Chapter 74 report of Dr. Zeitlin was served and went unchallenged.

Plaintiffs designated Dr. Lach as their expert witness and not Dr. Zeitlin.

Dr. Lach had completely different criticisms and theories of negligence than Dr. Zeitlin. The San Antonio Court of Appeals distinguished *Methodist Charlton v. Steele* because this was not a new or different cause of action, but a different negligence theory.

Once the threshold of Section 74.351 is met and satisfied, the case is controlled by the Texas Rules of Civil Procedure.

Columbia v. Hogue – 271 S.W.3d 238 (Tex. 2008) Texas Supreme Court .

In this case, the hospital was liable because they could not do a STAT echo.

At admission, Robert Hogue failed to tell the doctors that he had a heart murmur. The doctor said he "might" "perhaps" "possibly might have" put heart higher on the differential diagnosis if he had been told that Mr. Hogue had a history of heart murmur.

The hospital complained of the trial court's denial of a contributory negligence issue.

The Supreme Court held it was not error. The testimony that the doctor "might" "perhaps" "possibly might have" put heart higher on the differential diagnosis was nothing more than speculation.

Practice pointer: if the defense theory is based on speculation - possibility - instead of probability, then file a motion for summary judgment, Daubert challenge and motion in limine.

Tolling of the 120 days

In *Morris v. Umberson*, ___SW3d ___, 2009 WL 3672915 (Tex. App.-Houston [1st Dist.] 2009) the trial court and appellate court agreed with plaintiff that the 120 day period was told for the period beyond the answer date before the defendant filed an answer:

> We hold that the statutory period for Umberson to serve her expert report on Dr. Morris was tolled until May 7, 2009, the date Dr. Morris answered. Dr. Morris untimely answered on May 7, 2009. The statutory period for timely serving the expert report was tolled until that date. Umberson had 75 days remaining until July 21, 2009, to serve her expert report on Dr. Morres, 120 days less 45 days that had already elapsed from date of filing to date that Dr. Morris answer was due). Accordingly, we further hold that Umberson's expert report was timely served on Dr. Morris on May 11, 2009.

November 21, 2008:	Umberson filed suit.
December 9, 2008:	Morris served with citation - answer due January 5, 2009.
February 6, 2009:	Umberson filed Dr. Ahsan Ali's expert report and curriculum vitae, but did not serve it on Dr. Morris, who still had not answered.
April 30, 2009:	Umberson filed a "Motion for Interlocutory Default Judgment as to Liability Only"
May 7, 2009:	Dr. Morris filed his answer.
May 11, 2009:	Umberson served Morris the expert report and curriculum vitae of Dr. Ali.

Serving the Defendant's Attorney with the Report and Curriculum Vitae Before the Healthcare Provider Answers is Served in Answers.

In *Dingler v. Tucker* Ft. Worth Court of Appeals November 19, 2009, Plaintiff's sued Dr. Nacona and Dr. Dingler. Mike Wallach answered for Dr. Nacona and plaintiff served Mike Wallach with an expert report that implicated both Nacona and Dingler. Dingler, however was not served within 120 days of the filing of the petition. He ultimately was served and Jennifer Andrews of Mike Wallach's firm answered for Dr. Dingler. In a 2-1 opinion, the Fort Worth Court of Appeals held that the trial court should have dismissed Dr. Dingler on his motion because although Dr. Dingler's lawyers had been served with the report within 120 days, he was not a "party" to the lawsuit until he was served.

Effect of Nonsuit on right to pursue interlocutory appeal.

In *Hernandez v. Ebron*, 289 SW3d 316 (Tex. 2009) the Texas Supreme Court holds that there is no time limit for a defendant to file an interlocutory appeal from the denial of a motion

to dismiss. Six months after the denial of the motion to dismiss, the plaintiff took a nonsuit. Dr. Hernandez filed his interlocutory appeal after the nonsuit. Since pursuit of an interlocutory appeal is permissive and not mandatory, the Texas Supreme Court holds that the court of appeals had jurisdiction to entertain the interlocutory appeal.

Plaintiff may add additional defendants beyond 120 days from the original petition.

In *Osanna v. Smith*, ___SW3d ___ (Tex. App.-San Antonio, pet. denied) Plaintiff originally sued two healthcare providers and served expert reports within 120 days as to those two defendants. Dr. Osanna and another healthcare provider were added by amended petition. Plaintiff served Dr. Osanna 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. Osanna, the 120 day period began to run when the plaintiff filed an amended petition naming Dr. Osanna as a defendant. The Texas Supreme Court denied review November 20, 2009.