

CLE Resources: Texas Health Law Conference 1998

Liability Update

Presented by **Maureen Murry**
Thompson & Knight, P.C.
Written by **Lawrence E. Henke**

I. Legislative Review

A. 1997 Chapter 88 Overview

Senate Bill 386

In 1997 the Texas Legislature amended Title 4 of the Civil Practices and Remedies Code and added Chapter 88 entitled "Health Care Liability." In that amendment the legislature specifically provided for an administrative process in making claims against health care providers and addressed several areas wherein health care providers would incur liability for specific actions. Under section 88.002(f) managed health care organizations are barred from removing or failing to renew a health care provider for advocating on behalf of an enrollee for appropriate and medically necessary health care for the enrollee. An anti-indemnity provision is included in section 88.002(g) wherein managed care organizations are barred from contracting for indemnity or hold harmless clauses in their favor. Such existing indemnification clauses are also declared void. The legislature also specifically eliminated the corporate practice of medicine defense in passing section 88.002(h), which bars the use of the defense that a managed care organization may be legally prohibited from practicing or being licensed to practice medicine. The legislature also addressed the no control or delay defense by providing that section 88.0028 is a statutory defense if the entity and its agents did not control, influence, or participate in the decision and did not deny or delay payment for a recommended or prescribed treatment. In assessing health care provider liability, the legislature also addressed the mere listing liability provision. Section 88.002(l) states liability cannot be based solely on proof that the purported agent's name appears in a listing of approved physicians or health care providers made available to insureds or enrollees. In addition the legislation provides for agency liability under section 88.002(b) which holds that a managed care organization may be liable for failure to exercise ordinary care when making health care treatment decisions proximately causing harm to an insured or enrollee. Managed care liability extends to the organization's employees, agents, ostensible agents, or representatives acting on its behalf and over whom it has the right to exercise influence or control, which results in the failure to exercise ordinary care.

Corp. Health Insurance, Inc. v. Texas Dept. of Insurance, et al., -- F.Supp.2d --, No. H-97-2072 (S.D.Tex., September 18, 1998).

The Health Care Liability Act (the Act) was challenged almost immediately by a group of Aetna Health Care entities, which requested a declaration that the Act is preempted by ERISA and the Federal Employees Health Benefit Act (FEHBA) and sought an injunction to prevent enforcement of the Act. The Texas Department of Insurance filed a motion to dismiss, which was later converted to a motion for summary judgment by the court, contending that the Act regulates only HMO's in Texas. The Act's purpose is to prevent health plans from escaping liability for the medical decisions they make, control or influence, not to seek any regulation of how HMO's make benefit or coverage determinations. Plaintiffs also filed a motion for summary judgment, contending that the Act "impermissibly interferes with the purpose, structure and balance of ERISA and FEHBA, thereby injecting state law into an area exclusively reserved for Congress." They contend the Act also wrongfully binds employers and plan administrators to particular choices and impermissibly creates an alternative enforcement mechanism. The court granted the Department's motion to dismiss based on sovereign immunity grounds; however, it declined to dismiss Insurance Commissioner Bomer. The court next held that the Act is not protected from preemption by the ERISA insurance savings clause. The court also held that the Act failed to meet the *Metropolitan Life* test (the Act was not limited to entities within the insurance industry) and was therefore

not saved from preemption by the insurance exception of ERISA section 514(b). See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). Next, the court analyzed whether the Act was preempted because it "related to" an employee benefits plan. The court extensively defined an ERISA benefit plan, and it distinguished between health insurance carriers, HMO's, and managed care entities, finding that these health plans do not constitute ERISA plans. This finding, however, was termed inconsequential by the court. The court focused on the "relates to" provisions of ERISA preemption, examining whether the Act has a connection with or reference to an ERISA plan. The court concluded that the Act does not reference an ERISA plan, thus is not preempted under that provision. The Act does, however, have a connection with an ERISA plan, in that it improperly mandates the structure of plan benefits and their administration. Specifically, the Act's provisions for an independent review were held to improperly mandate the administration of employee benefits, and are therefore preempted. The court also agreed that the Act binds employers and plan administrators to particular choices based on Fifth Circuit's *Cigna* precedent. See *Cigna Healthplan of La. v. Louisiana*, 82 F.3d 642 (5th Cir. 1996). Based on these conclusions, the court found that section 88.002(g) and the relevant language in section 88.003 were preempted. In addition, the language added by the Act to article 20A.09(e)(4), article 20A.12A and the amendments to articles 21.58A(6)(b)(5) and (6)(a); article 21.58A(6A), article 21.58A(8)(f); and article 21.58C of the Texas Insurance Code is preempted.

B. Texas Natural Death Act

Stolle v. Baylor College of Medicine, 1998 W.L. 552827 (Tex. App.-Houston [1st Dist.] August 20, 1998).

This case addresses whether the Texas Natural Death Act provides immunity to a doctor for actions in the care and treatment of a patient. Mrs. Stolle gave premature birth to twins and soon after delivery one died when mechanical ventilation was withdrawn. The remaining twin survived. Dr. Schaffer was the child's attending physician and pediatrician following her birth. A head ultrasound revealed the child suffered from a grade IV left intra ventricular hemorrhage and a grade II right intra ventricular hemorrhage. Dr. Schaffer had the child transferred to the Texas Children's Hospital, where he continued to act as her attending physician and pediatrician. While there, doctors from the Baylor College of Medicine were the child's neonatal physicians. Dr. Zeller performed a neurological consultation and determined that the child had suffered irreversible brain damage and would have a neurological defect. Dr. Zeller noted in the child's medical chart that the mother and father "did not want any heroic efforts" made to prolong the child's life if the occasion arose. Three days later, Dr. Schaffer ordered that the child was not to receive chest compressions, intubation, or cardiac medications. The mother and father executed a directive to physicians on behalf of the child in which they made known their desire that the child's life not be artificially prolonged. A month later the child suffered an apneic episode with bradycardia after regurgitating her food. An unnamed, unidentified nurse administered chest compressions for thirty to sixty seconds. This intervention ended the episode and the child is alive today. The plaintiffs (the mother and father) sued the doctors, the hospital and Baylor College of Medicine for initiating life saving measures in violation of Dr. Schaffer's orders. The Houston Court of Appeals held that the Texas Natural Death Act provides immunity to the doctors for their actions in the treatment and care of the appellant's child. They added further that the immunity precludes common law causes of action asserted by the appellants arising out of the same facts.

C. Texas Tort Claims Act

Ager v. Wichita General Hospital, 1998 W.L. 286590 (Tex. App.- Fort Worth, June 4, 1998).

The issue here is whether the plaintiff was able to prove that any particular acts or tangible items were definitively used or misused as required to overcome the immunity provision under the Texas Tort Claims Act. Plaintiff underwent a laparoscopic tubal fulguration for the purpose of sterilization at the North Texas Surgical Center. The surgery was performed by Dr. Paul Kinnard. Two days later the plaintiff was readmitted to the emergency room with a perforated viscus. Dr. Jerry Myers evaluated the plaintiff and performed exploratory surgery, during which he discovered and repaired a small bowel perforation. Plaintiff was placed in the intensive care unit after surgery and remained there for ten days. The plaintiff sued Dr. Kinnard, the North Texas Surgical Center, and the Wichita General Hospital alleging negligence.

The defendant Wichita General Hospital was granted a summary judgment on the grounds that the hospital was immune from suit as a governmental unit and the actions of Dr. Kinnard were not attributable to the hospital as a matter of law. The hospital also claimed that it exercised ordinary care as a matter of law during its treatment of the plaintiff. On appeal the plaintiff argued that she adequately pleaded and proved that nurses at the hospital negligently used thermometers and stethoscopes thereby bringing her claim within the waiver provision of the Tort Claims Act. The Fort Worth Court of Appeals held that the mere allegation that the nurses may have used those items and reacted improperly to the information obtained from them is speculation and does not create a fact issue on the element of use or misuse of tangible property. The Fort Worth court upheld the trial court's summary judgment in favor of the defendant hospital.

Brooks v. Center for Health Care Services, 1998 W.L. 354211 (Tex. App.- San Antonio, June 30, 1998)

This case dealt with whether the defendant, Center for Health Care Services, is liable under the Civil Rights Act and the Texas Tort Claims Act for an alleged injury sustained by the patient while at the Center for emergency mental health treatment. Patient James Brooks was admitted to the Center for Health Care Services for mental evaluation. During his confinement, he was placed in a small room where he allegedly was not restrained until after he had injured himself on a mirror in the room. James Brooks apparently inflicted the injury upon himself by banging his head against a mirror on the wall during a time when he was unsupervised in the room. He was subsequently restrained by employees of the crisis center who physically attached restraints and confined him for his own safety. James Brooks alleges injuries which included a chipped tooth, a cracked hip joint, bruises, cuts and abrasions, and mental health injuries all as a direct result and a proximate cause of the agents of the Center using excessive force. The Center was granted summary judgment at the trial court level on the grounds of immunity under the Texas Tort Claims Act. On appeal the plaintiffs alleged that the Center's sovereign immunity was waived by the condition or use of personal and real property on the premises of the Center. The San Antonio Court of Appeals held that the plaintiff's affidavit claiming that "agents" of the crisis center physically restrained him and injured him during the course of applying restraints was sufficient to raise a fact question regarding the Center's liability under the Tort Claims Act. It was not necessary that the plaintiff allege specifically that the injuries resulted from the acts of "employees" of the Center. It stated that imposing such a strict requirement would be inconsistent with the summary judgment practice.

Gaskin v. Titus County Hospital District, 1998 W.L. 429071 (Tex. App.-Texarkana, July 31, 1998)

On August 11, 1994, Linda Gaskin gave birth at Titus County Memorial Hospital. Gaskin's doctor, Gary B. Taylor delivered the infant. During the delivery an episiotomy was performed. Gaskin experienced hemorrhaging after the delivery. She was discharged on August 13, 1994. Because of continued hemorrhaging, Gaskin continued to consult Dr. Taylor. After several visits, Dr. Taylor recommended that she be hospitalized for a dilation and curettage (D&C). The D&C was performed by Dr. Taylor on September 29, 1994 at the hospital. Gaskin was subsequently discharged from the hospital, but continued to experience problems, including repeated vaginal discharge of gas and feces. Gaskin eventually consulted another physician, who detected a recto vaginal fistula. Gaskin was admitted to the Women's Health Clinic in Little Rock, where the defect was surgically repaired. The Gaskins filed suit against Dr. Taylor and the hospital in October 1996, alleging professional negligence arising out of the hospitalizations in August and September 1994. The hospital moved for summary judgment, contending that the Gaskins had not met the statutory notice requirement of the Texas Tort Claims Act. The Texarkana Court of Appeals reversed and remanded holding that under section 101.101 of the Tort Claims Act, the claimant must provide a governmental unit with formal written notice of a claim against it within six months of the incident giving rise to the claim; however, formal notice requirements do not apply if the governmental unit has actual notice of the claim. The plaintiff's medical records raised a fact issue as to the hospital's actual notice of the plaintiff's injury with respect to the hospital's failure to recognize and treat the fistula. The medical records do not, as a matter of law, raise a fact issue as to the hospital's actual notice of possible culpability for causing the fistula itself.

II. Vicarious Liability C Emergency Room Physicians

A. Agency.

Baptist Memorial Hospital System v. Sampson, 969 S.W.2d 945 (Tex. 1998).

The Texas Supreme Court reversed a decision of the San Antonio Court of Appeals, wherein it sought to prevent hospitals from avoiding vicarious liability by notifying patients upon presentation at the emergency room of the emergency room physician's independent status. The San Antonio court expressed concerns that hospitals would engage in far-reaching general notices if not curtailed. See *Sampson v. Baptist Memorial Hospital System*, 940 S.W.2d 128 (Tex. App.-San Antonio, 1996). Citing the rationale of a New York case, the San Antonio court imposed a nondelegable duty on hospitals for the negligence of emergency room physicians. Plaintiff was bitten on the arm by some unknown animal or insect. A friend drove her to the emergency room where she was examined, diagnosed with an allergic reaction, and sent home. The next day the plaintiff returned to the emergency room still in pain and still complaining about the allergic reaction. A second emergency room physician administered additional pain medication to plaintiff and again sent her home. Fourteen hours later, the plaintiff went to another hospital and was admitted to the intensive care unit in septic shock. Although the plaintiff survived, she was left with respiratory difficulties and extensive scarring and pain. In reversing the San Antonio Court of Appeals, the Supreme Court held that the plaintiff failed to establish the requisite elements of ostensible agency to impugn the emergency physician's negligence to the hospital. The Supreme Court rejected the Court of Appeals holding that there were two methods in Texas by which a plaintiff could establish agency, ostensible agency and apparent agency. Based on the Restatement (2nd) of Torts, ' 429, the Texas Supreme Court explicitly rejected any reference to the apparent agency theory in medical malpractice cases. It added that the elements of ostensible agency in a malpractice case are: (1) a belief that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) the plaintiff justifiably relied on the representation of authority. This rule emanates directly from the Restatement (2d) of Agency, ' 267. Next, the Texas Supreme Court rejected the court of appeals' suggestion that hospitals should be subject to a nondelegable duty for the malpractice of emergency room physicians. Again, the court found that the disclaimers contained in the hospital forms were sufficient evidence that the hospital did not hold itself out as the physician's employer. Therefore, a hospital cannot be held liable for the negligence of a physician who is an independent contractor if the hospital has not led a patient to believe the physician is an employee or agent of the hospital.

Valdez v. Pasadena Health Care Management, Incorporated, 975 S.W.2d 43 (Tex. App.-Houston [14th Dist.] 1998, pet. filed)

The Houston Court of Appeals, in a ruling preceding the Supreme Court's *Samson* decision by approximately one month, also decided that a hospital cannot be held responsible for the negligent acts of an independent contractor physician. In *Valdez* the parents sued the defendant hospital on behalf of their infant son for an injury sustained during childbirth. Mrs. Valdez arrived at the Southmore Medical Center on February 12, 1993 and was told by the admitting nurse that her water had broken. Mrs. Valdez requested that her doctor, Dr. Aziz, be called, however, the nurse informed her that Dr. Aziz was away from the hospital and Dr. John Devine was the on-call physician. The nurse then gave Mrs. Valdez a consent to treat form, which she signed. During delivery, Mrs. Valdez's son sustained a permanent shoulder injury due to shoulder dystocia. The Valdezes filed suit against Dr. Aziz for her negligent failure to diagnose their child's shoulder condition and against Dr. Devine for the negligent treatment during childbirth. Plaintiffs also claimed Southmore Medical Center was vicariously liable for Dr. Devine's negligence because he was the hospital's ostensible agent. The Houston Court of Appeals held that because the Valdez's summary judgment proof does not raise a fact issue as to whether Southmore held out Dr. Devine as its employee or agent, the trial court did not err in granting summary judgment in favor of Southmore. The Houston Court of Appeals went through an analysis of several factors in deciding whether or not Southmore held Dr. Devine out as its agent, and these factors were consistent with the Supreme Court's three-part test subsequently established in *Samson*. *Schultz v. Rural/Metro Corp. of New Mexico-Texas*, 956 S.W.2d 757 (Tex. App.-Houston [14th Dist.] 1997, no pet.) In another agency case, the Houston Court of Appeals determined that a medical transport company was not a health care

provider as defined by Medical Liability and Insurance Improvement Act. *Schultz v. Rural/Metro Corp.* of New Mexico-Texas, the court held that employees who were transporting a patient were not acting as the agents of its medical director during transport. At the time of the incident the plaintiff was terminally ill with cancer and undergoing radiation therapy at Peakwood Rehabilitation Center in Houston, Texas. Because he needed assistance getting to Peakwood from the hospital, his wife arranged for AMT, a private ambulance company, to transport him. While being transported to Peakwood, the plaintiff fell from his stretcher and suffered injuries. The defendants attempted to invoke article 4590i, claiming that Schultz's cause of action is a health care liability claim as defined in section 1.03(a)(4). In this reverse agency claim, AMT attempted to define itself as a health care provider by being the ostensible agent of its medical director, Dr. Smith. The court held that AMT may not invoke the protections of article 4590i because it failed to prove it was the ostensible agent of a health care provider under that statute.

B. Third Party Liability

Day v. Munoz, 961 S.W.2d 278 (Tex. App.-Houston [1st Dist.] 1997, *no pet.*)

The question presented here is whether two doctors who contracted to provide medical services at a rock concert are liable to a fan who suffered an asthma attack and died immediately following the concert. This question arose in the context of a legal malpractice lawsuit. The plaintiffs were suing their ex-lawyer who allegedly committed legal malpractice because the defendant doctors were granted summary judgment on the grounds that no physician patient relationship had been formed between them and the rock concert patron they never saw or treated. The plaintiffs argued that the two doctors had a duty to provide emergency treatment to the decedent because the doctors contracted with the arena to do so. The physician's relationship with the arena is "akin to an on call physician," which does not create a doctor patient relationship as a matter of law. Because the defendant doctors could not be liable as a matter of law to the plaintiffs in any event, the plaintiffs could not assert a cause of action against their lawyers because the medical malpractice claims were properly dismissed. The court did note that an automatic physician patient relationship may be created in certain circumstances. For instance, when a physician's contract to provide emergency care at a hospital leaves the doctor no discretion to refuse to treat patients, patients seeking care may enjoy a presumed relationship with the doctor.

Zeulka v. Thapar, 961 S.W.2d 506 (Tex. App.-Houston [1st Dist.] 1997, *no pet.*)

The issue here is whether the lack of a doctor patient relationship is a defense to a suit against a doctor for failure to warn a third person that the patient is dangerous. Dr. Thapar began treating the plaintiff's son in May of 1985 when he was brought to the emergency room of Southwest Memorial Hospital. The patient's son, Freddy Ray Lilly, was a war veteran who served two tours of duty in Vietnam as an army intelligence specialist. Lilly had been in and out of psychiatric hospitals and alcohol treatment facilities since his return from Vietnam. Lilly was mentally unsound, he was paranoid, delusional, and on numerous medications, and he was undergoing psychotherapy. When the patient did not take his medication he became violent. Dr. Thapar, as the treating physician, knew this. Additionally, the doctor's hospital notes reflect that the patient was homicidal and wanted to kill his stepfather. The doctor, however, did not warn anyone about the patient's specific threats before discharging him once again. When the patient was discharged from his last hospitalization he killed his stepfather. In reversing summary judgment on Dr. Thapar's behalf, the court held that when a physician knows of a threat to a specific identifiable person, he has a duty to warn the authorities and the person of the potential danger. He may be liable to the injured person for not taking reasonable steps to prevent the harm threatened. Lack of a doctor patient relationship with the injured party is not a defense.

Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1997)

The question presented here is whether a physician owes a duty to third parties to warn an epileptic patient not to drive? The patient suffered a grand mal seizure while driving and broadsided a vehicle driven by the plaintiff, who ultimately died from the injuries he sustained in the accident. The patient's physician treated him regularly for many years for epilepsy. The patient's seizures were well under control with medication, however. The Texas Supreme Court held that a physician does not owe a duty to third

parties to warn epileptic patients not to drive, nor are physicians required to report an epileptic's condition to state authorities that issue the driver's licenses. Treating physicians are permitted, but not required, by statute to inform the Department of Public Safety of patients who have epilepsy. The court pragmatically recognized that even if the physician did warn the patient not to drive, there was no guarantee that the patient would not drive anyway.

Van Horn v. Chambers, 970 S.W.2d 542 (Tex. 1998)

The issue is what duty a physician owes to third parties outside the physician patient relationship. In this case two hospital employees were killed and a fellow employee injured while trying to subdue a violent patient. The episode occurred after an attending physician transferred the patient from the neurological critical care unit to a private room on an unsecured general floor. The injured employee and the parents of one of the deceased employees sued the physician for negligence and gross negligence in causing the bodily injuries and wrongful death. The Texas Supreme Court held that there is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless a special relationship exists between the actor (i.e. the doctor) and the third person, which imposes a duty upon the actor to control the third person's conduct. The court found that the doctor patient relationship is not so special as to impose a duty to control the conduct of the third person, and it held there was nothing inherent in the relationship that gives the doctor the right to control his patient's conduct.

Santa Rosa Health Care Corporation v. Garcia, 964 S.W.2d 940 (Tex. 1998)

The issue in this case was whether the Santa Rosa Health Care Corporation owed a duty to the plaintiff to advise her that she was at risk of contracting the HIV virus from its patient, Adalberto Balderas. Adalberto Balderas met Linda Garcia in 1987, and the two married in 1988. Balderas, a hemophiliac, had become infected with the HIV virus from injections of the blood-clotting agents Factor VIII he received in the 1970's and 1980's. Balderas first came in contact with Santa Rosa in the late 1970's, when he sought Factor VIII after suffering an injury. Over the next few years, he contacted Santa Rosa for Factor VIII on two or three other occasions. After April 1980, Balderas did not contact Santa Rosa about receiving any more Factor VIII. At some point in the mid 1980's, Santa Rosa became aware that before the 1980's, some of the nation's blood supply was contaminated with HIV and Balderas may have been exposed to the virus. Between 1986 and 1989, Santa Rosa sent seven written notices to Balderas' home asking him to come in for his annual appointments. The last six of these notices also indicated that Balderas should bring his wife or any steady girlfriend with him. In 1991, Balderas and Garcia sued Santa Rosa for their breach of duty to notify them of Balderas' exposure to HIV. The Corpus Christi Court of Appeals held that the hospital had a duty to notify the spouse of the patient's apparent contraction of HIV via blood under the Communicable Disease Prevention and Control Act. See *Garcia v. Santa Rosa Health Care Corp.*, 925 S.W.2d 372 (Tex. App. -- Corpus Christi 1996). The Texas Supreme Court reversed, holding that Santa Rosa had no statutory duty in 1989 to report the risk to Garcia. Additionally, the court held that there was no common law duty to notify the spouse that she was at risk of contracting HIV from the patient.

III. Limitations

Brown v. Shwartz, 968 S.W.2d 331 (Tex. 1998)

The plaintiffs alleged that prebirth negligence caused the death, one day after birth, of their infant child. The plaintiffs sent a notice letter within two years of the alleged negligence, but suit filed two years plus seventy-five days plus one day after the alleged negligence. The Waco Appellate Court upheld summary judgment on limitations. See *Brown v. Shwartz*, 929 S.W.2d 609 (Tex. App.-Waco 1996, writ granted). The Texas Supreme Court reversed. Mrs. Brown went to the emergency room at Navarro Memorial Hospital during her third trimester complaining of pregnancy related complications. Dr. Schwartz ordered a sonogram and sent the patient home with instructions to return if the symptoms worsened. Four days later, Mrs. Brown returned to the hospital where she was diagnosed as having suffered ruptured membranes. She was admitted to the hospital and gave birth to a premature baby who died the next day. Two years and seventy-six days after Brown was treated by Dr. Schwartz, she filed her malpractice claim

asserting wrongful death and survivor claims. The plaintiffs argued that the date of treatment should not be the start date for limitations purposes when the treatment of a fetus results in prenatal injuries. The plaintiffs contended that a fetus cannot be a patient, and that limitations therefore should not begin to run until the child is born. Limitations in a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor. This means that an action for wrongful death of a child who lives more than two years after a prenatal injury will as a rule be barred by limitations, but the same result follows when the decedent is an adult. While there are circumstances when this result seems harsh, it is well within the legislature's prerogative to prescribe the limitations period for a wrongful death claim which did not exist at common law and is a creature of statute. Reasoning that a physician can be liable for negligently injuring a fetus if the child is later born alive, it follows that a fetus can be a patient. The plaintiffs' survival action, however is the same action the child had on the day he died. The survivorship claim was tolled at least until the day he died because he was a minor. Since suit was brought within two years and seventy-five days of the date he died, the survival claim was timely. Once the child died, he ceased to be a minor under twelve years old and the tolling provision no longer applied. Thus, the limitations began to run at his death. Therefore, the limitations for survivorship claims for a child treated in utero begin to run on the date of his death, not the date of the treatment.

James v. Persona Care of San Antonio, 954 S.W.2d 113 (Tex. App.-San Antonio 1997, no pet.)

Plaintiff, Stanley L. James, brought suit individually and as a personal representative of the estate of Bernice James, deceased, against Persona Care of San Antonio for medical malpractice. Plaintiff appealed summary judgment for Persona, contending that the trial court improperly granted Persona's motion for summary judgment because it failed to provide medical records in violation of article 4590i, section 4.01(d). James alleged that Persona did not timely provide complete records as required by the act and that the tolling period should be extended because of Persona's failure to produce the records. The San Antonio Appeals Court held that a defendant's failure to provide medical records to the plaintiff as required by article 4590i, section 4.01(d), does not toll limitations. Plaintiff must file suit within two years and seventy-five days to comply with the limitations period.

Husain v. Khatib, 964 S.W.2d 918 (Tex. 1998)

The issue presented was when does the limitations period begin to run when the cause of action is based on readily identifiable dates of treatment which continue over a period of time. In this case, the patient, Khatib, was evaluated by her gynecologist, Dr. Husain on several occasions between December 1989 and August 1992 for the thickness of her breast. Initially a mammogram led to a diagnosis of fibrocystic disease. During a later visit, Dr. Husain conducted no further diagnostic tests and failed to detect the cancer. On her final visit in 1992, another mammogram was ordered, which indicated breast cancer. The result of this second mammogram was reported to Plaintiff within two years and seventy-five days of the date suit was filed. The decision of the Fort Worth Court of Appeals, reversing and remanding the trial court's summary judgment, heavily relied on the termination of the course of treatment on the date the results of the second mammogram were reported. See *Khatib v. Husain, 949 S.W.2d 805 (Tex. App.-Fort Worth 1997)*. The Texas Supreme Court determined that the dates of Dr. Husain's alleged negligence were readily ascertainable. The characterization of the claim as either a failure to diagnose cancer or an improper course of treatment was immaterial because each of the dates of treatment fell outside the limitations period of two years and seventy-five days. Because there was no course of treatment, each of the dates of treatment was individually assessed for timeliness. Article 4590i does not permit a plaintiff to simply choose the most favorable of the three dates that section 10.01 specifies, if the date of the negligence can be ascertained, then there are no doubts to resolve and limitations must be measured from the date of the act or omission alleged to be negligence.

Kahenek v. Gross, 1998 W.L. 338062 (Tex. App.-San Antonio, June 24, 1998, no pet. h.)

In another limitations decision following the rationale applied in *Husain*, the San Antonio Court of Appeals held that when the precise date of a specific tort is ascertainable from the facts of the case, the statute of limitations for medical malpractice claims begins to run from that date. In 1986 Kyndil Kahenek was born with a congenital heart defect and underwent successful heart surgery. In June 1990, Kyndil

experienced a seizure and her parents were referred to Dr. Gross, a pediatric neurologist. To control Kyndil's seizures, Dr. Gross prescribed the drug Tegretol. In January 1992, Kyndil experienced another seizure and Dr. Gross increased the Tegretol dosage and authorized Dr. Barth to continue refilling Kyndil's Tegretol prescription as needed. Approximately a year and a half later on June 12, 1993, Kyndil complained of nausea and abdominal pain. Her heart and liver ceased to function and Kyndil died on June 13, 1993. Dr. Gross did not examine Kyndil between January 20, 1992 and the date of her death, but Kyndil continued to take the prescribed medication in keeping with Dr. Gross's instructions. Dr. Gross admitted that he last offered a refill of Tegretol for Kyndil on August 10, 1992. Plaintiffs filed their suit against the defendant doctor on June 6, 1995. Dr. Gross obtained a summary judgment based on limitations. In applying the course of treatment doctrine the San Antonio court held that the limitations defense was inapplicable to this case because the date of the tort was not readily identifiable. The doctor's admission that he authorized drug prescription refills over the course of Kyndil's treatment defeated any limitations claim. The court found that Dr. Gross failed to conclusively establish the affirmative defense of limitations.

Savage v. Psychiatric Institute of Bedford, Inc., 965 S.W.2d 745 (Tex. App.-Fort Worth 1998, no pet. h.)

The issue presented was whether the filing of a fraudulent concealment claim in conjunction with a health care liability cause of action tolls the limitations period under article 4590i. The facts presented showed that at age 15 Savage was suffering from depression related to the recent breakup with her boyfriend, stresses at school, and her family relationships. Based on recommendations from a family friend, Savage visited with staff members in the adolescent unit at Bedford Meadows Hospital. Based on the staff analysis and recommendations, Savage was voluntarily admitted to Bedford on April 21, 1990, and discharged on May 30, 1990. On August 31, 1995, Savage filed suit against numerous defendants for the treatment she received at Bedford Meadows. Savage asserted causes of action for negligence, false imprisonment, intentional infliction of emotional stress, fraud, and violations of the Texas DTPA related to her treatment. In October 1996 the trial court granted the defendants' collective motions for summary judgment on limitations. Plaintiff alleged that defendants fraudulently concealed information which caused her to fail to file her suit within the limitations period. Plaintiff alleges that this course of action taken by the defendants should toll the statute of limitations. Savage had the burden of coming forward with proof raising an issue of fact regarding the fraudulent concealment claim. Because she failed to do so her allegations of fraudulent concealment did not defeat the defendants' right to summary judgment. The court held that all the claims were for breach of accepted standard of care, governed by two years statute of limitations period, and that the discovery rule did not toll the limitations period. Likewise, recasting the claim as a DTPA action did not defeat the limitations defense.

Martin v. Catterson, 1998 W.L. 177345 (Tex. App.-Houston [1st Dist.] April 16, 1998)

When a plaintiff files a common law action for medical malpractice that would be time barred except for the open courts provision of the Texas Constitution, does the plaintiff's subsequent death cause him to lose the protection of the open courts provision? Don Martin sued for medical malpractice when his dermatologist failed to diagnose skin cancer. After filing a lawsuit on March 8, 1994, Mr. Martin died on June 13, 1996. The plaintiffs then filed an amended petition asserting wrongful death and survivorship claims. Citing *Diaz v. Westfal*, 941 S.W.2d 96 (Tex. 1997), the defendants argued that because the plaintiffs' claims are now all statutory and timely only if they are permitted to rely on the open courts doctrine (which requires a common law cause of action) the plaintiffs' claims should be dismissed as barred by the absolute two year limitations period set forth in article 4590i. Because Martin's claims were transformed to statutory claims after his death, the open courts doctrine should no longer apply according to the defendants. Without citing any real authority, the court of appeals simply held that it would be completely unfair to dismiss the claims as untimely. Because the claims were cognizable common law causes of action when filed, the court held that the open courts doctrine applies and the claims were not barred by limitations. The court analogized from the relation back doctrine and the inception of title doctrine for the concept that the character of a lawsuit or of property, such as a cause of action, is fixed at its inception.

Hyson v. Chilkewitz, 971 S.W.2d 563 (Tex. App. -- Dallas 1998, pet. granted)

The issue presented was what effect a misnomer claim has on the tolling of limitations in a medical malpractice action. Plaintiff injured his back in 1987 and sought treatment from an orthopedic surgeon who subsequently referred him to Dr. Hyson's office for pre-operative tests. In 1988, Chilkewitz underwent back surgery. During the procedure, a technician from defendant's office performed somatosensory (SEP) monitoring. The surgeon used an electrocautery unit (ECU) during the procedure. Because the ECU was improperly grounded, the electricity from the ECU passed back to ground through one of the SEP monitor electrodes and severely burned plaintiff's leg. Plaintiff brought suit under the Medical Liability and Insurance Improvement Act against the surgeon who was not present at the surgery, but was the sole shareholder of the professional association employing the technician. After the applicable limitations period expired, plaintiff filed amended pleadings naming the corporation as defendant, claiming misnomer as a matter in avoidance of limitations. The Dallas Court of Appeals held that the doctrine of misnomer did not toll the Medical Liability Act's two-year statute of limitations. The Plaintiff advanced the misnomer claim at trial, but the court distinguished this from the misidentification claim offered on appeal. The court held that these are distinct doctrines and require separate analysis. The majority engaged in a lengthy analysis of the legislative intent behind section 10.01 and concluded that most tolling provisions do not apply to that section, including misnomer or misidentification.

Jones v. Miller, 964 S.W.2d 159 (Tex. App. -- Houston [14th Dist.] 1998, no pet.)

In another limitations case, the court ruled on a mental incompetence tolling claim and again addressed when the limitations begins to run. Plaintiff and her husband brought suit against ten doctors and twelve medical facilities for failing to diagnose the cause of the wife's multiple personality disorder. Plaintiff was referred to Charter Hospital in Houston for further treatment of a dissociative identity and was treated by Dr. Miller. Three years and four months later, plaintiffs sued Dr. Miller for malpractice contending his diagnosis of multiple personality disorder caused by satanic ritual abuse was "baseless." Summary judgment was granted on limitations, but plaintiff appealed on the ground that she was mentally incompetent and thus limitations was tolled. Plaintiff presented summary judgment proof in the form of an unsworn Social Security notice granting her disability benefits and an affidavit from another treating psychiatrist. The summary judgment proof was determined incompetent to support tolling under a mental deficiency claim, and the court affirmed the defendant's summary judgment. The court referred to the readily ascertainable dates of alleged acts or omissions and held the statute of limitations begins to run on that date.

Terry v. Barrinuevo, 961 S.W.2d 528 (Tex. App.-Houston [1st Dist.] 1997, no pet.)

Between August 1992 and May 1993 Alfred Mark Terry received physical therapy treatment on his shoulder at Rehab Plus. During the course of a therapy session on January 14, 1993, his injured shoulder popped out of its socket or became dislocated. On January 6, 1995, plaintiff sent notice of his intent to assert a claim under the Medical Liability and Insurance Improvement Act. Two years and six days after the alleged injury Terry filed suit against Rehab Plus. The defendants moved for and were granted summary judgment based on a limitations defense. The court held that article 4590i does not apply to physical therapists. Thus, sending a physical therapist a notice letter does not extend limitations by seventy-five days. The two year personal injury statute of limitations applies.

Slater v. National Medical Enterprises, Inc., 962 S.W.2d 228 (Tex. App. Fort Worth 1998, pet. denied)

The issue is whether duress of a third party or fraudulent concealment act to toll the limitations period for a fraud claim. Plaintiff, a former patient, sued several psychiatric hospitals and treating physicians, alleging that defendants engaged in a fraudulent scheme to admit patients for the sole purpose of obtaining insurance payments. Plaintiff was treated at the Psychiatric Institute of Fort Worth for chemical dependency. She claims that during her treatment she was over medicated, mistreated and that her drug abuse counselor, whom she later married, subjected her to mental and emotional abuse and sexual advances. The Fort Worth court declined the opportunity to hold for the first time that duress can toll the

limitations in an article 4590i claim. In addition, the court held that duress imposed by a third party cannot inure to a plaintiff's benefit to toll limitations as to parties who did not impose the duress.

IV. Experts

A. Reports

Horsely-Layman v. Angeles, 968 S.W.2d 533 (Tex. App. CTexarkana 1998, no pet.)

In a witness exclusion ruling, the Texarkana Court of Appeals refused to dismiss a case for failure to identify an expert and provide a report within 180 days pursuant to article 4590i, section 13.01(e). Plaintiffs brought suit against Dr. Angeles and several other defendants alleging that all the defendants were negligent in the treatment of the plaintiff. The plaintiffs' counsel filed a requisite 180-day expert report against one of the defendants, but did not timely file any reports specifically addressing Dr. Angeles. Dr. Angeles filed a motion to dismiss on the grounds that the plaintiffs had not complied with the requirements of section 13.01(d) because they failed to file the expert report as to him within 180 days of filing suit. The plaintiffs' attorneys simply argued that the original timely filed report was impliedly critical of Dr. Angeles, although it did not address him or his care and treatment. The court held that plaintiffs' counsel's brief is sufficient to show that his failure to file a specific report regarding Dr. Angeles was not the result of conscious indifference or intentional conduct, but merely a mistake. As a result, the court of appeals reversed the trial court's dismissal of the case against Dr. Angeles. The court of appeals held, without acknowledging the impossibility of the burden of proof, that the defendants must specifically controvert the plaintiff-attorney's evidence that the failure to file the report was merely a mistake and not intentional.

McClure v. Landis, 959 S.W.2d 679 (Tex. App.-Austin 1997, pet. denied)

The question raised is when should a court excuse a plaintiff's failure to timely provide the expert report and information required under article 4590i, section 13.01? In this case, McClure filed suit against Landis on October 20, 1995 in an action governed by the Medical Liability and Insurance Improvement Act. Under the Act, she was obliged to furnish Landis with an expert report within 180 days of filing suit or suffer dismissal of her case with prejudice. During the hearing on the defendant's motion to dismiss, it was determined that the report was actually prepared within the 180 day time period but due to a clerical error had not been sent to the defendants. The court held that because the plaintiff's attorney's legal assistant failed to send a report to the defense counsel as instructed and the plaintiff's attorney did not know it had not been sent out, the trial court abused its discretion when it dismissed the case with prejudice rather than allowing an extension of time to provide the report. Proof of accident or mistake, according to the court, negates the conscious indifference for which a case may be dismissed.

Estrello v. Elboar, 965 S.W.2d 754 (Tex. App.-Fort Worth 1998, no pet.)

In another case addressing expert reports, plaintiff's counsel failed to provide a report within the first 180 days because she thought the cost bond that she had filed was sufficient to comply with the statutory requirements under article 4590i, section 13.01. Plaintiff's counsel did not request the report from her expert until about 220 days after she filed suit, nor did she timely ask for an extension to file the report. The defendants then moved to dismiss under section 13.01(e). The trial court dismissed the case. Plaintiff did not move for or request a hearing until almost 22 months after the 180-day period expired to seek an extension of time to file the expert report. Such request was too late.

Qualifications

Hall v. Huff, 957 S.W.2d 90 (Tex. App.-Texarkana 1997, no pet.)

In another expert case, the court was asked whether a physician may testify as to the standard of care for nurses? This complicated malpractice case involved a patient who first hurt his elbow. He went to Dr. Huff for treatment but his condition worsened. Although the case does not describe how, the patient ended up in the hospital for 9 days with renal failure. Dr. Huff, however, only treated the elbow problem and what he

believed was pneumonia. The patient was transferred to another hospital for dialysis where a cardiac catheter was incorrectly placed by another doctor. The catheter perforated the patient's heart. The plaintiffs offered the affidavit of their physician expert to criticize the hospital's nursing staff for not recognizing the symptoms of cardiac tamponade in time to save the patient's life. The appellate court held the trial court should have considered the testimony of the plaintiff's physician expert that was critical of the nursing care provided by the hospital. The physician was well-trained in internal medicine and taught nursing classes on how to manage critically ill patients. Summary judgment in favor of the hospital was reversed and the case was remanded for trial. This case also had an extensive discussion of what constitutes a superseding cause. The court ruled that the misplacement of the cardiac catheter was not a superseding cause of the patient's death because Dr. Huff's alleged mismanagement of the patient resulted in a need for the cardiac catheter in the first place.

Boren v. Bullen, 972 S.W.2d 863 (Tex. App.-- Corpus Christi 1998, no pet.)

In this case the trial court excluded the plaintiff's expert's affidavit filed in opposition to defendant's motion for summary judgment because the plaintiff had not proven the expert witness was qualified under Rule of Evidence 702. The court held the party offering an expert's testimony bears the burden of proving the witness is qualified. The plaintiff offered a board certified orthopedic surgeon as his expert witness; however, nowhere did the plaintiff allege that the witness' expertise was in treating infectious diseases, the defendant's field of specialization. The court stated that something beyond mere possession of a medical degree is necessary to satisfy Rule 702 in a medical malpractice case, particularly when the subject matter of the proffered testimony involves the performance of a specialist within his field of expertise. The trial court could properly reject the testimony of an expert should it determine the expert is unqualified.

Sisters of Charity of the Incarnate Word, Houston, Texas v. Gobert 1997 W.L. 746032 (Tex. App.- Houston [1st Dist.] Nov. 26, 1997)

The question presented was whether expert testimony is required to establish the negligence of a mental health facility where a male patient entered a female patient's room and sexually assaulted her? The plaintiff sued the mental hospital where she had been admitted for negligence and gross negligence after one of the male patients entered her room uninvited and sexually assaulted her. There was no expert testimony from the plaintiff as to what the standard of care was for overseeing or monitoring patients in a mental institution.

A negligence verdict in favor of the plaintiff was affirmed. The case did not involve a patient care issue, but rather what a reasonable facility should do to protect its patients from harm. Because the hospital knew that the male patient was difficult and had made previous unwanted advances toward the female patient and the staff was already alerted to the problem, the jury did not need expert testimony to help decide this case. The jury was entitled to find that the hospital's failure to keep unwanted intruders out of the patient's room was below the standard of ordinary care. Also, because the alleged criminal conduct of this mental patient was foreseeable by the hospital, it was not a superseding cause of the plaintiff's injuries.

V. Spoilation of Evidence

Malone v. Foster, 41 Tex. Sup. Ct. J. 923 (June 5, 1998)

The issue presented was whether the administrative destruction of an incident report constituted spoilation of evidence.

On December 17, 1990, Malone was admitted to Baylor University Medical Center and initially diagnosed with a kidney infection. On December 18, 1998, Malone fell in his room. In compliance with hospital policy, Nurse Chason filled out an incident report. In accordance with its incident report retention policy, Baylor subsequently destroyed this incident report.

Malone sued Drs. Foster and Christensen and Baylor University Medical Center (collectively "Baylor") for medical malpractice and evidence spoliation. The trial court granted partial summary judgment dismissing the Malones' spoliation claim. The trial court excluded the testimony of Mr. Watkins about the destruction of the hospital report. Watkins is an administrator at Baylor University Medical Center and would have testified about Baylor's policy of destroying incident reports after 6 months.

On this record, the court could not hold that the trial court abused its discretion. For example, Nurse Chason testified that it was her practice to incorporate the contents of any incident reports into her regular nursing report. Because her nursing report for the time period in question was available to the Malones, the trial judge could have concluded that the absence of the alleged incident report was not prejudicial to the Malones. Accordingly it was not reversible error for the trial court to refuse to admit the testimony before the jury.

Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998)

In this companion case, the Texas Supreme Court reaffirmed that Texas does not recognize an independent cause of action for spoliation of evidence against persons who are parties to the underlying cause of action.

Ortega alleged that defendants, Drs. Aleman and Trevino, were negligent in providing care and treatment during Linda Ortega's birth. Plaintiffs discovered that Linda's medical records from the birth had been destroyed. They then brought a separate suit for intentionally, recklessly or negligently destroying the records from the birth.

The Texas Supreme Court refused to recognize spoliation as an independent cause of action, analogizing to a line of cases refusing to recognize a separate cause of action for perjury or embracery. The obligations to not destroy evidence arise in the context of particular lawsuits; consequently, spoliation is best remedied within the lawsuit itself, not as a separate tort.

VI. Procedure

A. Summary Judgment

Mathis v. Bocell, 1998 W.L. 209215 (Tex. App.-Houston [1st Dist.], April 30, 1998).

In a case involving expert reports, the Houston Court of Appeals reversed the trial court's grant of summary judgment in a medical malpractice case brought against physicians for failure to provide appropriate follow up care following arthroscopic surgery of the patient's knee. The court held that if you object to the other side's expert affidavit because the expert did not attach the records on which he relied and rendered his opinions, you have to do it at the trial court level and obtain a ruling. Failure to attach medical records to an expert witness's affidavit is a defect as to form that is waived if not raised at the trial court level. It is not a substantive defect that can be argued on appeal for a first time.

Whitley v. Heston, 954 S.W.2d 119 (Tex. App.-- San Antonio 1997, *no pet.*)

In this case, an optometrist was sued for an alleged failure to diagnose a retinal tear. The defendant moved for summary judgment supported by his affidavit and the deposition of a board certified ophthalmologist who had also treated the plaintiff. The defendant doctor's affidavit stated his qualifications and his familiarity with the standard of care. It described the patient's complaints and the details of his examination, after which he concluded there was no need for a referral to another health care provider at that time. It also stated the defendant told the patient to be alert for certain signs and symptoms. The affidavit concluded that this examination and these warnings were consistent with the standard of care.

The court of appeals noted, however, that the affidavit did not articulate a particular standard of care but only contained the defendant's conclusory statement that he was familiar with the standard of care. The court believed that the affidavit also insufficiently described the examination and treatment of the

defendant. Without a specific standard of care and a description of these facts, the court ruled that the affidavit was insufficient to support summary judgment.

Hernandez v. Calle, 963 S.W.2d 918 (Tex. App. -- San Antonio 1998, *no pet. h.*)

Plaintiff brought suit against his physician for alleged negligence in failing to properly assess his symptoms and complaints, failure to order appropriate tests, failure to refer to a specialist, and failure to diagnose cancer in a timely manner.

Antonio Hernandez was admitted to Santa Rosa emergency room after suffering a head injury. After initial observation by the emergency room physician, another doctor treated Hernandez, ordering a CT scan. A second CT scan was performed four days after admission. A month later, Hernandez was transferred to another hospital for rehabilitation where a third brain scan revealed an inoperable brain tumor. Defendants were granted summary judgment based on an affidavit from the treating physician which alleged no breach of duty and a lack of causal connection.

The court held that even though the affidavit lacked a sufficient statement of the standard of care, it sufficiently negated causation. It stated that the standard of care statement is not a prerequisite to consideration of causation. Because the defendant conclusively negated an essential element of the plaintiff's cause of action, summary judgment was appropriate.

Jones v. Miller, 966 S.W.2d 851 (Tex. App. -- Houston [1st Dist.] 1998, *no pet. h.*)

In another case involving summary judgment affidavits, the Houston Court of Appeals once again affirmed the rule that conclusory affidavits are not sufficient to support a summary judgment motion.

Plaintiff brought suit claiming medical malpractice and failure to obtain informed consent. The plaintiff saw Dr. Miller for foot pain. After an examination, Dr. Miller diagnosed a bunion and recommended surgery, which was performed the following week. Dr. Miller saw the plaintiff on three post-operative visits and ultimately diagnosed her foot as completely healed. After experiencing pain over the next few months, plaintiff consulted another podiatrist who determined there was bone non-union. He concluded the foot was not completely healed and performed another surgery. Plaintiff brought suit for failure to diagnose the non-union and for failure to obtain informed consent (claiming because the doctor did not personally give her the consent form to sign, it was not informed consent). The trial court granted summary judgment for defendant on both issues.

The appeals court found that Dr. Miller's summary judgment affidavit was merely conclusory and did not properly set forth the standard of care for a podiatrist. The only post-operative standard of care criteria listed was to perform an x-ray. The court found this insufficient to negate the elements of duty and breach because it did not include a specific standard of post operative care. The court reversed summary judgment on this point, but affirmed the informed consent summary judgment.

B. Instructed Verdict

Harris v. Belue, 974 S.W.2d 386 (Tex. App. CTyler 1998, *pet. filed*)

This is a medical malpractice case in which Wanda Harris and her husband, Bobby Harris alleged that Dr. Belue was negligent while performing a laparoscopic-assisted vaginal hysterectomy (LAVH). They claimed that during the procedure he stapled Harris' small bowel and mesentery causing a bowel obstruction. The central issue is whether the plaintiffs' expert was capable of testifying as to causation based solely on his review and assessment of the medical procedures that were followed.

The court held that the expert's conclusion that Dr. Belue was performing the LAVH and fired the errant staple that caused the obstruction in the patient's small bowel was a straight-forward medical deduction based upon physical facts, which did not have to satisfy the standard for admission of novel scientific evidence. The Tyler Court of Appeals reversed the plaintiffs' take nothing judgment and remanded the remaining issues for a new trial.

C. Class Certification

Methodist Hospitals of Dallas v. Tall, 972 S.W.2d 894 (Tex. App. Corpus Christi 1998, *no pet. h.*)

Methodist Hospitals of Dallas brought an interlocutory appeal of an order certifying a class action in a claim of improperly disposing of medical records.

Linda Tall is the named representative of the class, which alleges that Methodist Hospitals of Dallas improperly disposed of radiological films taken of Tall's children and other members of the class. The class certification was reversed and remanded to the trial court.

Affidavits of hospital employees concerning the numbers of radiology patients and the defendant's policies for destruction of radiological films were not before the court at the certification hearing but were merely introduced at the hearing on the motion for reconsideration and therefore may not be considered in support of the trial court's decision. Plaintiff was required to present evidence which showed that Methodist Hospital "routinely" destroyed x-rays, and she failed to do so. Her bare assertion in the petition was insufficient to carry her burden.

D. Appeals

Miller v. Green Park Surgery Center Associates, Ltd., 1998 W.L. 305028 (Tex. App. Houston [1st Dist.] 1998)

In this unreported decision, the court addressed the filing deadlines and the effect of filing an appeal bond.

This is a medical malpractice action in which the plaintiff obtained a default judgment against the defendant hospital, then entered into settlement negotiations with the defendant, signed a release, and filed a joint motion to vacate the default judgment and to dismiss the plaintiff's claims with prejudice. The trial court granted both motions.

The plaintiff later filed a motion to vacate the dismissal order on the ground that the trial court signed the order after its plenary power had expired. The trial court granted the motion and the plaintiff obtained an abstract of title and attempted to execute the judgment. In response, the defendant filed suit seeking a declaratory judgment that the release was valid and obtained a TRO blocking any further attempts to execute the judgment. Plaintiff counterclaimed and defendant was granted summary judgment on all claims.

The appeal was dismissed for want of jurisdiction. Although an affidavit of inability to pay costs submitted to the appellate court within 15 days after it is due serves as an implied motion for an extension of time, the appellant is still obligated to come forward with a reasonable explanation to support the late filing. In this case, the plaintiff/appellant failed to provide any such explanation or cite any evidence in the record to justify the late filing.

E. Pleading Amendments

Garcia v. Columbia Medical Center of Sherman, 996 F. Supp. 605 (E.D. Tex. 1998)

The issue presented is whether an allegation of concealment or destruction of evidence constitutes just cause to allow amendment of a pleading after the defendant has answered.

Plaintiffs filed this medical liability case on March 17, 1997 pursuant to article 4590i of the Texas Medical Liability and Insurance Improvement Act. Plaintiffs claim that Juan Garcia was wrongfully intubated after his prostate surgery on July 11, 1995. His wrongful intubation occurred when an endotracheal tube was placed in Garcia's esophagus rather than in his trachea. According to the plaintiffs, this wrongful intubation caused Garcia to suffocate, suffer cardiac arrest and ultimately die.

During discovery, the plaintiffs learned that Columbia conducted a clandestine EEG on Garcia on July 11, 1995 shortly after he was wrongfully intubated. This EEG revealed that Garcia was brain dead. The Plaintiffs alleged that Columbia neither informed them that this test was being done nor disclosed its results. Instead, Columbia went to great lengths to cover up the results of this test and acted as if the

extent of Garcia's condition was unknown until after the results of the EEG taken 3 days later were reported.

Plaintiffs moved to amend their complaint to add to their negligence and gross negligence claims causes of action for negligence per se, fraud, intentional infliction of emotional distress, intentional tort, assault and battery, civil conspiracy, bystander recovery, spoliation and punitive damages. Defendants opposed the amendment on ground of undue delay, prejudice and futility.

The court found that the plaintiffs should be allowed to amend their original complaint. However, the court engaged in significant discussion regarding each of the additional complaints and limited the amendments to specific areas in each of the alleged complaints. The court denied amendments relating to negligence per se (in part), fraud (in part), intentional infliction of emotional distress (in part), intentional tort, bystander recovery, assault and battery, and spoliation.

F. Discovery

In re Anderson, 973 S.W.2d 410 (Tex. App.CEastland 1998, *no pet. h.*)

This is a mandamus proceeding following a suit brought by parents against a doctor and his clinic alleging that a technician employed by the doctor sexually assaulted their daughter during an EEG exam. The plaintiff sought to discover the identity of other persons who had made a complaint against the doctor, his clinic or the technician. The defendants responded that such matters come within the physician-patient privilege, and refused to disclose the information.

The Eastland Court of Appeals reversed the trial court's determination that the information was discoverable. The court held that the identity of other patients who had made complaints was protected from discovery by the physician-patient privilege and the physician did not have the authority to waive such privilege.

G. Witness Exclusion

Perez v. Murff, 972 S.W.2d 78 (Tex. App.-Texarkana 1998, *pet. filed*)

In another witness exclusion case, the trial court ruled that all witnesses be excluded because the plaintiff failed to designate them in accordance with an agreed pretrial order. The Texarkana Court of Appeals reversed.

The trial court's decision to strike all witnesses the plaintiff's counsel failed to designate in accordance with an agreed pretrial order was an abuse of discretion because it resulted in a "death penalty" sanction precluding a trial on the merits. The court did purport to weigh the equities in the case; namely, the precluded witnesses were all identified in response to interrogatories and several of them had already been deposed by the defendants. The plaintiffs simply failed to submit a witness list in order to comply with the letter of the pretrial order.

H. Venue

Surgitek, Inc. v. Adams, 955 S.W.2d 884 (Tex. App.CCorpus Christi 1997, *pet. filed*)

The issue in this case is whether the joinder of 75 plaintiffs into one breast implant lawsuit in Cameron County is appropriate under the Texas Rules of Civil Procedure.

Seventy-five plaintiffs sued 42 doctors and the breast implant manufacturer in Cameron County. Only 2 of the plaintiffs lived in Cameron County so the defendants objected to venue there as to the remaining 73 and argued that it would be improper to join all the plaintiffs in one lawsuit where venue is patently wrong as to 73 of them.

The court held Rule 40(a) of the Texas Rules of Civil Procedure allows joinder of the plaintiffs under these circumstances in one suit in Cameron County. Venue need not be established for every plaintiff so long as the four requirements of section 15.003(a) of the Texas Civil Practices and Remedies Code are met. Those include, (1) they assert any right to relief jointly, severally, or arise out of the same transaction,

occurrence, or series of transactions or occurrences, (ii) there is no unfair prejudice to defendants by maintaining suit in Cameron County, (iii) there is an essential need for the plaintiffs to try their case in Cameron County, and (iv) the venue in Cameron County is fair and convenient.

I. Removal

Cyr v. Kaiser Foundation Health Plan of Texas, 12 F.Supp.2d 556 (N.D. Tex.1998)

This case was removed from state court to the District Court by defendants Kaiser Foundation Health Plan of Texas (Kaiser). The state court claims involved a failure to diagnose and treat a serious physical ailment suffered by plaintiff. Defendants removed on the grounds that the claims were within the scope of ERISA and therefore pre-empted.

The court engaged in a lengthy discussion of the state law claims, and an evaluation of the pre-motion claims of the defendant. The court held that the defendants failed to meet their burden to establish that at least one of the claims was subject to complete pre-emption and the cause was remanded to state court.

J. Res Ipsa Loquitur

Schorlemer v. Reyes, 974 S.W.2d 141 (Tex. App. -- San Antonio 1998, *pet. filed*)

This case presented the question of whether a res ipsa loquitur instruction was proper in this medical malpractice case.

This is a medical malpractice case arising from a gynecological surgical procedure. Reyes was referred to Dr. Schorlemer for treatment of a solid mass on her right ovary. Dr. Schorlemer recommended an exploratory laparotomy, to include a biopsy of the mass and possible removal of the reproductive organs. The surgery was performed and Dr. Schorlemer ultimately removed the cyst, ovary and fallopian tube, feeling they were not salvageable based on surrounding adhesions. After experiencing post operative pain and not being satisfied with Dr. Schorlemer's explanations, Reyes consulted a second physician who determined that a sponge had been left inside during the surgery.

Reyes sued the hospital, nurses, and Dr. Schorlemer. After pre-trial settlements, only Dr. Schorlemer remained. Over Schorlemer's objection, the jury charge included a res ipsa loquitur instruction.

The court recognized that the res ipsa loquitur doctrine is generally inapplicable to medical malpractice cases, but held that in this case the instruction was proper because there was no dispute that the sponge was left in the patient following surgery. It added that providing this instruction was within the trial court's discretion.

K. Evidence

Pace v. Sadler, 966 S.W.2d 685 (Tex. App. -- San Antonio 1998, *no pet. h.*).

The issue in this case involved the exclusion of testimony regarding a gap in the patient's medical chart.

Plaintiff brought suit alleging medical malpractice arising from surgery performed on her husband following his heart attack. Plaintiff alleges that her husband's death two days following surgery was the result of negligence, however, the jury returned a defense verdict. Plaintiff's primary contention is that she was prevented from responding to the defendant's misrepresentations about the medical records of her husband's care. The medical records included a multi-purpose flow sheet which contained a one-hour time period where the nurses made no entries. The trial court admitted the records but excluded any characterization of the gap as inadequate documentation.

The San Antonio Court of Appeals affirmed the trial court's decision to exclude the evidence, holding that the gap was not relevant to any disputed issue regarding the standard of care provided. The gap occurred during a time that the patient was not alleged to have complained of chest pains or discomfort.

VII. Negligent Credentialing

St. Luke's Episcopal Hospital v. Agbor, 952 S.W.2d 503 (Tex. 1997)

The issue presented here is whether the Texas Medical Practice Act, article 4495b applies to preclude a cause of action against a hospital for negligent credentialing.

The Agbors had a baby delivered at St. Luke's Hospital by Dr. Rothschild. The baby suffered an injury during birth that permanently disabled the baby's left arm. The baby's parents sued the doctor and also asserted a cause of action against the hospital for allowing the doctor to practice medicine there. This "negligent credentialing" cause of action was brought because Dr. Rothschild had been sued many times in the past, was not a Texas resident, and was not properly insured for acts of malpractice.

When a medical peer review committee evaluates a physician for the purpose of granting or denying that physician privileges to practice in a hospital, that medical peer review committee and, therefore, the hospital, are protected by article 4495b, section 5.06(1) that makes malice a prerequisite to liability.

Therefore, unless there is malice, the committee and hospital are immune from negligent credentialing liability. The court pointed out that malice need not be directed to an individual plaintiff. That is, if the committee approved a credentialing request essentially knowing that a doctor was incompetent and disregarded any concerns about the hospital's patients in general, an individual patient subsequently injured by that doctor might be able to assert a viable cause of action against the hospital.

VIII. Peer Review

Clark v. Texas Home Health, Inc., 971 S.W.2d 435 (Tex. 1998)

The issue presented in this case is whether the 1992 version of the Texas Revised Civil Statutes article 4525b, section 6 protected nurses serving on a peer review committee for the peer review of a licensed vocational nurse.

Ursula Shaw, a licensed vocational nurse, employed by Texas Home Health, caused a medication error that eventually resulted in a patient's death. At the time of the incident, Karen Clark, among others, was serving on the peer review committee for Home Health. Following this incident, the peer review committee expressed its intention to submit a report to the Texas Board of Vocational Nurse Examiners regarding the medication error. This was opposed by Texas Home Health Chief Executive Officer, who was concerned that Shaw had not been given an opportunity to file a rebuttal.

The nurses eventually mailed a report to the board on or about July 31, 1992. This was two days following their resignations after being demoted following a disagreement with Texas Home Health executives over submission of the report. The nurses sued Home Health and the executives under the Nurse Practice Act. The trial court granted summary judgment for all defendants on all claims. The court of appeals affirmed, concluding that the nurses could not recover under the Nurse Practice Act because it did not include within its definition of peer review the evaluation of licensed vocational nurses. *Clark v. Texas Home Health, Inc.*, 940 S.W.2d 835 (Tex. App. -- Amarillo 1997).

The Supreme Court affirmed that decision inasmuch as it held that the section 6 provisions provided no protection for nurses because it did not cover a licensed vocational nurse peer review committees. However, they disagreed with the court of appeals conclusion that nurses are not protected by section 11 solely because they failed to make a signed written report before the alleged retaliation by their employer. Reversed in part, remanded in part.

IX. Employment Issues

Brown v. St. Joseph's Hospital and Health Center, 998 F.Supp. 727, (E.D.Tex. 1998).

The question here is whether an employee/supervisor can be held individually liable for violations of Title VII?

Brown filed a sexual harassment and retaliation cause of action under Title VII alleging that the charge nurse, Kathy Griffin, made unwelcome sexual advances toward her. Brown's contention was that she was

also given a heavier work load in retaliation for her rebuke of these advances. Brown claims she was compelled to resign as a result of the ongoing improper behavior and St. Joseph's failure to curtail it.

The court found that Title VII prohibits an employer from discriminating against any employee on the basis of race, color, religion, sex or national origin. An employer for the purposes of Title VII includes any person engaged in an industry affecting commerce. The Fifth Circuit holds that immediate supervisors are considered employers when delegated the traditional rights of an employer, such as hiring and firing.

In the present case, Brown's Title VII action is maintainable against St. Joseph's, but not against Griffin individually. However, Brown may still pursue her cause of action against Griffin individually for the violations of state tort and contract law.

Montgomery County Hospital District v. Brown, 965 S.W.2d 501 (Tex. 1998).

The issue addressed is whether at-will employment can be modified by nothing more than an employer's oral assurances that an employee whose work is satisfactory will not be terminated without good cause.

For ten years Vallerie Brown was employed by the Montgomery County Hospital District as a laboratory systems manager. At the time she was hired, she was told by the hospital administrator that she would keep her job as long as she was doing her job and would not be fired without good reason or good cause. Brown was fired and filed a breach of contract claim for her termination without good cause.

The Texas Supreme Court held that oral assurances of employment for an indefinite term are not sufficiently specific and definite to modify an at-will employment relationship.

X. Products Liability

Herring v. Teletronics Pacing Systems, Inc., 964 S.W.2d 753 (Tex.App.--Beaumont 1998, no pet. h.).

The guardian of person and estate of pacemaker recipient filed an action against the pacemaker manufacturer, asserting claims of negligence. Summary judgment was granted at the trial court on pre-motion grounds, but was reversed and remanded by the Beaumont Court of Appeals.

Plaintiff alleges that Teletronics provided her mother a defective pacemaker and failed to monitor the pacemaker as promised. Plaintiff's mother, Zettie Jones, had a Teletronics pacemaker implanted for the purpose of assisting in the control of her heart beat. Less than one year later, the defective pacemaker was replaced, because it did not function properly.

The Beaumont Court reversed, finding no conflict between the federal requirements under the Medical Device Amendments of 1976 and the Plaintiff's state law claims.

Baxter Health Care Corp. v. Grimes, 1998 W.L. 548729 (Tex.App.--Dallas, Aug. 31, 1998)

This is an unreported decision in a products liability case arising out of silicone breast implant litigation. In a battle of experts, the plaintiffs obtained a jury verdict in their favor. Appeal was taken on a sufficiency of evidence issue, claiming that there was insufficient evidence to support the verdict.

The Dallas Court of Appeals declined to visit the expert issue, holding that without a properly briefed Daubert/Robinson complaint, it would not review the underlying reliability of the expert scientific evidence. The court ultimately held that the plaintiff produced sufficient evidence of causation and affirmed the trial court.

XI. Premises Liability

Laman v. Big Spring State Hospital, 970 S.W.2d 670 (Tex. App. -- Eastland 1998, no pet. h.)

Plaintiff presented a premises liability claim against Big Spring State Hospital after an unattended and sedated psychiatric patient was raped by another patient.

Plaintiff was admitted to the Southwest Psychiatric Services Unit at the Hospital on August 3, 1993. During her initial examination she became agitated, combative and delusional. She was moved to a "change-of-environment room" which was located in the men's side of the unit. She was supervised by a staff member until she was seen by the doctor, who prescribed a sedative. After she was asleep, the attendant left and a short time later, Laman was raped by a male patient.

The State claimed that it was immune from suit under the doctrine of sovereign immunity. Plaintiff countered that immunity is waived for personal injuries caused by a condition or use of tangible or real property.

The Eastland Court of Appeals held that the facts showing that Laman was heavily sedated and left unattended in the room with the door open to the men's hall do not support a cause of action for premises defect because they do not involve a defect, shortcoming, or imperfection of the room or the door. Affirmed the trial court's summary judgment on sovereign immunity grounds.

San Antonio State Hospital v. Koehler, 1998 W.L. 315584 (Tex. App. -- San Antonio, June 17, 1998)

In another premises defect claim, Plaintiff brought suit against the San Antonio State Hospital for injuries sustained after escaping from the hospital.

Plaintiff, Kim Koehler, was a patient at the San Antonio State Hospital. She suffered from undifferentiated schizophrenia and had been judicially committed to the hospital. After attending a hospital Halloween party, Koehler escaped the hospital grounds by exiting through a gaping hole in the fence that surrounds the facility. Koehler left the hospital voluntarily, with a male companion, a former patient who had apparently been visiting her nearly every day for the past month. Her male companion took her to a boarding house, where he made sexual advances, threatened her with a butcher knife, and eventually raped her.

The court denied the hospital's requests for instructed verdicts on the grounds that the hospital, as a state entity, was immune from suit. *cf Laman*, 970 S.W.2d 670 *supra*. However, it found as a matter of law that a hole in a fence that allows a mental patient to escape is not a condition or use of tangible personal or real property that could be the proximate cause of the plaintiff's injuries.

Dallas County Mental Health and Mental Retardation v. Bossley, 968 S.W.2d 339 (Tex. 1998).

The parents of a 27 year old mental patient sued the county hospital after their son escaped through an unlocked door and, in an apparent suicide, ran into the path of an oncoming truck. The trial court granted summary judgment on the grounds of sovereign immunity. The court of appeals reversed.

The Texas Supreme Court reversed the court of appeals. The court held that to fall within the Texas Tort Claims Act, a plaintiff's injury must directly result from the condition of the property.

XII. Immunity

Alvarez v. Anesthesiology Associates, 967 S.W.2d 871 (Tex. App. -- Corpus Christi 1998, *no pet. h.*)

In this case, a mother and her parents brought action against the hospital and physicians for *inter alia* malicious prosecution relating to the treatment of her child and reporting possible child abuse.

Michael Alvarez was the child of Roxanne Alvarez and Clifford Harwood. The baby suffered from sleep apnea and was treated regularly at Driscoll Children's Hospital. On several occasions, Alvarez brought Michael to Driscoll for treatment after she found him turning blue. On April 10, 1993, Michael suffered an asthma attack and was treated at Driscoll. While there, he experienced an episode of apnea, lapsed into a coma, and was transferred to ICU. While in ICU, Driscoll staff members noticed red marks on his back and head.

Driscoll contacted Child Protective Services and reported the suspected abuse. Alvarez was ultimately indicted, but the indictment was later dismissed. This suit followed.

All defendants claimed immunity from malicious prosecution under the mandatory child abuse reporting provisions. The court, however, found that a fact issue existed regarding the malicious prosecution claim and refused to grant summary judgment for all defendants. Plaintiffs alleged that the doctors knew that any injury to the child was the result of their own negligence in the treatment of the child, and that the doctors engaged in a cover-up of their liability by accusing Alvarez of child abuse. The holding was limited to the facts of this case, specifically where it is alleged that the existence of child abuse is fabricated to cover-up negligent treatment of the child.

Attaya v. Shoukfeh, 962 S.W.2d 237 (Tex. App. -- Amarillo 1998, *no pet. h.*)

This case was a doctor vs. doctor suit involving a Texas State Board of Medical Examiners Board (the Board) report. The issue of immunity was addressed as it relates to good faith reporting by a physician.

Attaya and Shoukfeh are both practicing cardiologists and staff members at a Lubbock Hospital. Shoukfeh asserted that the animosity between them relates to a peer review committee ruling that revoked Attaya's hospital privileges, which were later reinstated. Four years later, Attaya reported Shoukfeh to the Board, which investigated and brought charges. After hearing, the Board dismissed the complaint and this suit followed.

The Amarillo Court of Appeals reversed the trial court's judgment and discovery sanctions against Attaya. They held that all of Attaya's actions and conduct with the Board were immune from civil liability. The discovery sanctions were in connection with requested admissions relating to Board communications. The court ruled that the immunity from civil liability included the discovery process herein, stating otherwise, absolute immunity is ineffectual.

Walker v. Pollock, 1998 W.L. 177386 (Tex. App. -- Houston [1st Dist.], April, 16, 1998)

In an unreported decision, the Houston Court affirmed the immunity provision of the Family Code for a doctor who evaluated a child in connection with an abuse complaint.

The Harris County Child Protective Services (CPS) had received a complaint of child abuse. The child was removed from the home and the court ordered Dr. Pollock to examine him. Based on his examination, Dr. Pollock testified that the child had Organic Brain Syndrome (OBS), which was indicative of abuse. He further opined that great care should be taken in considering whether to return the child to the home. The plaintiffs sued Dr. Pollock for malpractice based on a subsequent examination by another physician who concluded that the child did not have OBS.

The court held Dr. Pollock was immune from suit because he was participating in a judicial proceeding by examining the child. The fear of an inaccurate diagnosis of child abuse being communicated in a court proceeding is outweighed by the public policy encouraging the reporting of child abuse.

XIII. Antitrust

Ingram v. Harris Health Plan, Inc., No. 598-CV-179 (E.D. Tex., May 12, 1998)

Members of the Harris Methodist Health Plan's HMO filed suit in federal court challenging the HMO's compensation arrangements with physicians. Defendants stated they anticipated the suit given the anti-HMO environment and attributed the suit to aggressive plaintiff's lawyers.

In a related case, Judge Sudderth issued a TRO against Harris Methodist Health Plan, ruling that the HMO's compensation arrangements with physicians were "probably illegal." See *White v. Harris Health Plan, Inc.*, No. 352-173216-98 (Tex. Dist. Ct., May 11, 1998). The TRO stemmed from a class action suit filed by physicians against Harris Methodist in early April, alleging that the negative incentive provisions of the HMO's 1995 payor contract act directly and indirectly as inducements and incentives to limit medically necessary care.

XIV. Damages

Mobil Oil Corp. v. Ellender, 968 S.W.2d 917 (Tex. 1998)

The issue in this case was whether a defendant can receive a dollar for dollar settlement credit for settlement amounts attributed to punitive damages?

The plaintiff died as a result of benzene exposure while working for Mobil Oil Corp. The jury returned a plaintiff's verdict awarding \$600,000 in compensatory damages and \$6,000,000 in punitive damages. Before trial, plaintiff received \$500,000 in exchange for releasing all claims for actual and punitive damages against the other settling defendants. The agreement did not allocate the amount between actual and punitive damages.

The court held a defendant cannot receive credit for settlement amounts representing punitive damages paid by other settling parties. When settlement agreements, however, do not allocate between compensatory and punitive damages, the court places the burden on the plaintiff to establish a distinction between the two. If the plaintiff fails to do so, then the non-settling defendants will be entitled to the entire dollar for dollar settlement credit.

Trinity Universal Insurance Company v. Bleeker, 966 S.W.2d 489 (Tex. 1998).

This is a personal injury case involving fourteen members of two families as plaintiffs who were riding in the back of one pickup truck and injured following an auto accident. Significantly, plaintiffs' counsel did not include in his settlement offer a guarantee that all outstanding hospital liens would be released. Plaintiffs recovered an \$11 million award against the defendant and then the defendant assigned the alleged *Stower's* claim to the plaintiffs' attorney.

The Texas Supreme Court held that when a hospital lien exists, an offer of release is not valid until (1) the hospital's charges were paid in full before the execution and delivery of release; (2) the hospital's charges were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or (3) the hospital is a party to the release. Accordingly, any release or settlement demand that the plaintiffs may have offered to the Defendant was not a full release until it included a lien release. Thus, plaintiffs' alleged *Stower's* demand was ineffectual and the assigned bad faith claims were dismissed.