

## **EXPERT REPORTS UNDER ARTICLE 4590i**

For historical purposes, and to offer comparison with Chapter 74, Article 4590i's expert report and cost bond requirements are set forth herein. Since a great deal of case law and judicial analysis informs Article 4590i's requirements, and may in some instances carry forward to the interpretation of Chapter 74, both 4590i and its related case law are still relevant. Section 13.01 of Article 4590i, innocuous on its face and benign in intent, has given rise to considerable satellite litigation, with resultant appellate court activity. Section 13.01 provides:

*A claimant shall, not later than the 90th day after the date the claim is filed:*

*(1) File a separate cost bond in the amount of \$5,000 for each physician or health care provider named in the action;*

*(2) Place cash in an escrow account in the amount of \$5,000 for each physician or health care provider named in the action; or*

*(3) File an expert report for each physician or health care provider with respect to whom a cost bond has not been filed and cash in lieu of the bond has not been deposited under Subdivision (1) or (2) of this subsection.*

*If a claimant fails to comply with this provision, the defendant can move the court to order that:*

*(1) Requires the filing of a \$7,500 cost bond with respect to the physician or health care provider not later than the 21st day after the date of the order; and*

*(2) Provides that if the claimant fails to comply with the order, the action shall be dismissed for want of prosecution with respect to the physician or health care provider, subject to reinstatement in accordance with the applicable rules of civil procedure and Subsection (c) of this section.*

It is important to note that this section only applied to plaintiffs. Defendants were not required to file any expert reports or cost bonds by the 90th day. The defendant in each health care liability claim only needed to abide by the Texas Rules of Civil Procedure when supplying an expert report if some other agreement with the plaintiff or court order had not occurred.

Section 13.01 further provided that a claimant must, by the 180th day after filing suit "furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report."

If the claimant failed to do so, he or she must voluntarily non-suit the action against the health care provider for which the report was not filed. (13.01(d)(2).)

In the reported case, *Jones v. Khorsandi*, 148 S.W.3d. 201 (Tex. App. - Eastland, 2004 n.p.h.), Plaintiff's counsel, in a good faith conversation with Defense counsel, indicated her intent to non-suit her case, as permitted by the Texas Rules of Civil Procedure. Non-suit in Texas is, of course, effective either upon filing or upon a Motion being made orally in open court.

As soon as Defense counsel heard this comment from Plaintiff's counsel, but without advising her in any way, he "raced" to the courthouse to file a Motion for Sanctions and/or Dismissal based on inadequacy of Plaintiff's expert report. This was an attempt to make a Motion for Affirmative Relief which eliminates the right to non-suit.

The *Jones* court spoke disapprovingly of Defense counsel's conduct, and then mooted the discussion by finding that the claim was not a health care liability claim in any event, so that no report was required, and therefore the Motion For Sanctions / To Dismiss, based on the report, was irrelevant.

Because this provision is so stringent and has such dire consequences, the legislature provided a grace period of an additional 30 days to allow a claimant to file an expert report by the 210th

day, if the claimant can show “good cause” for the failure to file.

(f) *“The court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.”*

Additionally, at Section (g), the statute provides for another possible extension, when plaintiff’s failure to file is the result of accident or mistake.

(g) *Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by “Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant’s attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under subsection (e) of this section.*

In 2001 the Supreme Court addressed §13.01 in *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001). Two aspects of the opinion are significant: First, the requirements for the content of the report are made more strict, with emphasis on spelling out of the expert’s opinions, and second, the Court makes the standard for review of the trial court’s decision an abuse of discretion standard. Writing for a unanimous Court, Justice Hankinson describes the requirements for the content of the expert’s report as follows:

“the definition requires, as to each Defendant, a fair summary of the expert’s opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury.” ...[thus], the report must inform the Defendant of the specific conduct the Plaintiff has called into question. ...and equally important, the report must provide

a basis for the trial court to conclude that the claims have merit. ...A report that merely states the expert’s conclusions about the standard of care, breach, and causation does not fulfill these two purposes.

In addition to *Palacios* numerous appellate decisions discuss the implications of §13.01.

#### 1. Failure to File: Accident or Mistake vs. Conscious Indifference

A claimant’s failure to file an expert report can result in dismissal of the claim with prejudice if the court finds that the claimant acted intentionally or with conscious indifference in not complying with section 13.01. If a claimant’s failure to file is merely an accident or mistake, however, the trial court abuses its discretion in dismissing the case with prejudice. Some mistakes, such as those covered below, involving calendaring errors or the like, can be excused as evidence in and of themselves of lack of conscious indifference or intent. Others, characterized as “mistakes of law”, require stricter scrutiny. *Walker v. Gutierrez*, 111 S.W.3d. 56 (Tex. 2003), elucidates this requirement. While “some mistakes of law may negate a finding of intentional conduct or conscious indifference, entitling the claimant to a grace period under 13.01(g),”...“not every act of a [claimant] that could be characterized as a mistake of law is a sufficient excuse”. Failing, as in the *Gutierrez* case, to address two of the three statutory requirements, in this case standard of care and the manner in which the standard was breached, does not establish a “sufficient excuse” to justify a finding of mistake of law. Filing of a report with such deficiencies does not negate a finding of intentional or conscious indifference. Similarly, in *Horizon/CMS Health Care v. Fischer*, 111 S.W.3d. 67 (Tex. 2003), omission in the expert report of both the standard of care and any causal connection between the conduct and plaintiff’s injuries was not such a “mistake of law” as to support a finding of “mistake” and to negate a finding of “intent or conscious indifference”.

- a. Examples of “Mistake”.
- i. The “Impliedly Critical” Report

In *Horsley-Layman v. Angeles*, 968 S.W.2d 533 (Tex. App. – Texarkana, 1998, n.p.h.), the plaintiffs filed suit against two defendants but had timely filed an expert report as to only one of them. The attorney for the plaintiffs testified at the hearing on the defendant’s motion to dismiss that he believed that he had substantially complied with the expert report requirement because he provided a report that was “impliedly critical” of that defendant. *Id.* at 535. The court of appeals found that Plaintiff’s counsel had set forth sufficient facts to negate any claim that his failure to file was intentional or the result of conscious indifference.

Previously, in *Jackson v. Mares*, 802 S.W.2d 48, 50 (Tex. App. - Corpus Christi, 1990, writ denied) and *Craddock v. Sunshine Bus Lines*, 133S.W.2d 124 (Tex. 1939), in the context of review of a default judgment, the court held that some excuse, not necessarily a good one, would suffice to prevent the harsh result of a default. The *Horsley-Layman* court analogized this concept and found it apposite in the 13.01 dismissal context to prevent the dismissal of the plaintiff’s suit for failure to comply with the 180-day deadline. “We assume the legislature intended that we construe these terms ... in a manner similar to the default judgment context”. *Id.* at 535.

- ii. Limitations on “Some Excuse”

*Estrello v. Elboar*, 965 S.W.2d 754 (Tex. App. – Fort Worth, 1998, n.p.h.) also addressed the consequences for not timely filing an expert report, but reached a different conclusion. The plaintiff missed the 180-day filing deadline by almost two and a half months. The defendant moved to dismiss. The trial court granted the motion, presumably finding the plaintiff’s excuses for not meeting the 180-day deadline insufficient to demonstrate mistake under 13.01(g). The plaintiff alleged that she missed several appointments with the expert and the expert did not return her telephone calls. In reviewing the trial court’s decision, the court of

appeals upheld the dismissal, stating that the plaintiff’s excuses did not suffice to meet the statutorily prescribed mistake or accident excuses under Section 13.01(g), and that Section 13.01(f) was designed for use when a plaintiff needs “a little extra time to comply” with the 180-day deadline (not two and a half months).

- iii. Assignment to associate, failure to read statute.

In *Roberts v. Medical City of Dallas Hospital*, 988 S.W.2d 398 (Tex. App. – Texarkana, 1999, writ refused), the plaintiffs’ case was dismissed for failing to comply with the expert report requirement. The plaintiffs’ attorney had an expert report which he had instructed his secretary to file. He then turned the case over to a newly-graduated associate with no medical malpractice litigation experience. Just six days before the running of the 180-day deadline, the associate received a telephone call from one of the defense attorneys informing him that no expert report had been filed and that the attorney was going to be filing a motion to compel the posting of a bond pursuant to Article 4590i. *Id.* at 400. The supervising attorney’s mistaken belief that an expert report had already been filed by his secretary was not controverted by the defendants, nor was the associate’s claim that he mistakenly believed that he needed to file a formal affidavit. The defendants offered no evidence that the associate knew the correct document to be filed (affidavit vs. report), and intentionally failed to file it. *Id.* Thus, the trial court had abused its discretion in ignoring plaintiff’s un-controverted evidence of mistake/absence of conscious indifference, mandating reversal.

- iv. Attorney’s Busy Docket

Another claimant sought to save her case from dismissal for failure to file a timely Sec. 13.01 report through the affidavit of her attorney, in which he asserted that the reasons for his failure to timely provide the report included: 1) the lateness with which the case was referred to him, 2) the large amount of work created by the case and others he was handling, and 3) his assumption that opposing counsel would not

“press the issue” and seek strict compliance with the report filing requirements. *Broom v. MacMaster*, 992 S.W.2d 659 (Tex. App., Dallas, 1999 n.p.h.). The Court held that:

None of these reasons constitutes a “mistake” or “accident” that would justify his failing to meet a known statutory deadline. *Broom* at 664.

v. Mistaken Mailing of Wrong Document

Conversely, mistake was proven in *McClure v. Landis*, 959 S.W.2d 679 (Tex. App. – Austin, 1997, writ denied), where the proof was that the plaintiff’s attorney had the report in time to meet the deadline, but that a letter from the plaintiff’s expert was inadvertently mailed to defense counsel instead of the report.

vi. Calendaring Errors

Calendaring errors can be proof of accident or mistake. *Presbyterian v. Afangideh*, 993 S.W.2d 319 (Tex. App. – Eastland, 1999, writ denied).

vii. Deposition Testimony May Not Suffice

In *Wood v. Tice*, 988 S.W.2d 829 (Tex. App. - San Antonio, 1999, writ denied), the court of appeals held that the trial court did not abuse its discretion when it dismissed the plaintiff’s case for failing to file an expert report under Article 4590i. The plaintiff attempted to meet the expert report requirement by referring the court and the defendants to the deposition testimony of a co-defendant. The deposition testimony did not mention any defendants by name or describe how any of them breached the standard of care, and no curriculum vitae was provided, and also failed to establish a causal connection. The court held that the testimony thus failed to meet the Section 13.01 requirements as a matter of law.

The trial court’s dismissal was reviewed on an abuse of discretion standard. Here, unlike in *Horsley-Layman*, plaintiff’s counsel’s statement about his mistaken belief was controverted by

different factual recitations by defendant’s counsel. Because the trial court ruled based on conflicting evidence, the court of appeals could not find abuse of discretion. *Wood* at p. 832

viii. “I Forgot”

In a not for publication case, cited here for illustrative purposes, counsel’s justification for failure to file the Section 13.01 report was that he “flat forgot”, that, at 69 years of age, his memory was “not what it once was in earlier years”, and that he had recently undergone open heart surgery and experienced “left main artery blockage” which may have affected his memory. He stated that the failure to furnish the report was “due solely to my inattention and faulty memory”, not intentional or consciously indifferent. *Dablemont v Dallas County Hospital District*, 2000 WL 17044 (Tex. App. - Dallas, 2000 n.w.h.) (**not designated for publication**). The court found that the “I flat forgot” explanation negated conscious indifference, and absent any testimony to the contrary, the trial court should have granted the 30-day grace period under Section 13.01(g), erred in not doing so, and therefore remanded the case for further proceedings.

ix. Negligence Does Not Equal Conscious Indifference

More than mere negligence is required to prove conscious indifference in missing the 13.01 180-day deadline. *Roberts v. Medical City of Dallas Hospital*, 988 S.W.2d 398 (Tex. App. – Texarkana, 1999, writ refused).

x. Hurricanes and other Acts of God as “Accident”

Can a natural disaster such as hurricane Allison and the notorious flooding it caused in the Houston area constitute an “accident” for purposes of justifying an extension under Section (g)? Yes, but the disaster must happen before the 180 day deadline passes, not after it. *Powers v. Memorial Hermann Hospital System*, 81 S.W.3d. 463 (Tex. App. - Houston [1st], 2002, writ ref’d).

xi. Expert change of mind as “accident”

When plaintiff’s retained expert unexpectedly and surprisingly “fell through” and declined to provide a report two weeks before the 180 day deadline, and plaintiff was unable to find another expert in time to comply, that happening was an “unexpected event” justifying granting of a 13.01(g) extension, and trial court did not, therefore, abuse its discretion in granting extension. *Logsdon v. Miller*, 2002 WL 437284 (Tex. App. - Austin, 2002, writ ref’d.), (**not designated for publication**). See also, *Harris v. Morgan*, 2002 WL 509700 (Tex. App. - Dallas, 2002, pet. refused) (**not designated for publication**), to the effect that an expert’s “change of opinion,” which resulted in report not being timely filed, justified an extension under Section 13.01(g), but did not save plaintiff from summary judgment when motion to extend time to respond to motion for summary judgment was denied due to plaintiff’s failure to use due diligence in procuring expert testimony.

b. Intent or Conscious Indifference

By contrast to the “mistake” cases, conscious indifference means “failing to take some action which would seem indicated to a person of reasonable sensibilities under similar circumstances.” *Prince v. Prince*, 912 S.W.2d 367, 370 (Tex. App. – Houston [14th] 1995, n.p.h.)).

i. Intentional Filing of Report Known Not to Meet Requirements

In *Schorp v. Baptist Memorial Health System*, 5 S.W.3d. 727 (Tex. App. - San Antonio 1999, n.p.h.) the plaintiff admitted to both defense counsel and the trial court that she intentionally filed a document she knew did not meet the requirements of section 13.01, in an attempt to minimize the costs of the litigation.

The only evidence before the court was that the plaintiff’s attorney intentionally filed a non-complying expert report in an attempt to save litigation costs, and dismissal was therefore proper.

ii. Attorney’s Knowing Failure

A case subsequent to *Roberts, supra*, and *Schorp, supra*, addressed the meaning of “conscious indifference” and “accident or mistake” under section 13.01(g). In *Nguyen v. Kim*, 3 S.W.3d. 146 (Tex. App. - Houston [14th Dist.] 1999, writ refused), the plaintiffs’ attorney missed the statutory 90-day and 180-day deadlines for filing expert reports under Article 4590i. This was so even after the defense attorney reminded the plaintiffs’ attorney via letter of the approaching deadline and cited the applicable statute that mandated the filing. *Id.* at 153.

The plaintiffs’ attorney in *Nguyen* made no effort to look at the statute or file an expert report or cost bond in spite of receiving repeated warnings and notifications by the defense attorney. In addition, the plaintiffs’ attorney affirmatively represented to both the defense attorney and the court that he was unaware of the statute’s provisions when the record contained notifications and citations to the plaintiffs’ attorney about what the statute required. *Id.* The court wrote, “Certainly, it would strain credibility to conclude from this record, which is replete with notices, warnings and even citations to the statute, that their non-compliance was the result of any unawareness or ignorance of the requirements ...” *Id.* Unlike the attorney in *Roberts*, who was acting under the mistaken belief that an affidavit, as opposed to a report, had to be filed, the plaintiffs’ attorney in *Nguyen*, intentionally and with conscious indifference, failed to take any action that would comply with the statute despite repeated warnings, thus, justifying dismissal with prejudice. *Id.* See also, *Castellano v. Garza*, 110 S.W.3d. 70 (Tex. App. - San Antonio, 2003 n.p.h.), where counsel withheld a report because all necessary records for the expert’s review were not available. This was an intentional failure to file.

iii. Reliance on Scheduling Order

While an Agreed Scheduling Order can preempt the deadlines in Section 13.01, certain requirements must be met in order for such a

result to be reached. *Finley v. Steenkamp*, 19 S.W.3d. 533 (Tex. App. – Fort Worth, 2000, n.p.h.) stands for the proposition that the Agreed Order must be specific about superseding in 4590i deadlines and should be on file before those deadlines arise.

A similar result was reached in *Tesch v. Stroud*, 28 S.W.3d. 782 (Tex. App. - Corpus Christi, 2000, writ refused), wherein the dueling affidavits of the parties’ attorneys tell the tale: Plaintiffs’ counsel filed an affidavit stating she “had an agreement with appellee’s counsel to extend the deadline, but that appellee’s counsel had failed to return the signed agreement to her.” On the other hand, Appellee’s counsel filed a counter-affidavit stating that there was “an oral agreement concerning a scheduling order to extend discovery deadlines for the designation of experts, but they had no agreement to extend the deadline for presentation of the expert report required by article 4590i, Sec. 13.01(d).” The Court held that the failure to file was intentional, and not mere mistake, despite counsel’s stated reliance on the oral promises of defense counsel. Since Sec. 13.01 explicitly requires that any agreement between the parties to extend the section deadline must be in writing and signed by both parties or their counsel and filed with the court, “no ‘person of reasonable sensibility under similar circumstances’ would rely on an oral agreement to extend the expert report deadline.” *Tesch* at p. 5. See also, *Cigna Health care v. Pybas*, 127 S.W.3d. 400 (Tex. App. - Dallas, 2004, n.p.h. judgment withdrawn by *Cigna Health care v. Pybas*, 2004 WL 585008 (Tex. App. - Dallas 2004) for the need for caution in making agreements to extend.

iv. Failure to File Because the Expert Needs More Time

A plaintiff who failed to file her report within the requisite 180 days had intentionally failed to file when the failure was due to plaintiff’s expert’s need for more time to examine and test plaintiff. This was not a “mistake,” but and “intentional” failure to file. *Pfeiffer v. Jacobs*, 29 S.W.3d. 193 (Tex. App. – Houston [14th], 2000, writ ref’d). See also, *Walker v. Thornton*,

67 S.W.3d. 475 (Tex. App. - Texarkana, 2002, n.p.h.).

v. Mistake v. Ignorance

A case subsequent to *Palacios, Gutierrez v. Walker*, 50 S.W.3d. 61 (Tex. App. - Corpus Christi 2001 reversed by *Walker v. Gutierrez*, 111 S.W.3d. 56 (Tex. 2003)), elucidates the difference between ignorance of Article 4590i’s requirements and mistake as to those requirements. In *Gutierrez*, the expert reports filed by appellants were deficient in that they failed to address two of the three statutory requirements: the standard of care and how it was breached. The Supreme Court held that Plaintiff’s counsel’s mistaken belief that he “believed the reports complied with the statute”, “in light of the clear statutory requirements to the contrary” does not establish a “sufficient excuse” necessary to support a finding of mistake of law. “Instead, we hold that, when a claimant files a report that omits one or more of Section 13.01(r)(6)’s required elements, a purportedly mistaken belief that the report complied with the statute does not negate the finding of “intentional or conscious indifference.” *Walker* at p.64.

vi. Proof of Mistake

It is important to note the several opinions which elucidate the means by which proof of inadvertence or mistake on the one hand, or of intent or conscious indifference on the other, must be accomplished. In *Horsley-Layman v. Angeles*, 968 S.W.2d 533 (Tex. App. – Texarkana, 1998, n.p.h.), plaintiffs’ counsel filed a verified motion for extension of time, asserting the reasons for having missed the deadline. This raised prima facie evidence of mistake, and negated intent or conscious indifferent. The defense filed no controverting evidence. Under such circumstances, the court held “that the trial court abuses its discretion by not granting the extension under the circumstances of uncontroverted testimony”. *Horsley-Layman* at p. 536.

In a second part of the *Horsley-Layman* opinion, the court elaborated on the procedure for the defendant to follow in trying to have a case dismissed once plaintiff has made a *prima facie* showing negating intent or conscious indifference. The non-movant defendant must “specifically controvert” plaintiff’s proof of mistake. Here, the court of appeals overturned the dismissal because the defendant failed to produce any evidence that controverted the plaintiffs’ attorney’s evidence of his belief that the timely-filed report complied with Article 4590i’s statutory requirement. *Id* at 536.

Although in some instances, unsworn testimony by Plaintiff’s counsel about the nature of the mistake might be considered “evidentiary”, this is not usually the case. In *Knie v. Piskun*, 23 S.W.3d. 455 (Tex. App. – Amarillo, 2000, pet. denied), the Court held that an attorney’s unsworn statement did constitute evidence, because “the evidentiary nature of Knie’s attorney’s statements was apparent.” *Knie v. Piskun*, 23 S.W.3d. 455, 463 (Tex. App. – Amarillo, 2000, pet. denied). However, in a case following *Knie*, *Landry v. Ringer*, 44 S.W.3d. 271 (Tex. App. - Houston [14th], 2001, n.p.h.), plaintiff’s attorney’s unsworn statement was insufficient to constitute “evidence” of “mistake” such as to invoke the protections of Section (g) of the statute.

A recent trial court dismissal based on Plaintiff’s failure to file a verified response was reversed. *Marquez v. Providence*, 57 S.W.3d. 585 (Tex. App. - El Paso, 2001 writ ref’d.) stands for the proposition that Plaintiffs’ evidence of mistake in seeking a §13.01(g) extension need not be verified. After lengthy analysis of the *Craddock*, *supra*, standard relative to setting aside default judgments, the El Paso Court found that had the Legislature intended to require verified or sworn explanations of mistake, it could have done so. It did not do so, and though the Court states that it is “by far the better practice” to file sworn evidence of mistake, it is not required. Conclusory statements alone will not constitute adequate proof of “accident or mistake.” The Plaintiff must demonstrate in some way what exactly the error was. *Doades v. Syed*, 94 S.W.3d. 664 (Tex. App. - San Antonio, 2002, n.p.h.). See also, *Patton v. Healthsouth*,

2004 WL 253282 (Tex. App. - Houston [1st] 2004 n.p.h.) (**not designated for publication**) regarding the importance of evidence of mistake.

## 2. Adequacy of the Expert Report

Another entire area of satellite litigation spawned by § 13.01 involves the adequacy of plaintiffs’ experts’ reports. Failure to adhere to the definition of “expert report” found in Article 4590i can result in dismissal of the plaintiff’s claims with prejudice to their refileing.

Section 13.01(r)(6) defines “expert report” 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.*

In 2001 the Supreme Court addressed §13.01 in *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001). Two aspects of the opinion are significant: First, the requirements for the content of the report are made more strict, with emphasis on spelling out of the expert’s opinions, and second, the Court makes the standard for review of the trial court’s decision an abuse of discretion standard. Writing for a unanimous Court, Justice Hankinson describes the requirements for the content of the expert’s report as follows:

“the definition requires, as to each Defendant, a fair summary of the expert’s opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury.” ...[thus], the report must inform the Defendant of the specific conduct the Plaintiff has called into question. ...and equally important, the report must provide a basis for the trial court to conclude that the claims have merit. ...A report that merely states the expert’s conclusions about the standard of care, breach, and causation does not fulfill these two purposes.”

Since *Palacios, supra*, courts finding reports adequate despite challenge under *Palacios* are as follows: *Moore v. Sutherland*, 107 S.W.3d. 786 (Tex. App. - Texarkana 2003 pet. denied), *Birdwell v. Texarkana Memorial Hospital*, 122 S.W.3d. 473 (Tex. App.- Texarkana, 2003, pet. denied), *Russ v. Titus Hospital District*, 128 S.W.3d. 332 (Tex. App. - Texarkana 2004 pet. refused), *Chandler v. Singh*, 129 S.W.3d. 184, (Tex. App. - Texarkana 2004 n.p.h. ).

Cases finding deficiencies for failure to include one element or another, or for having too conclusory a statement of opinion, among many, many others, are: *Lopez v. Montemayor*, 131 S.W.3d. 54 (Tex. App - San Antonio, 2003, pet. denied), *Jones v. Ark-La-Tex Visiting Nurses*, 128 S.W.3d. 393 (Tex. App. - Texarkana 2004 n.p.h.) *Hawkins v. Gomez*, 2004 WL 306077 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2004, n.p.h. **(not designated for publication)**), *Dominguez v. Payte*, 2004 WL 343573 (Tex. App. – San Antonio, 2004, n.p.h.) **(not designated for publication)**, *Gonzales v. Graves*, 2004 WL 510898 (Tex. App. – Amarillo, 2004, n.p.h.) **(not designated for publication)**, *Sigler v. Mendoza*, 2004 WL 690710 (Tex. App. – Eastland, 2004 n.p.h.) **(not designated for publication)**. *Kirksey v. Marupudi*, 2003 WL 23096028 (Tex. App. – Amarillo, 2003, n.p.h.) **(not designated for publication)**, *Sutton v. Collums*, 2003 WL 22533688 (Tex. App. – Amarillo, 2003, n.p.h.) **(not designated for publication)**, *Robinson v. Murthy*, 2003 WL 22026593 (Tex. App. - Ft. Worth, 2003, n.p.h.) **(not designated for publication)**, *Hansen v. Starr*, 123 S.W.3d. 13 (Tex. App. – Dallas, 2003, pet. refused), *Strom v. Memorial Hermann Hospital System*, 110 S.W.3d. 216 (Tex. App. - Houston [1st Dist.] 2003, pet. denied).

i. Proof of Error - Section (g)  
Grace Period Still Applies

Section (g) applies to grant a grace period in appropriate cases despite arguments that *Palacios* precludes such grace period. Further, the Court holds that the report not meeting the statutory requirements (omitting causation, specific discussion of the standard of care applicable to various health care providers and

so on), though a failure to comply with the Act, may in fact be the result of accident or mistake rather than conscious indifference. The Plaintiff's attorney in *Whitworth v. Blumenthal*, 59 S.W.3d. 393 (Tex App – Dallas, 2001, writ dism'd by agreement) proved to the trial court that he had never filed a §13.01 report before, believed his report was adequate, and believed he had met the requirements of §13.01. This evidence was un-controverted at the trial court level. Thus, the trial court abused its discretion in not permitting a grace period.

Note that the same report formed the basis of dismissal of the same Plaintiffs' case against the hospital involved in the same underlying incident. In a not-for-publication case, *Whitworth v. Presbyterian Health Care Center*, 2001 WL 1264238 (Tex. App. – Dallas, 2001, n.w.h.) **(not designated for publication)**, the Dallas Court of Appeals upheld the dismissal of the Plaintiffs' claim against the hospital. Since the evidence was contradictory, the Court was free to disregard the evidence justifying the failure to file an adequate report, and to dismiss the case.

The fact that two opinions from the same Court of Appeals about the same report in the same underlying lawsuit can yield contradictory results demonstrates problems with which litigants are faced in dealing with §13.01.

ii. The “Fill in the Blanks”  
Attempt

In *Tibbetts v. Gagliardi*, 2 S.W.3d. 659 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, pet. denied), plaintiff filed expert reports as to each of two defendants. The defendants challenged the reports asserting that they were inadequate because they did not comply with the 13.01(r)(6) definition of “expert report”. Dismissal was proper.

The plaintiff filed two letters that were virtually identical, both written by the plaintiff's counsel on counsel's letterhead. Both asked the experts whether, based on the legal definitions of negligence and ordinary care, the defendant was negligent in his care and treatment of the

plaintiff. Following the questions, were blanks for the expert to check “yes” or “no”. The same format was used for proximate cause. The letters did not contain any signature lines for the experts and there was nothing else about the letters that would indicate that it was actually the expert who answered the check-the-blanks questions. No attempt was made to provide a “fair summary” of opinions concerning the applicable standards of care, to provide a summary of opinions describing how each defendant failed to meet the standards of care or to provide a summary of the experts’ opinion concerning the causal connection between the failure and the damages claimed by the plaintiff. *Id.*

### iii. The Narrative Report

In contrast to *Tibbetts*, another adequacy case emphasizes that, though a report may be informal, it must still track all elements of §13.01. *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001).

Further, a report describing the failure of “the staff” to meet the standard of care for positioning a patient for a colonoscopy was not fatally deficient for failing to name specific nurses by name. *Paslay v. Prigoff*, 2001 WL 637819 (Tex. App. - Dallas, 2001, n.p.h.) (**not designated for publication**).

### iv. Failure to Address Causation

In *Gonzalez v. El Paso Hosp. Dist.*, 2000 W.L. 424321 (Tex. App. - El Paso, 2000, opinion withdrawn & superceded on rehearing by 68 S.W.3d. 712, Tex. App. - El Paso, 2001, n.w.h.), the plaintiff filed a report which did not address causation. As the court noted, although Plaintiffs’ expert’s report clearly documented both a) the applicable standard of care and b) the manner in which that standard had been breached, nowhere in the report did Dr. Martinez “even attempt to explain how (or even whether) the various breaches may have caused the injury, i.e. the death of Appellants’ new born child.” Although the words “cause” or “causation” do not necessarily have to be used (see *Arlington Memorial Hospital Foundation, Inc. v. Baird*,

991 S.W.2d 918, 922 (Tex. App. – Fort Worth, 1999, writ denied)), some substituted word, phrase, or reference is required in order to be fully compliant with Subsection 13.01 (r)(6). Thus, the court found that the Dr. Martinez’ report failed to address causation.

Moreover, importantly, the Plaintiffs’ failure required dismissal with prejudice.

In a similar case, *Hart v. Wright*, 16 S.W.3d. 872 (Tex. App. - Ft. Worth, 2000, writ refused), the Court dismissed plaintiff’s case with prejudice because the report tendered from its expert did not define the standard of care or address causation.

### v. Failure To Use “Magic Words”

Several cases have dealt with the failure of plaintiffs reports to use certain specific words. *Morrill v Third Coast Emergency Physicians*, 32 S.W.3d. 324 (Tex. App. - San Antonio, 2000 writ refused) was a case with an exhaustive expert report, timely filed by plaintiffs.

“Magic” language, for example the term “reasonable medical probability”, is not required to satisfy the requirements of Section 13.01.

Note, however, that mere “possibility” that the deviation from the standard resulted in harm is insufficient. *Bowie Memorial Hospital v. Wright*, 79 S.W.3d. 48 (Tex. 2002).

### vi. Specificity of Content

A host of cases emphasize the importance of specificity in the expert reports. Mere conclusory statements that the standard of care was breached without evidence describing the standard itself, are inadequate. *Bobo v. Berry*, 2001 W.L. 1046931 (Tex. App. - Houston [14th], 2001, writ ref’d) (**not designated for publication**), demonstrates the extent to which *Palacios* has been taken. *Bobo* perpetuates the *Palacios* holding that the report must inform the Defendant specifically of the nature of the conduct about which complaint is made and must contain sufficient information so that the trial court can determine the merit of the lawsuit.

This has since been followed in *Shaw v. BMW Health Care*, 100 S.W.3d. 8, (Tex. App. - Tyler, 2002, pet. refused), *Eichelberger v. St. Paul Medical Center*, 99 S. W. 3d 636, (Tex. App. - Dallas, 2003, pet. refused), *Cleary v. Rohrich*, 2002 WL 1769266 (Tex. App. - Tyler, 2002, n.p.h.), **(not designated for publication)**, *Lira v. Cerna*, 2002 WL 1767569 (Tex. App. - El Paso, 2002, n.p.h.), **(not designated for publication)** and *Forrest v. Danielson*, 77 S.W.3d. 842 (Tex. App. – Tyler, 2002, n.w.h.).

In addition to specificity as to the standard of care, the report must be specific as to how the breach of the standard caused harm. *Bowie Memorial Hospital v. Wright*, 79 S.W.3d. 48 (Tex. 2002). Failure to address causation makes the report inadequate. *Daniel v. Beck*, 2002 WL 31323498 (Tex. App. - Tyler, 2002, n.p.h.) **(not designated for publication)**.

§13.01 requires only a good faith effort to provide a fair summary of the expert’s opinions on each element of the statutory elements. Although “the expert must explain the basis of his statements to link his conclusions to the facts,” it is not necessary that the expert lay out the entirety of Plaintiff’s case in the report. *Petrus-Bradshaw v. Dulemba*, 158 S.W.3d. 630, (Tex. App. - Ft. Worth, 2005, pet. denied). See also, *Hoelscher v. San Angelo Community Medical Center*, 2004 WL 2731967 (Tex. App. - Austin 2004, n.p.h.) **(not designated for publication)**, dissenting opinion, Justice Mack Kidd. Despite a vitriolic dissent by Chief Justice Gray, the Waco court has reached a similar finding in the much reported case of *Langley v. Jernigan*, 76 S.W.3d. 752, (Tex. App. - Waco, 2002), rev’d by, *Jernigan v. Langley*, 111 S.W.3d. 153 (Tex.2003), opinion on remand 2004 WL 1211602 (Tex. App. - Waco 2004) **(not designated for publication)** opinion withdrawn and superceded on rehearing by 2004 WL 2110386 (Tex. App. - Waco, 2004) **(not designated for publication)**, opinion withdrawn on rehearing and superceded by 2005 WL 486759 (Tex. App. - Waco, 2005, **(not designated for publication)**), reversed by *Jernigan v. Langley*, 195 S. W. 3d 91, (Tex. 2006) .

#### vii. TDHS Report Not Sufficient

A Texas Department of Human Services report was not an expert report within the meaning of Section 13.01. *Raney v. Ashford Hall*, 2002 WL 14354 (Tex. App. - Dallas, 2002, pet ref’d), **(not designated for publication)**.

#### 3. Mandamus and Interlocutory Appeals in the Expert Report Context

##### a. Mandamus

The Supreme Court has addressed, but has not resolved, a simmering dispute between the State’s Appellate Courts on the issue of whether or not *mandamus* relief is available in cases involving the denial of a defense Motion to Dismiss for a deficient report under Section 13.01. In a consolidated opinion involving some 10 cases, the Court without opinion, denied *mandamus* in all cases. This drew a blistering dissent from Justices Owen, Hecht and Brister, who favor *mandamus* review of such denials at the Appellate and Supreme Court levels. *In Re Woman’s Hospital of Texas*, 141 S.W.3d. 144 (Tex. 2004). The cases included in the consolidated appeal are *In Re Jeffrey Horsewell, M.D.*, *In Re Kenneth Shapiro*, *In Re Pablo Rodriguez*, *In Re Fort Worth Osteopathic Hospital*, *In Re Craig Barker*, *In Re Southside Family Care Associates*, *In Re Riverside Hospital*, *In Re Derek Farley*, and *In Re Sidney Lynn Redles*. The Court thus left unresolved for the moment whether or not *mandamus* is or is not available in 13.01 cases, though, clearly, in the 10 referenced cases, the majority of the Court opted against granting *mandamus* review. What is unknown is whether *mandamus* review was denied as unwarranted under the facts of each of the 10 cases or whether the denial was based on procedural and jurisdictional grounds, i.e.: that *mandamus* is not an appropriate remedy in such cases.

In any event, the practitioner will note that the Legislature, in Section 51.014(9) and (10), CPRC, has permitted interlocutory appeals from denials of dismissals under Section 74.351(b)[the recodification of Section 13.01]. The cautious practitioner will also note the

distinction between interlocutory appeals and *mandamus* in applying for relief.

One court has held that under Chapter 74, *mandamus* is the proper method for contesting a decision by a trial court that grants a thirty day extension. Citing *In Re Covenant Health System*, 223 S.W.3d. 423 (Tex. App. - Amarillo 2006, n.p.h.), and *In Re Zimmerman*, 148 S.W.3d. 214, 216 (Tex. App. – Texarkana, 2004, no pet.), the Corpus Christi court holds that an order allowing amendment of a report during a thirty day grace period is reviewable on *mandamus*. *Watkins v. Jones*, 192 S.W.3d. 672 (Tex. App. - Corpus Christi, 2006), subsequent *mandamus proceeding In Re Watkins*, 279 S.W. 3d. 633 (Tex. 2009).

However, the Amarillo Court has made it clear that an adequate remedy on appeal exists for Defendants complaining of the grant of an extension of time to file adequate reports. Thus, the Amarillo Court also impliedly finds that it has *mandamus* jurisdiction to consider appeals from the granting of such motions, though on the facts of this case, it did not agree with Defendant's request on the merits. *In Re Covenant Health System*, 223 S.W.3d. 423 (Tex. App. - Amarillo 2006, n.p.h.).

#### b. Interlocutory Appeals

The legislature has made it clear that the right to interlocutory appeals under Chapter 74 is very restrictive. While it is not always entirely clear where the line between denial of a Motion to Dismiss under 74.351(b) and the grant of an extension under 74.351(c), it is abundantly clear that the defense is expressly prohibited by 51.014(a)(9) from bringing an appeal from an order granting an extension. See discussion at p. 88, *supra*.

#### 4. The Standard of Review

The Supreme Court addressed the standard of review in *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001).

Therein the Court adopted the abuse of discretion standard of review. Thus, the legislative intent that a mere threshold showing be met, at a preliminary stage in the case, which would argue for the proposition that the standard of review ought to be less strict than at the summary judgment stage, the Court has instead made the standard of review more strict for the preliminary §13.01 report than for a summary judgment affidavit, while simultaneously stating that the Plaintiff need not meet the summary judgment standard for their evidence. The legislature's desire to screen out frivolous cases has thus been turned into a discovery tool for Defendants, and a point at which cases can be dismissed by a trial court with little recourse for Plaintiffs.

#### 5. The Constitutionality of Section 74.351 and 13.01

The expert report requirement of Section 74.351 does not violate the open courts provision of the Texas Constitution. This suit was brought by a prison inmate who also filed an Affidavit of Indigency and whose case was dismissed as frivolous. *Powell v. Clements*, 220 S.W.3d. 138 (Tex. App. – Waco, 2007, pet.denied). Section 74.351 also does not deny plaintiff's due process right to obtain redress for injuries. *Etheredge v. McCarty*, 2006 WL 1738258 (Tex. App. – Dallas, 2006, n.p.h.) (**not designated for publication**).

In an opinion by Justice Bob Pemberton, former rules attorney for the Supreme Court, and Alan Waldrop, one of the drafters of Chapter 74, the Austin Court finds that the expert report requirement of Chapter 74 does not violate the due process clause. *Bogar v. Esparza*, 257 S.W.3d. 354 (Tex. App. – Austin, 2008, n.p.h.).

The Oklahoma Supreme Court has held Oklahoma's expert report requirement unconstitutional. The requirement violated the Oklahoma Constitution's "Special Law" prohibition, found at Article 5, Section 46 of the Oklahoma Constitution. That section provides as:

"The Legislature **shall not** except as otherwise provided in this Constitution, **pass any local or special law** authorizing:

“... regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts...” [emphasis provided in opinion].

Note that the Texas Constitution contains the following: Article 3, Section 56: (a) the Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

“...16) regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before the courts.”

It is obviously difficult to draw a distinction between the two constitutional prohibitions, since they are verbatim duplicates. *Zeier v. Zimmer*, 2006 OK 98 (Oklahoma, 2006).

Constitutional challenges to section 13.01’s cost bond and expert report requirements met little success. Open Courts, Due Process and Equal Protection challenges all failed.

In *McGlothlin v. Cullington*, 989 S.W.2d 449 (Tex. App. -- Austin, 1999, writ denied). Plaintiff argued that the provisions of section 13.01 violated the due process clause of the United States Constitution and violated the Open Courts provision of the Texas Constitution. *Id.* at 451, but because the plaintiff in *McGlothlin* failed to provide sufficient evidence that section 13.01’s financial requirements actually prevented her from pursuing her claim, the court of appeals did not address the constitutionality issue. *Id.* at 453. See, also, *Knie v. Piskun*, 23 S.W.3d. 455 (Tex. App. – Amarillo, 2000, pet. denied) and *Gill v. Russo*, 39 S.W.3d. 717 (Tex. App. -- Houston [1st], 2001, pet refused).

After *McGlothlin*, another challenge was made to section 13.01’s provisions. In *Andress v. MacGregor Medical Association, P.A.*, 5 S.W.3d. 855 (Tex. App. – Houston [14<sup>th</sup>], 1999, no pet.) the plaintiffs, in this wrongful death and survival action, challenged the constitutionality of the expert report requirement. The plaintiffs in *Andress* failed to comply with Section 13.01 and, after their suit was dismissed with

prejudice, asserted Open Courts and due process challenges against this provision. *Id.* at 858.

The court of appeals upheld the constitutionality of this provision under both constitutional clauses.

## 6. Effect of Non-Suit on the Expert Report Requirement

Heretofore, as evidenced by the *Martinez v. Lakshmikanth*, 1 S. W. 3d 144 (Tex. App. - Corpus Christi, 1999, pet. denied) case, the right to non-suit also applied in health care liability claims, and plaintiff had a “new” 120 day clock in the later re-filed suit. The *Mokkala* Court, despite a well-reasoned dissent pointing out the error by the majority, concludes that plaintiff still has the “right” to take a non-suit in a health care liability suit, but that the exercise of that “right” does not stop the running of the 120 day time period. Thus, even in the absence of a claim for affirmative relief, plaintiffs’ “right” in health care liability claims is hollow - the procedural “statute of limitations” of Section 74.351 will run during the period between non-suit and re-filing, thereby forever barring plaintiffs’ claim. *Mokkala v. Mead*, 178 S.W.3d. 66 (Tex. App. - Houston [14<sup>th</sup>], 2005, pet. denied).

Another court has now followed *Mokkala* in holding that the 120 clock does not start again when a case is non-suited and then refiled. *Daughtery v. Schiessler*, 229 S.W.3d. 773 (Tex. App. – Eastland, 2007, n.p.h).

Note, however, that *Mokkala* was decided before the 2005 amendments to Chapter 74 became effective. Those changes changed the date from which the 120 day deadline for filing of Plaintiff’s report is calculated from the time of the original “claim” to the time of filing of the “original petition.” This well may moot some of the effect of *Mokkala*, in that *Mokkala* speaks in terms of a non-suit not dismissing a “claim,” an argument which cannot be made with regard to the dismissal of a lawsuit. A non-suit without question dismisses a petition. (Tex. R. Civ. P. 162). Thus, as made very clear in the 2005 amendment, the 120 day deadline is calculated

from the filing of the original petition, and *Mokkala* may no longer be relevant since those changes were made.

Note further that in a case in which the Defendant's Motion to Dismiss had been denied, non-suit was permitted and effective. *Yaquinto v. Britt*, 188 S.W.3d. 819 (Tex. App. - Fort Worth 2006, pet. denied).

Further, even the Houston 14th Court has reached a different result in a non-suited case subsequent to *Mokkala*. Therein, the suit filed subsequent to the non-suit involved a different Plaintiff, and alleged at least one additional cause of action. This distinguished it from *Mokkala*, which involved the same patient and the same alleged conduct by the same health care providers. The differences in the refiled suit kept the 120 day clock from running continuously during the non-suit. *Manor Care v. Ragan*, 187 S.W.3d. 556 (Tex. App. - Houston [14th] 2006, review granted, judgment vacated, remanded by agreement, March, 09, 2007).

In a case involving a venue change from one county to another, after dismissal of the case in the original venue and re-filing, the Court of Appeals notes that "the sole issue on which the merits of this appeal pivot is whether we deem the date of filing of the health care claim to be the date the filing of the [original] suit or the filing date of the [second] suit... Central to our decision in this case is the enacting provision of the 2003 version of Chapter 74... which states that 74.351 applies 'only to an action filed on or after the effective date' of ... the act... ." The "action" was the second suit and Plaintiff's filing deadline clock began to run from the filing of that suit. *Park v. Lynch*, 194 S.W.3d. 95 (Tex. App. - Dallas 2006, n.p.h.). Plaintiffs who filed a second action against a physician after having nonsuited their first action, satisfied the 120-day deadline for serving the expert report as to the second action by virtue of having timely served the physician with an expert report in the first action, even though a report was not served in the second action until more than 120 days after the second action was filed. *Moreno v. Palomino-Hernandez*, 269 S.W.3d. 236 (Tex. App. - El Paso, 2008, pet. denied). However, a

Plaintiff who non-suited his original claim on day 96 of the 120-day period, then, a year later, re-filed the claim and then filed--for the first time--an expert report 93 days later did not meet the statutory burden. The court rejected plaintiff's argument that the re-filing of suit triggered a new 120-day period *Runcie v. Foley*, 274 S.W.3d. 232 (Tex. App. - Houston [1st], 2008, n.p.h.).

## 7. The Expert Report as Summary Judgment Evidence

A plaintiff cannot use his or her own expert report, originally filed to comply with section 13.01 of Article 4590i, as evidence to defeat a summary judgment motion.

In a drug reaction case, *Garcia v. Willman*, 4 S.W.3d. 307 (Tex. App. -- Corpus Christi, 1999, n.p.h.), the plaintiff attempted to use the expert report that she filed pursuant to section 13.01 of Article 4590i and a supplemental expert affidavit as evidence in response to a motion for summary judgment. The second affidavit was a supplement to the initial report. The defendant objected to both the report and supplemental affidavit arguing that the plaintiff was statutorily prohibited from using either one under Article 4590i's section 13.01(k). Section 13.01 (k) provides:

*Notwithstanding any other law, an expert report filed under this section:*

- 1) *is not admissible in evidence by a defendant;*
- 2) *shall not be used in a deposition, trial, or other proceeding; and*
- 3) *shall not be referred to by a defendant during the course of the action for any purpose.*

TEX. REV. CIV. STAT. ANN., Art. 4590i, Section 13.01(k) (Vernon Supp. 1999).

The appellate court, in upholding the trial court's decision to strike the plaintiff's report and affidavit, held that this language in section 13.01 is clear and unambiguous. *Id.* at 310. However, the defect is not one of substance, but

one of form, and is curable, and it is error for the trial court to deny the Plaintiffs the right to amend their affidavit to provide that evidence from the expert in something other than the 13.01(k) report form. *Keeton v. Carrasco*, 53 S.W.3d. 13 (Tex. App. – San Antonio, 2001, pet. denied). See also, *Trusty v. Strayhorn*, 87 S.W.3d. 756 (Tex. App. - Texarkana, 2002, n.p.h.), holding that use of the 13.01 report in response to a motion for summary judgment is a defect in form and the party should be given an opportunity to amend its summary judgment proof to correct the defects and that failure of the defense to object to the formal defect at the trial court level waived the objection. But note *Green v. Cypress Fairbanks Medical Center*, 2003 WL 475846 (Tex. App. - San Antonio, 2003, n.p.h.) (**not designated for publication**), in which Plaintiff's suit was dismissed on summary judgment, in part because she used her 13.01 report as summary judgment evidence. Plaintiff made no effort to cure this defect in form between the time the hospital objected to her evidence and the time the Court granted Defendant's motion. Accordingly, it was not error to dismiss her suit. See also, *Coleman v. Wolf*, 129 S.W.3d. 744 (Tex. App. - Fort Worth, 2004, n.p.h.).

#### 10. The Distinction Between Section 13.01(f) & Section 13.01(g) "Extensions"

There are two clauses in Section 13.01 that provide for potential extensions of time for filing reports. Different requirements apply to both sections.

Subsection (f) provides as follows:

*(f) The court may, for good cause shown after motion and hearing, extend any time period specified in subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.*

In contrast, subsection (g) provides as follows:

*(g) Notwithstanding any other provision of this section, if a claimant has failed to*

*comply with a deadline established by "Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under subsection (e) of this section.*

Case law relative to the two sections elucidates the differences, and the critical importance of requesting relief under the correct section. See generally *Richburg v. Wolf*, 48 S.W.3d.375, (Tex. App. - Eastland, 2001, writ refused). A request under the wrong section can result in denial of the relief (extension) sought.

##### i. Subsection (f)

##### a. Time For Filing Request

Courts have held that the 30-day extension authorized by subsection (f) can only extend the deadline to 210 days from the initiation of suit. Thus, a request for a subsection (f) extension made outside of 210 days is in-effective. *Knie v. Piskun*, 23 S.W.3d. 455 (Tex. App. – Amarillo, 2000, pet. denied). *Roberts v. Medical City of Dallas Hospital*, 988 S.W.2d 398 (Tex. App. – Texarkana, 1999, writ refused).

A motion filed for the first time 229 days after suit was filed was untimely under Subsection (f), and, thus, an extension under that section could not be granted. *Landry v. Ringer*, 44 S.W.3d. 271 (Tex. App. - Houston [14th], 2001, n.p.h.). See also, *Whitworth v. Blumenthal*, 59 S.W.3d. 393 (Tex App – Dallas, 2001, writ dism'd by agreement) holding that a Section (f) request for a grace period made outside of 210 days is ineffective.

##### b. Good Cause

Section 13.01(f) is a "good cause" section. It uses the word "may" indicating that the court may, for good cause, grant the extension. Since this is a discretionary, not mandatory function, the abuse of discretion standard applies to its

review. Thus, even when a plaintiff shows “good cause”, the court is still within its discretion to grant or deny the Section 13.01(f) extension. *Roberts* at p.402.

*Pfeiffer v. Jacobs*, 29 S.W.3d. 193 (Tex. App. – Houston [14th], 2000, writ ref’d) holds that a plaintiff may file a motion for an extension of time under Section (f) after the expiration of 180-days but before the expiration of the 210-day period. The plaintiff cannot, however, file her Section (f) motion outside the 210-day period. *Pfeiffer* at p.197.

c. Section (f) is for “A Little Extra Time”

The Fort Worth court of appeals has held that Section (f) is intended for use when a plaintiff “needs a little extra time to comply” with the 180-day period. *Estrello v. Elboar*, 965 S.W.2d 754, 758 (Tex. App. – Fort Worth, 1998, n.p.h.). The request, thus, must be made within the 210-day time period.

d. Section (f) Can Only Extend Time For 30 Days

A Section (f) request for a 30-day extension can extend the time only for 30 days, to 210 days after the filing of the suit. *Tesch v. Stroud*, 28 S.W.3d. 782 (Tex. App. - Corpus Christi, 2000, writ refused).

ii. Subsection (g)

Section (g), on the other hand does not hold such requirements. Section (g) provides that a court “shall grant a grace period of 30 days” if, after a hearing the court finds that the failure to comply with the 180-day deadline was not intentional or the result of conscious indifference but was the result of accident or mistake. A motion for relief under Subsection (g) is timely if filed before any hearing on a motion to dismiss for failure to comply with subsection (d). *Knie v. Piskun*, 23 S.W.3d. 455 (Tex. App. – Amarillo, 2000, pet. denied).

a. Subsection (g) is Mandatory

Unlike subsection(f), the grace period under subsection(g) is mandatory if the movant satisfies the subsection’s two elements; 1) that the failure to file the required reports was due to accident or mistake, and 2) that it was filed before a hearing on the defense motion to dismiss. *Knie* at p 462. Under subsection(g), once the plaintiff has demonstrated evidence supporting that it has made a mistake, then the plaintiff prevails on that issue, and the statutory provision allowing an extension is satisfied unless the defense specifically controverts plaintiffs evidence. *Roberts v. Medical City of Dallas Hospital*, 988 S.W.2d 398 (Tex. App. – Texarkana, 1999, writ refused). Thus, the trial court abuses its discretion by not granting the “grace period” under section(g), when faced with such un-controverted testimony by plaintiff or plaintiffs’ counsel. *Roberts* at p. 404.

*Tibbetts v. Gagliardi*, 2 S.W.3d. 659 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, pet. denied).

Granting a one-day extension after finding that the plaintiff’s failure to timely file suit was due to accident or mistake was error. *Hanzi v. Bailey*, 48 S.W.3d. 259 (Tex. App. - San Antonio, 2001, writ refused). Once the trial court finds plaintiff’s failure to file suit was due to accident or mistake, the court must grant a 30-day grace period.

Purely conclusory statements about “accident or mistake” will not suffice to gain extensions of time under §13.01(g). *Hargrove v. Denno*, 40 S.W.3d. 714 (Tex. App. - San Antonio, 2001, n.p.h.).

b. “A Little Extra Time”

The “a little extra time” of *Estrello, supra* and *Roberts, supra*, however, which applies to a Section (f) Motion for Extension of Time, does not apply to Section (g). In a case in which the Section (g) motion for the 30-day grace period was timely filed, that is, filed before any hearing on defendant’s motion to dismiss, there still had to be proof of “accident or mistake.” *Pfeiffer v. Jacobs, supra* at p 198.

c. Section (g) and Conflicting Testimony

The trial court does not abuse its discretion in denying a Section (g) request if it bases its decision on conflicting evidence. Thus, a plaintiff who timely files a request under Section 13.01(g) for the grace period, and demonstrates mistake, can still lose if the plaintiffs' testimony about his "mistake" is controverted by other testimony demonstrating lack of mistake, which the court chooses to accept. *Wood v. Tice*, 988 S.W.2d 829 (Tex. App. - San Antonio, 1999, writ denied).

The Court will not strike a §13.01 report because it conflicts with the expert's other testimony. Though such conflict may have merit in terms of summary judgment or trial practice, it does not operate to invalidate the §13.01 report and support dismissal on that basis. *Chilcott v. Tubbs*, 2001 WL 925762 (Tex. App. - El Paso, 2001, n.w.h.) **(not designated for publication)**.

When the Plaintiffs' lawyer seeks to explain his failure to timely file an expert report in order to invoke the "accident or mistake" language of §13.01 (g), the Court abuses its discretion in ignoring un-contradicted evidence of mistake. See *Whitworth v. Blumenthal*, 59 S.W.3d. 393 (Tex App – Dallas, 2001, writ dism'd by agreement), in which the Plaintiffs' lawyer stated that this was his first §13.01 report, that he thought it was adequate, that the Defense had not complained about it, and that he therefore had not acted with conscious indifference in failing to file an adequate report. Therein, the Court of Appeals reversed the dismissal of the case, and the Plaintiff was entitled to a grace period. However, in *Whitworth v. Presbyterian Health Care Center*, 2001 WL 1264238 (Tex. App. – Dallas, 2001, n.w.h.) **(not designated for publication)**, a case arising out of the same underlying lawsuit, the Court of Appeals upheld dismissal of Plaintiffs' cause of action based on the same report. The explanation apparently offered for the failure to file an adequate report against the hospital was that it was the Plaintiffs' lawyers' first §13.01 report, that he thought it was adequate, that no one complained about it, and so he had not acted with conscious

indifference and that the hospital had failed to produce all medical records, thereby making filing of an adequate report impossible. The contradictory nature of this explanation (not knowing the requirements of §13.01 versus not being able to meet them because of impossibility) permitted the trial court to refuse the grace period without abusing its discretion, and the portion of the Whitworth's case against the hospital was not re-instated.

These two cases highlight the importance of non-contradictory explanations to the trial court for failure to file a timely report in those instances where a grace period is sought on that basis.

d. Reliance on Verbal Agreement

Reliance on a verbal agreement, or conversation, about whether or not the deadline would be extended in the absence of a Rule 11 agreement to that effect, was not an adequate "mistake" under Section (g) to justify the grace period being granted. *Tesch v. Stroud*, 28 S.W.3d. 782 (Tex. App. - Corpus Christi, 2000, writ refused).

e. Time For Filing

The limitation that the subsection (f) report be filed before 210 days does not apply to subsection (g). *Knie v. Piskun*, 23 S.W.3d. 455 (Tex. App. – Amarillo, 2000, pet. denied) at p. 462. The Section (g) motion is timely if filed at any time prior to hearing on defendant's motion to dismiss. *Pfeiffer, supra*, at p. 198.

*Kidd v. Brenham School*, 93 S.W.3d. 204 (Tex. App. - Houston [14th], 2002, pet ref'd.) stands for the proposition that Plaintiffs need not wait for the Defense to file a Motion to Dismiss before requesting a §13.01 extension. If the Plaintiff realizes that he/she has failed to timely file a report in compliance with §13.01 (or realizes that a timely filed report is deficient in some way), the *Kidd* court suggests filing the Motion for Extension of time with the late filed reports.

f. Only One Section (g) Extension

Only one Section (g) extension is allowed. If a plaintiff obtains a 30 day grace period due to accident or mistake, and subsequently fails to timely file report(s) by the deadline in the grace period, proof of additional accident or mistake will not support granting of another grace period. *Thomas v. Healthmark Partners*, 93 S.W.3d. 465 (Tex. App. - Houston [14th], 2002, writ refused).

g. 30 Day Extension Runs From Date Granted

A 30 day extension granted under Section (g) runs from the date it is granted, not from the end of the original 180 days. *Salazar v. Canales*, 85 S.W.3d. (Tex. App. – Corpus Christi, 2002, no pet.).

11. Can the Defense Waive A Complaint About §13.01 Reports?

In construing the only case to reach it, thus far, on waiver issues, the Supreme Court, while finding that no waiver had occurred under the facts of that case, held that “...to establish an intent to waive the right to dismissal under Section 13.01(e), the defendant’s silence or inaction must be inconsistent with the intent to rely upon the right to dismissal. For example, if the defendant fails to object to the report’s inadequacy until after the case is disposed of on other grounds, waiver may be implied.” *Jernigan v. Langley*, 76 S.W.3d. 752, rev’d, 111 S.W.3d. 153 (Tex. 2003), opinion on remand 2004 WL 1211602 (Tex. App. - Waco, 2004) (**not designated for publication**), opinion withdrawn and superceded on rehearing by 2004 W.L. 2110386 (Tex. App. - Waco, 2004) (**not designated for publication**), opinion withdrawn on rehearing and superceded by 2005 W.L. 486759 (Tex. App. - Waco, 2005, pet. filed) (**not designated for publication**). At the Appellate level, the Waco court had found waiver based on: (a) waiting 646 days after the lawsuit was filed, (b) proceeding normally with, and undertaking a considerable amount of discovery, (c) filing a Motion for Summary Judgment on other grounds (charitable immunity) and (d)

filing an amended answer which deleted language in the original answer which specifically referred to statutory prerequisites not being met. The Supreme Court found this conduct insufficient to constitute waiver. See also *Alphin v. Huguley Nursing Center*, 109 S.W.3d. 574 (Tex. App. - Ft. Worth, 2003, n.p.h.).

In a case following *Jernigan, supra*, the El Paso Court found waiver of a physician’s complaint of a deficient report. The physician waited one thousand one hundred eighty-three (1,183) days before filing his Motion to Dismiss, participated actively in discovery (beyond just “finding out what the Plaintiff’s case was about”), and in fact “completed discovery and announced ready for trial.” The Court found that “in the context of this particular case, we believe that this is inconsistent with an intent to rely upon the right to seek a dismissal,” and upheld the trial court’s finding that the Defendant had waived its right to complain about the adequacy of the report. *In Re Sheppard*, 197 S.W.3d. 798 (Tex. App. - El Paso, 2006, *mandamus* denied). Furthermore, “[w]hile a three-year delay in filing a motion to dismiss may result in the defendant’s forfeiture of the cost-reducing benefits of the statute, it is not a ‘clear demonstration’ of an intent to waive the statutory right to dismissal.” *Apodaca v. Miller*, 281 S.W.3d. 123 (Tex. App. - El Paso, 2008, n.p.h.).

Also note *Martinez v. Lakshmikanth*, 1 S.W.3d. 144 (Tex. App. - Corpus Christi, 1999, pet. denied), in which failure to request dismissal prior to non-suit by plaintiff acted as waiver of the right.

A waiver complaint by a plaintiff, however, must be preserved at the trial court level, or it, in turn, is waived. *Nichols v. Nacogdoches Hospital District*, 96 S.W.3d. 582 (Tex. App. - Tyler, 2002, n.w.h.). Further, in order to rely on the waiver concept espoused in *Langley, supra*, plaintiff must meet the test that: “there must be conduct that misleads the opposite party to his prejudice to believe that a waiver was intended,” *Langley, supra*, at 756. In the absence of such prejudicial conduct to the detriment of plaintiffs, waiver of complaints about plaintiffs’ reports

will not be found. *Nichols, supra*, and *Hernandez v. Piziak*, 2003 WL 248329 (Tex. App. - Austin, 2003, pet. denied) (**not designated for publication**). And note the 2003 Legislature change, at §74.351(c) providing that Defendant must object within 21 days of the filing of the report or all objections are waived.

## 12. The Defense Is Not Required to Inform Plaintiff of the Nature of Any Deficiency In Its §13.01 Report

The defense is not required to inform plaintiff of the nature of any deficiency in its Section 13.01 report. *Villa v. Hargrove*, 110 S.W.3d. 74 (Tex. App. - San Antonio, 2003, pet. denied). It is not a violation of due process for the defense to fail to provide a notice of non-compliance prior to filing its Motion to Dismiss. *Walker v. Gutierrez*, 111 S.W.3d. 56, 66 (Tex. 2003). Note, however, that under §74.351(c), the Defendant must object within 21 days of service, or such objection is waived.

## 13. Health Care Claims Not Requiring §13.01 Reports

**Caveat:** most of the cases listed in this section refer to Article 4590i, and all predate the Supreme Court's holding in *Diversicare v. Rubio*, 185 S.W.3d. 842 (Tex. 2005) in which the Supreme Court equated multiple rapes and sexual assaults of a nursing home patient with health care. Since that holding, it is apparent that virtually all conduct occurring on the premises of a health care provider, or involving health care defendants, equates to health care, no matter how barbaric the conduct. See also *Buck v. Blum*, 130 S.W.3d. 285 (Tex. App. - Houston [14<sup>th</sup> Dist.], 2004, n.p.h.), in which the 14th Court reached an analogous conclusion in holding that a neurologist's placing of his penis in a patient's hand during a neurological examination amounted to "health care" for purposes of the statute. Nonetheless, a host of cases have made it clear that not all cases against health care providers are by definition 4590i claims. Thus, not all claims brought against health care providers are subject to the procedural requirement of 4590i, including

Section 13.01. Causes of action discussed in connection with this issue include the following in which the claims fell outside 4590i: a) **fraud:** *Gomez v. Matey*, 55 S.W.3d. 732 (Tex. App. – Corpus Christi, 2001, n.w.h.) (note, however, that in *Gomez*, the Plaintiff plead that the Defendant knew that the Plaintiff did not need a hysterectomy, but went ahead and did it anyway by fraudulently inducing the Plaintiff to acquiesce to the surgery. The Court held that under certain instances, a fraud claim might not constitute a 4590i claim, but on the facts of the *Gomez* case, 4590i did apply. The determination of whether or not 4590i applies is based on the type of proof that the Plaintiff must adduce in order to prove her claim. In *Gomez*, the Plaintiff would have had to introduce physician evidence about whether or not she needed a hysterectomy, in effect employing the type of proof that the Court holds invokes 4590i requirements. Thus, in *Gomez*, 4590i applied and §13.01 reports were required, but the Corpus Court makes it clear that in certain instances where the type of proof would not require expert medical testimony, §13.01 might not apply.) See also *Estate of Smith v. Swan*, 2002 WL 287709 (Tex. App. - Corpus Christi, 2002, pet. refused) (not designated for publication), holding Plaintiff's claims impermissibly re-cast as fraud claims when there were no independent factual allegations supporting fraud other than those relating to a medical malpractice claim; b) **negligent credentialing**, *Rose v. Garland Community Hospital*, 87 S. W. 3d 188 (Tex. App. -Dallas, 2002, reversed by *Garland Community Hospital v. Rose*, 156 S.W.3d. 541 (Tex. 2004); c) **violation of the Deceptive Trade Practices Act, breach of oral contract and battery**, *Russell v. Murphy*, 86 S.W.3d. 745 (Tex. App. - Dallas, 2002, writ refused) (involving use of sedative by anesthesiologist after promise to use only local anesthesia); d) **common law negligence**, *Sarwal v. Hill*, 2002 WL 31769295 (Tex. App. - Houston [14<sup>th</sup>], 2002, n.w.h.) (**not designated for publication**) (though in this case holding that plaintiff's pleadings alleged only health care liability claims under 4590i, recognizing the possibility that common law negligence claims, properly pleaded and proved might except a Plaintiff from the requirements of 4590i); e) **common**

**law negligence, premises liability and breach of the patients' Bill of Rights**, *Zuniga v. Health Care San Antonio, Inc.*, 94 S.W.3d. 778 (Tex. App. - San Antonio, 2002, n.w.h.); f) **assault**, *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d. 669 (Tex. App. - Dallas, 2001, n.p.h.); g) **sexual assault**, *Rubio v. Diversicare General*, 82 S.W.3d. 778 (Tex. App. - Corpus Christi, 2002) *reversed by Diversicare v. Rubio*, 185 S.W.3d. 842 (Tex. 2005) and *Sisters of Charity v. Gobert*, 992 S.W.2d 25 (Tex. App. - Houston [1st], 1997, n.w.h.) holding that sexual assault is not health care; h) **bystander injury for sexual assault on another**, *Health Care Centers of Texas v. Rigby*, 97 S.W.3d. 610 (Tex. App. - Houston [14<sup>th</sup>], 2002, pet. denied); i) **violations of EMTALA**, *Herman v. St. Paul Medical Center*, 2002 WL 1060530 (Tex. App. - Dallas, 2002, writ ref'd) (**not designated for publication**), (but holding that all of plaintiff's pleadings and proof fell within 4590i); j) **res ipsa loquitur**, (note, however, that in *res ipsa* cases, in those limited categories permitted under Article 4590i, Sec. 7.01, expert testimony is required on the causation aspect of plaintiff's liability case, and thus 13.01's requirements do apply to that portion of the claim), *Garcia v. Palestine Memorial Hospital*, 2002 WL 192359 (Tex. App. - Houston [14th], 2002, n.w.h.) (**not designated for publication**), *Herman v. St. Paul Medical Center*, 2002 WL 1060530 (Tex. App. - Dallas, 2002, writ ref'd) (**not designated for publication**), *Ruiz v. Walgreen*, 79 S. W. 3d 235 (Tex. App. - Houston [14th], 2002, n.w.h.) (emphasizing both that plaintiff must provide expert testimony for causation even in a *res ipsa* case and that plaintiff's pleadings must clearly support claims outside of 'health care liability' claims in order to be exempted from the requirements of 13.01); k) **placement of supplies**, *Rogers v. Crossroads Nursing Services, Inc.*, 13 S.W.3d. 417 (Tex. App. - Corpus Christi, 1999, n.p.h.); l) murder, civil conspiracy, intentional infliction of emotional distress, *Swanner v. Bowman*, 2002 WL 31478769 (Tex. App - Dallas, 2002, writ refused), (**not designated for publication**) (though on the pleadings in *Swanner*, all of which involved allegations of negligent health care, plaintiff was bound by the requirements of 4590i).

Another host of attempts to evade 4590i have failed. These causes of action *are* health care liability claims: An attempt to re-cast a m) "**use of a wheelchair**" case as a non-health care liability claim failed in *Wilson v. Austin Nursing Center*, 2002 WL 31118311 (Tex. App. - Austin, 2002, writ refused) (**not designated for publication**), as all the proof involved breach of accepted standards of health care, in that "caring for wheelchair-bound patients is central to the basic functioning of a nursing home." n) **failure to provide a safe environment**: safe nursing care is integral to health care, and failure to provide a safe nursing environment is a 4590i health care liability claim. *Romero v. Baptist Hospital*, 2001 WL 946497 (Tex. App. - Amarillo, 2001, n.p.h.) (**not designated for publication**); o) **Occupational therapy**: negligence in the performance of occupational therapy is a 4590i health care liability claim, and does require a 13.01 report. *Ponce v. El Paso Health Care*, 55 S.W.3d. 34 (Tex. App. - El Paso, 2001, pet refused); p) **administration of a physical exam and stress test**: because the physical tests were inextricable from the medical judgment involved in interpreting them, the claim was a 4590i claim and was impermissibly sought to be re-cast outside the statute. *Martinez v. Batelle Memorial*, 41 S.W.3d. 685 (Tex. App. - Amarillo, 2000, n.w.h.); q) **assault and battery**: physician drained abscess without permission from patient who stated she only wanted antibiotics. The care was "an inseparable part of the rendition of medical services," and was therefore a 4590i claim. *Williams v. Walker*, 995 S.W.2d 740 (Tex. App. - Eastland, 1999, n.p.h.). r) **Common law fraud, DTPA violation** - the allegations were an impermissible recasting of a health care liability claim *Trevino v. Christus*, 2002 WL 31423711 (Tex. App. - San Antonio, 2002, n.p.h.) (**not designated for publication**). *Tuley v. Ruiz*, 2004 WL 331501 (Tex. App. - Houston [14th], 2004, n.p.h.) (**not designated for publication**). (s) **Informed consent**. Expert testimony (and a 13.01 report) are required in such cases. *Lookshin v. Feldman*, 127 S.W.3d. 100 (Tex. App. - Houston [1st], 2003, pet. denied).

#### 14. Experts From Different Schools

Experts from one field of practice may provide §13.01 reports against experts from other fields of practice, but the §13.01 reports themselves must clearly show the basis for such experts' familiarity with the standards of care. *Tomasi v. Liao*, 63 S.W.3d. 62 (Tex. App. - San Antonio, 2001, n.w.h.).

#### 15. What is to "Furnish" a §13.01 Report?

As with other "furnish" or "service" requirements in the Rules of Civil Procedure, Rule 5 of The Texas Rules of Civil Procedure applies. Rule 5 provides, in pertinent part: "If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, if received by the clerk no more than ten days tardily, shall be filed by the clerk and deemed filed in time." "We see no reason to impose a more onerous burden on a party to meet deadlines related to furnishing materials to an opposing party than the burden on a party to meet deadlines provided for filing materials with the court." *Salazar v. Canales*, 85 S.W.3d. (Tex. App. – Corpus Christi, 2002, no pet.). "We find that the appellants complied with the "furnish" requirements under section 13.01(d) by the twin acts of timely filing the expert report and curriculum vitae with the trial court and on the same day mailing the report and curriculum vitae to the opposing counsel." *Id.*

#### 16. Effect of Amending Claims

An amended complaint adding new claims starts a new 180 day clock as to those claims under Article 4590i. *Puls v. Columbia Hospital at Medical City*, 92 S.W.3d. 613 (Tex. App. - Dallas, 2002, pet. denied). Adding new claims does not restart the 120 day clock under Chapter 74. *Toro v. Alaniz*, 2007 WL 1200122 (Tex. App. – San Antonio, 2007, n.p.h.) **(not designated for publication)**.

#### 17. §13.01 and Privilege

In a curious case, the defense sued a third party defendant, and filed an expert report under 13.01 against that third party defendant. The defenses expert against that third party defendant was a Dr. Tompkins. Thereafter, the defense non-suited their claims against the third party defendant, and re-designated Dr. Tompkins as a consulting expert. Plaintiffs on the other hand proceeded with suit against the third party defendant. The defense's attempt to cloak Dr. Tompkins and his report in privilege failed, and discovery as to Dr. Tompkins' opinions was permitted. *In Re Heritage Oaks Retirement Village*, 2003 WL 21234632 (Tex. App. – Waco, 2003, n.p.h.) **(not designated for publication)**.

#### 18. Four Corners of the Report

In *Palacios*, the Supreme Court held that determinations as to the adequacy of an expert report must be made based only on the "four corners" of the report. That is, the trial court is not free to go outside the report in indulging in inferences or considering extraneous materials not contained in the report, to determine whether or not it is adequate. *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001). A myriad of cases have reinforced the "four corners" doctrine. *Lopez v. Montemayor*, 131 S.W.3d. 54 (Tex. App - San Antonio, 2003, pet. denied), *Jones v. Ark-La-Tex Visiting Nurses*, 128 S.W.3d. 393 (Tex. App. – Texarkana, 2004, n.p.h.), *Hawkins v. Gomez*, 2004 WL 306077 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2004, n.p.h.) **(not designated for publication)**, *Domínguez v. Payte*, 2004 WL 343573 (Tex. App. – San Antonio, 2004, n.p.h.) **(not designated for publication)**, *Gonzales v. Graves*, 2004 WL 510898 (Tex. App. – Amarillo, 2004, n.p.h.) **(not designated for publication)**, *Sigler v. Mendoza*, 2004 WL 690710 (Tex. App. – Eastland, 2004 n.p.h.) **(not designated for publication)**. *Kirksey v. Marupudi*, 2003 WL 23096028 (Tex. App. – Amarillo, 2003, n.p.h.) **(not designated for publication)**, *Sutton v. Collums*, 2003 WL 22533688 (Tex. App. – Amarillo, 2003, n.p.h.) **(not designated for publication)**, *Robinson v. Murthy*, 2003 WL 22026593 (Tex. App. - Ft. Worth, 2003, n.p.h.) **(not designated for publication)**, *Hansen v. Starr*, 123 S.W.3d. 13

(Tex. App. – Dallas, 2003, pet. refused), *Strom v. Memorial Hermann Hospital System*, 110 S.W.3d. 216 (Tex. App. - Houston [1st Dist.] 2003, pet. denied).

Paradoxically, two courts have held that, in order to determine the adequacy of a report, the trial court must look in addition at plaintiff's pleading. "... to determine whether a report meets the statutory requirements and whether the claims have merit, a trial court need not look at the expert report in isolation. Instead, the trial court must necessarily be permitted to examine a plaintiff's pleadings. *Lovato v. Austin Nursing Center*, 2003 WL 1561203 (Tex. App. – Austin, 2003, n.p.h.) **(not designated for publication)**. Similarly, in *Windsor v. Maxwell*, 121 S.W.3d. 42 (Tex. App - Ft. Worth, 2003, pet. denied), as the dissent in that case points out, "...the majority's use of *Windsors'* pleadings to measure whether Dr. Jones's report constitutes a good faith effort turns Texas pleading practice on its head". *Id.* at 52.

#### 19. Vicarious Liability Claims Do Not Require Separate Expert Reports

In cases of pure vicarious liability, such as implied agency, agency by estoppel, *respondeat superior* and so on, must Plaintiff produce a separate report under Article 4590i, Sec. 13.01 or Chapter 74, Sec. 74.351? And if so, what type of expert would Plaintiff use? A lawyer on the legal issue of agency liability? Lawyers do not qualify as experts under the statutory definitions embodied in 13.01 or 74.351; only physicians do. But physicians are not qualified on the legal ramifications of agency law. This has been a conundrum that has bedeviled parties since the enactment of 13.01. The Beaumont Court, in *In Re CHCA Conroe, L.P.*, 2004 WL 2671863 (Tex. App. – Beaumont, 2004, n.p.h.) **(not designated for publication)** addressed the issue, and in a *per curiam* opinion, held as follows:

"the conduct by the hospital on which the agency relationship depends is not measured by a medical standard of care. These are principles of agency law on which no expert report is required. .... Plaintiffs have abandoned

all claims against the relators except an ostensible agency claim on which a separate report is not required...." [emphasis added].

See, also *University of Texas Southwestern Medical Center v. Dale*, 188 S.W.3d. 877 (Tex. App. – Dallas, 2006, n.p.h.). UT Southwestern was sued as a Defendant, on the basis that its residents had negligently treated a patient. Plaintiffs did not allege that UT Southwestern was directly negligent, but alleged that it was liable for the negligence of its residents. Plaintiffs served a report on UT Southwestern which named the applicable residents, stated the applicable standard of care, stated how each resident breached the standard of care, and stated how the breach proximately caused the injury. Thus, Plaintiff satisfied the Chapter 74 requirements and the requirements under *American Transitional Care Centers v. Palacios*, 46 S.W.3d. 873 (Tex. 2001).

UT Southwestern's complaint was that the report did not name "UT Southwestern."

The Dallas Court holds that "...because Appellants were not alleging UT Southwestern was directly negligent, the expert report was not required to mention UT Southwestern by name." Importantly, the Court notes in a footnote "presumably, all that UT Southwestern asserts the expert should have included was a statement that the residents were acting in the course and scope of their employment with UT Southwestern. However, we failed to see how a medical expert would be qualified to provide an opinion on this issue."

See, also *Casados v. Harris Methodist H-E-B*, 2006 WL 2034230 (Tex. App. – Fort Worth, 2006, n.p.h.) **(not designated for publication)**.

A non-physician corporate lawyer was allowed to "connect the dots" between the entities and individuals responsible for training programs and management of emergency rooms so that plaintiff's physician experts could prepare a sufficient expert report. *Packard v. Guerra*, 252 S.W.3d. 511 (Tex. App. – Houston [14 Dist.], 2008, pet. denied).

If the report identifies conduct by the hospital's employee, the hospital is implicated, and as long as the report adequately addresses the standard of care applicable to the employee, how the employee breached the standard of care, and that the breach caused the plaintiff's injury, it is sufficient to satisfy the expert report requirement for the vicarious liability claims against the hospital. *Azle Manor, Inc. v. Vaden*, 2008 WL 4831408 (Tex. App. - Fort Worth, 2008, n.p.h.) **(not designated for publication)**.

Thus, emerging case law is clear that no expert report is required in a purely vicarious liability circumstance as to the "standard of care" or causation violations of the parent entity.

## 20. §13.01 Reports in Federal Court

The 13.01 deadline for filing expert reports is procedural, not substantive, and thus does not control over Federal procedural guidelines and scheduling requirements for filing expert reports. Thus, in Federal Court cases involving Texas health care liability claims, plaintiffs must comply with the scheduling requirements imposed by those courts, and not with the 180 day requirement of Article 4590i. Virtually every district court within Texas to consider the applicability of the expert report requirement in federal diversity cases has held that the Federal Rules of Civil Procedure preempt the requirement. *Mason v. United States*, 486 F. Supp.2d 621, 623-26 (W.D. Tex. 2007); *Toler v. Sunrise Senior Living Servs., Inc.*, 2007 U.S. Dist. LEXIS 23720, at \*9-12 (W.D. Tex. Mar. 21, 2007); *Sauceda v. Pfizer, Inc.*, 2007 U.S. Dist. LEXIS 1600, at \*5-8 (S.D. Tex. Jan. 9, 2007); *Beam v. Nexion Health Management, Inc.*, 2006 WL 2844907 (E.D. Tex., 2006); *Hall v. Trisun*, 2006 U.S. Dist. LEXIS 59005, at \*1-2 (W.D. Tex. Aug. 1, 2006); *Wakat v. Montgomery County*, 2006 U.S. Dist. LEXIS 33546, at \*2-4 (S.D. Tex. May 23, 2006); *Baker v. Bowles*, 2005 U.S. Dist. LEXIS 32942, at \*36-39 (N.D. Tex. Dec. 14, 2005); *Garza v. Scott & White Mem. Hosp.*, 234 F.R.D. 617, 623 (W.D. Tex. 2005); *Brown v. Brooks County Detention Ctr.*, 2005 U.S. Dist. LEXIS 38522, at \*4-8 (S.D. Tex. June 23, 2005); *Nelson v. Myrick*, 2005 U.S. Dist. LEXIS 5059, 2005 WL

723459, at \*4-13 (N.D. Tex. Mar. 29, 2005); *McDaniel v. United States*, 2004 U.S. Dist. LEXIS 23196, at \*18-30 (W.D. Tex. Nov. 14, 2004). For example, the district court in *Garza v. Scott & White Mem. Hosp.*, 234 F.R.D. 617, 623 (W.D. Tex. 2005), identified four ways in which the expert report requirement is in direct collision with the federal rules: (1) the mandatory sanction schemes imposed by Section 74.351 completely remove the court's discretion with respect to the imposition of Rule 11 sanctions for filing frivolous claims; (2) although former Article 4590i, § 13.01 made expert reports unavailable for use at trial, depositions, or other proceedings, Section 74.351 removes these restrictions as soon as the plaintiff makes an affirmative use of the report; (3) the stay of discovery until the filing of claimant's expert reports is in "direct and unambiguous conflict with the federal rules, which plainly tie the opening of discovery to the timing of the Rule 26(f) conference;" and (4) one of the purposes of Section 74.351 — namely the provision of notice to defendants — invades the province of Rule 26, which is also designed to provide notice to defendants. *Id.* at 623. Other district courts similarly hold that the expert report requirement of disclosure and sanctions must yield to the disclosure and sanction schemes provided by Rules 26 and 37 of the Federal Rules of Procedure. *Sauceda*, 2007 U.S. Dist. LEXIS 1600, at \*5-8; *Beam*, 2006 U.S. Dist. LEXIS 71732, at \*3-9. *Poindexter v. Bonsukan*, 45 F. Supp. 800 (E. Dist. Tex. 2001). *Beam v. Nexion Health Management, Inc.*, 2006 WL 2844907 (E.D. Tex., 2006). The same rationale applies in Chapter 74 cases. The Sec. 74.351 expert report requirement does not apply in Federal Court. *Castaneda v. Aetna Health*, 2008 WL 1994936 (E.D. Tex. 2008). The Court distinguishes *Cruz v. Chang*, 400 F.Supp. 2d 906 (W.D. Tex. 2005) which seemingly holds that the requirement *does* apply in Federal Court.

## 21. Other Provisions of §13.01

Section 13.01 allows the parties to extend any time period specified in the section by agreement. The agreement is binding and will be honored by the court if signed by all parties.

TEX. REV. CIV. STAT., Art. 4590i, sec. 13.01(h).

Nothing in the act requires that one expert comment on all of the liability and causation issues for every defendant. The claimant can file separate reports of different experts for each defendant. TEX. REV. CIV. STAT., Art. 4590i, sec. 13.01(i).

Also, the expert report need only address negligence and causation. A claimant does not need to file an expert report that addresses the damages of the case. TEX. REV. CIV. STAT., Art. 4590i, sec. 13.01(j). (But see *Wood v. Tice*, 988 S.W.2d 829 (Tex. App. - San Antonio, 1999, writ denied)), wherein the court stated in dicta that the plaintiffs expert report failed to demonstrate “causation and damages”, implying that plaintiffs have a burden under 4590i to provide an expert report addressing damages.)