The *Carreras* Trap & *Stockton* Excuse

Glenn W. Cunningham
Law Offices of Glenn W. Cunningham
Pacific Plaza
14100 San Pedro Ave., Suite 550
San Antonio, Texas 78232
t. 210.228.0600
f. 210.228.0602
glenn@cunninghamfirm.com

TEXAS TRIAL LAWYERS ASSOCIATION
22nd ANNUAL MEDICAL MALPRACTICE CONFERENCE
AUSTIN, TEXAS
June 2, 2011

The author gratefully acknowledges the able assistance of Andrew J. Skemp of the Janicek Law Firm, P.C. in the research and development of this paper.

THE *CARRERAS* TRAP and *STOCKTON* EXCUSE

I. THE *CARRERAS* TRAP

On April 1, 2011 the Texas Supreme Court released *Carreras v. Marroquin*, No. 09-0857, 2011 WL 1206377 (Tex. April 1, 2011). In *Carreras*, the Court dealt with serving notice of claim with an accompanying authorization, pursuant to Texas Civil Practice and Remedies Code §§ 74.051 and 74.052.

A. BACKGROUND

Carreras arose out of a medical malpractice action. On December 16, 2001, a woman underwent an operation treating her broken leg. The woman died two days later. The woman's parents brought claims against surgeon Dr. Jose Carreras of Rio Grande City, Texas, alleging that insufficient post-surgery treatment caused her death.

On December 17, 2003, two days before the two-year statute of limitations[1]would have expired, the Plaintiffs provided Defendant with notice of their health care liability claims, as required by § 74.051(a). No accompanying authorization for release of protected health information was sent as required by §§ 74.051 and 74.052. On February 26, 2004, Plaintiffs filed suit in Hidalgo County. After Dr. Carreras was served, Defendant filed a plea in abatement, claiming that no authorization had been given.

Defendant moved for summary judgment in the trial court, arguing that the claims were barred by the statute of limitations. The Plaintiffs argued that notice was provided, and because of the tolling of the statute of limitations, suit was timely filed. The trial court denied the summary judgment, as did the Court of Appeals, holding that "the plain language of the statute makes the notice requirement independent from the medical authorization requirement."[2]

B. THE STATUTES

Sections 74.051 and 74.052 address the notice requirements for a medical malpractice claim. The statutes trace back to Article 4590i, § 4.01.[3]

---

[1] TEX. CIV. PRAC. & REM. CODE § 74.251.
[2] *Carreras v. Marroquin*, 297 S.W.3d 420, 423 (Tex. App.—Corpus Christi 2009, pet. granted).
[3] TEX. REV. CIV. STAT. ANN. art. 4590i, § 401, *repealed* by Act of June 2, 2003, 78th Leg. R.S., Ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

Section 74.051 states that health care liability plaintiffs must provide written notice of a health care liability claim "by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit. …"[4]

Section 74.051(a) goes on to state that "the notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052."[5]

Providing notice of health care liability claim will toll the statute of limitations for seventy-five days, if the notice is given "as provided" by the rest Chapter 74.[6]

Section 74.052 provides that failure to accompany notice with an authorization results in an abatement of sixty days from the date an authorization is received.[7] Section 74.052 prescribes the form and content of the required authorization.[8]

C. PRE-*CARRERAS*

The scheme set up by Chapter 74 requires that plaintiffs cannot file suit until after they give notice of the claim to the defendants. After giving notice, the plaintiffs must wait sixty days, and then may file. The notice will toll the statute of limitations for seventy-five days. The result is that notice may be sent just prior to the running of limitations, and the plaintiff will not lose their cause of action because of the sixty day waiting period.

The notice must be accompanied by an authorization form, giving the defendant the ability to access the plaintiff's protected health information.

Prior to *Carreras*, the Court of Appeals were spit on whether to read §§ 74.051 and 74.052 together. The Austin Court held that a plaintiff's failure to include the required, but separate, medical authorization form upon providing notice to a defendant health care provider did not bar the tolling provisions afforded in § 74.051.[9] The Court stated that "a plaintiff's failure to include the required by separate authorization form when he provides notice of his claim to

---

[4] TEX. CIV. PRAC. & REM. CODE § 74.051(a).
[5] *Id.*
[6] TEX. CIV. PRAC. & REM. CODE § 74.051(c).
[7] TEX. CIV. PRAC. & REM. CODE § 74.052(a).
[8] *Id.*
[9] *Hill v. Russell*, 247 S.W.3d 356, 360 (Tex. App.—Austin 2008, no pet.).

a defendant within the two-year limitations period does not bar the tolling of limitations but instead allows the provider to obtain an abatement until sixty days after she receives the authorization form."[10] As noted above, the Corpus Christi Court went along with the holding in *Hill*.[11]

The El Paso Court disagreed, stating that the statutes "clearly require that the notice must be accompanied by a medical authorization form in order to toll the limitations period."[12]

D. THE *CARRERAS* HOLDING

The question before the *Carreras* Court was whether notice provided without an authorization form is considered to be given "as provided" in Chapter 74 and effective to toll the statute of limitations. The Court answered no, holding that "if the authorization does not accompany the notice, then the benefit of the notice – tolling – may not be utilized."[13] Several reasons for this holding were cited by the Court, including the plain language of the statute, statutory history, and policy reasons.

The language of §§ 74.051 and 74.052 both state that notice "must be accompanied by" an authorization form. "Must accompany is a directive that creates a mandatory condition precedent."[14]

The Court noted that prior to 2003, Article 4590i, § 4.01 only required written notice to toll the statute of limitations, while authorization was treated separately. Because the requirements concerning notice and authorization were combined in the new statute, the Court reasoned that the Legislature intended a new scheme in which both were required before the tolling benefits accrued.[15]

In addition, the Court explained that the purpose of the notice provision was to encourage pre-suit negotiations.[16] Thus, it was imperative that an authorization be included in the notice so that the defendant could evaluate the claim and settle the case in an expeditious fashion.[17]

---

[10] *Id*.
[11] *Carreras*, 297 S.W.3d at 424.
[12] *Rabatin v. Kidd*, 281 S.W.3d 558, 562 (Tex. App.—El Paso 2008, no pet.).
[13] *Carreras*, 2011 WL 1206377, at *4.
[14] *Id*.
[15] *Id*.
[16] *Id*. (*citing In re Collins*, 286 S.W.3d 911, 916-17 (Tex. 2009).
[17] *Id*.

E. THE "TRAP"

Obviously *Carreras* makes clear that a notice alone will do nothing to toll the statute of limitations. However, this case may have further implications than that. The next step the Supreme Court may take could be to apply *Carreras* to cases where a notice and authorization are served, but where the authorization is found to be "deficient" in some way.

Defendants are now arguing in cases where the tolling aspect of §74.051 is utilized that the authorization was deficient, and thus no authorization at all. Therefore, pursuant to *Carreras*, it would follow that no tolling was allowed. The reasons for raising a deficient authorization vary, but could include that not all medical providers were provided in the authorization or that the authorization did not properly track the form laid out in §74.052(c).

This argument is very similar to the argument advanced by Justice Willett in *Ogletree v. Matthews*[18] and *Lewis v. Funderburk*.[19] In *Ogletree* and *Lewis*, Justice Willett argues that there may be a "rare bird," or third classification of 120 day expert reports between deficient reports and no report at all – the report that is properly filed but it so deficient as to amount to no report at all. This report would not be entitled to a 30 day extension to cure and result in a case being dismissed.

By analogy, this argument could be applied to authorizations required by §§ 74.051 and 74.052. This argument has already been rejected by one court of appeals. In *Rabatin*, the El Paso Court held that an authorization was a component of notice and no tolling could take place without both.[20] But the Court went on to reject the defendant's argument that because "the attached medical authorization form was defective, plaintiff could not receive the benefit of the tolling the statute of limitations."[21] The authorization omitted doctors who had treated the plaintiff in the five years preceding the claim. The Court held that "tolling the statute of limitations when a notice letter and medical authorization form, albeit an improperly filled out form, gives fair warning of a claim and an opportunity to abate the proceedings for negotiations and evaluation of the claim, which carries out the Legislature's intent in enacting the statute."[22]

---

[18] 262 S.W.3d 316 (Tex.2007) (Willett, J. concurring).
[19] 253 S.W.3d 204 (Tex.2008) (Willett, J. concurring).
[20] *Rabatin*, 281 S.W3d at 561.
[21] *Id.*
[22] *Id.* at 562.

There are a couple of things plaintiff's attorney can do to avoid this potential trap and not become the next case the Supreme Court uses to further restrict medical malpractice cases.

First and most obvious is to never rely on the tolling provisions of § 74.051 at all. Second, counsel must be thorough in their interview of the client and the gathering of medical information. It is imperative that all relevant medical providers be included in the authorization so that no argument can be made that it was deficient. The attorney needs to stress to the client that the search all of their records to ensure the accuracy of all the medical providers. Third, counsel must be diligent in documenting their file so that it reflects that all information gathered from the client was included in the authorization.

II. THE *STOCKTON* EXCUSE

On February 25, 2011, the Texas Supreme Court released *Stockton v. Offenbach*, No. 09-0446, 2011 WL 711094 (Tex. Feb. 25, 2011). The Court dealt with service of 120-day expert reports, pursuant to Texas Civil Practice and Remedies Code §§ 74.351(a).

A. BACKGROUND

Stockton arose out of a medical malpractice action.[23] A mother filed a health care liability claim against Dr. Howard Offenbach, alleging malpractice in the delivery of her son. Specifically, the Plaintiff alleged that Dr. Offenbach's failure to recommend and perform a caesarian section based on Ms. Stockton's risk factors for vaginal delivery resulted in permanent injury to her son's left arm at birth. The Plaintiff also accused Dr. Offenbach of being a drug addict and the Court found that the record reflected that he had, in fact, abused prescription drugs "for many years."[24] Dr. Offenbach lost his medical license in 2001 and left the state. His whereabouts were unknown at the time the lawsuit was filed.

The Plaintiff had attempted to locate Dr. Offenbach prior to filing suit. When she filed the lawsuit, she had spent several months looking for him. She had hired a private investigator and searched various public records to no avail. She had initiated a Rule 202 proceeding seeking information from the hospital where her son was born, but the hospital could not help in locating Dr. Offenbach. She had also contacted Dr. Offenbach's last known liability insurance carrier, and had even provided them with a copy of the expert report she would

[23] TTLA member Robert J. "Bob" Talaska represented Ms. Stockton; TTLA Chairman of the Amicus Curiae Committee, Peter M. Kelly, filed a Brief of Amicus Curiae on behalf of TTLA.
[24] *Stockton*, 2011 WL 711094, at *1.

later attach to her original petition. All of these attempts proved fruitless and the Plaintiff could not locate the Defendant.

Plaintiff filed her original petition on June 13, 2007, together with an expert report and the curriculum vitae of her expert. She attempted to serve Dr. Offenbach at his last known address but, not surprisingly, that attempt failed. Thereafter, on July 24, 2007, Plaintiff filed a motion for citation by publication. However, the trial court did not immediately grant the motion and several months passed before the trial court requested additional information.

On November 28, 2007, the Plaintiff filed a supplemental motion to serve Dr. Offenbach via citation by publication, adding additional details regarding efforts to locate the Defendant. The court granted the motion allowing substituted service by publication on December 20, 2007.

Citation by publication finally issued on March 13, 2008, and service was completed on April 9, 2008. The citation advised Dr. Offenbach to answer by April 28, 2008.

Although Dr. Offenbach was still missing, his liability insurance carrier answered the lawsuit and filed a motion to dismiss, claiming that the 120-day expert report was not served on Dr. Offenbach within the statutory time period. The trial court denied the motion, finding that the 120-day report requirement should not apply in this situation. At the hearing, the trial court stated that "the intent of the Legislature was fulfilled by both sending the report to the insurance carrier before [Stockton] filed suit and by filing the report at the time the petition was filed."

An interlocutory appeal was initiated by the Defendant, with the Plaintiff arguing that it was impossible to serve Defendant within 120 days of her filing suit, that sec. 74.351(a) unreasonably prevented her from pursuing her claim, and that if there were no exception to the statutory deadline, the statute was unconstitutional as applied to her. The Dallas Court of Appeals rejected these arguments and overruled the trial court, finding that the statute required dismissal of the case.[25] The Texas Supreme Court agreed and affirmed.

B. THE STATUTES

Section 74.351 requires that an expert report be served on each physician or health care provider against whom a health care liability claim is made.[26] If

[25] *Offenbach v. Stockton*, 285 S.W.517 (Tex. App.—Dallas 2009, pet granted).
[26] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

service of the report is not effectuated within 120 days after the date the original petition is filed, courts are directed to dismiss the case.[27]

In order to "serve" a 120 day expert report, there must be service by one of the four methods prescribed in Texas Rule of Civil Procedure 21a.[28]

C. PRE-*STOCKTON*

Prior to the 2003 tort reform, art. 4590i, § 13.01(d)(1) required that an expert report be "furnished" within 180 days to opposing counsel.[29] Thus, compliance with TRCP 21(a) was not required until after 2003.

Art. 4590i, § 13.01(g) also allowed for a plaintiff to obtain an extension of time to "furnish" the expert report, even when no report was provided by the deadline, if the plaintiff could show an "accident or mistake" in failing to furnish the timely report. This provision was eliminated from Chapter 74.

D. THE *STOCKTON* HOLDING

Before the Supreme Court, the Plaintiff argued that the court of appeals erred in construing the statute's 120-day deadline to be absolute and, instead, should have recognized a "due diligence" exception to the deadline. In addition, the Plaintiff argued that, if the 120-day deadline is not subject to a due diligence exception, then Chapter 74.351(a) is unconstitutional as applied to her case.

1. Due Diligence Exception?

The Plaintiff claimed that, if the service requirement in Chapter 74 incorporates TRCP 21a, then it should also incorporate the due diligence doctrine that courts have attached to the rule.[30] Stockton argued that, since the exercise of due diligence in the service of process can interrupt the running of the statute of limitations, so too should due diligence in the service of the expert report interrupt the running of the 120-day expert report deadline.

The Defendant countered that argument by claiming that, because the legislature in Chapter 74 eliminated the "accident or mistake" loophole contained in former article 4590i, § 13.01(g), and because Chapter 74 expressly provides that the 120-day deadline can only be extended by the written

---

[27] *Id*. at §74.351(a), (b).
[28] *Herrera v. Seton Nw. Hosp*., 212 S.W.3d 452, 459 (Tex. App.—Austin, no pet.).
[29] TEX. REV. CIV. STAT. ANN. Art. 4590i, § 13.01(d)(1), *repealed* by Act of June 2, 2003, 78th Leg. R.S., Ch. 204, § 10.09.
[30] *See Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007).

agreement of the parties or a court order granting a 30-day extension to cure a deficiency, then only strict compliance with the statute would suffice. The Defendant also submitted that grafting a due diligence exception onto 120-day expert reports would ignore §74.002, which states that "in the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict."

However, the Supreme Court pointed out that §74.001 states that "any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law." The Court found that "the word 'served' is not defined in Chapter 74, but its meaning under common law includes the notions of due diligence and relation back. And if Chapter 74 incorporates these concepts through its use of the word 'served', no conflict, as prohibited by § 74.002, would exist."[31]

Just as the Supreme Court was seemingly about to set the stage to craft a due diligence exception onto the service of an §74.351(a) expert report, the Court abruptly changed course, finding that "even assuming that a due diligence exception applies, we are not persuaded that the evidence here is legally sufficient to raise the issue."[32] Thereafter, the Supreme Court picked at the record, illuminating every instance in which the Plaintiff could have moved a bit more quickly to exercise due diligence – assuming a due diligence exception even exists!

Although Stockton argued that the trial court was to blame for any delay in effectuating service upon Dr. Offenbach and, in turn, the Plaintiff's inability to timely serve the expert report, the Supreme Court emphasized the following instances of apparent delay on the part of Stockton:

- Stockton did not move for substituted service until 40 days after filing suit;
- After moving for substituted service, Stockton had 80-days in which to serve Dr. Offenbach with citation by publication and timely file an expert report;
- After moving for substituted service, Stockton did "nothing" for 4 months to obtain an order from the trial court – during which time the expert report deadline passed;[33]
- Stockton did not convey any sense of urgency to the trial court by referencing the expert report deadline and/or requesting immediate relief;

[31] *Stockton*, 2011 WL 711094, at *5.
[32] *Id.*
[33] Noteworthy, Stockton claimed that an employee of the Plaintiff's attorney repeatedly called the court during this 4 month period to inquire about the status of the order for substituted service.

- Another 3 months elapsed between the time the trial court granted the Plaintiff's motion for substituted service (December 20, 2007) and citation by publication was finally issued (March 13, 2008); and
- Service upon Dr. Offenbach by publication was not completed until April 9, 2008.

The Court concluded that, had Stockton called the expert report deadline to the trial court's attention sooner, then "we might reasonably assume that [the trial court] would have acted on the motion [for substituted service] promptly."

Thus, the Texas Supreme Court rejected the "notion that the trial court was solely to blame for the delay in service or that a fact issue was raised concerning Stockton's due diligence in the matter."

2. Statute Unconstitutional as Applied to Stockton?

Stockton argued that the expert report deadline, when applied to her, violated the open court's provision of the Texas Constitution. In rejecting this argument, the Texas Supreme Court relied upon established case precedent that "[a] plaintiff may not obtain relief under the open courts provision if he does not use due diligence [in pursuing his claim]." *See Shah v. Moss*, 67 S.W.3d 836, 847 (Tex. 2001). Accordingly, the Court concluded that "Stockton's argument that the statute is unconstitutional as applied to her then is merely a variation of her preceding argument for a due diligence exception to the expert report deadline."

Significantly, however, the Texas Supreme Court intimated that, if it were ever confronted with a situation in which it was truly impossible for a plaintiff to comply with § 74.351(a), then the Court would acknowledge a due diligence exception, rather than finding that the statute was unconstitutional. In this regard, the Court stated the following:

> "We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, … and 'we are obligated to avoid constitutional problems if possible.' … Thus, if presented with a choice between an impossible condition and a due diligence exception we would, of course, choose the latter."

E. THE DUE DILIGENCE "EXCUSE"

The applicability of a due diligence "excuse" to a *Stockton* scenario is murky, at best. This was, no doubt, intentional on the part of the Texas Supreme Court. Nevertheless, the Court indicated that, in the right circumstance, it would

be willing to craft a narrow due diligence exception to the absolute 120-day expert report deadline.

If you are faced with a situation similar to *Stockton*, in which it is impossible to timely serve an expert report upon a defendant, it would be best if your record established that you did everything humanly, metaphysically, and procedurally possible to ensure that there were no periods of delay, which the Texas Supreme Court could attribute to you. Remember, the Texas Supreme Court has essentially said it must be presented with "an impossible condition" in order to find a due diligence exception.

Also, keep in mind that, if and when the Texas Supreme Court crafts a due diligence exception to remedy "an impossible condition," it is likely going to narrowly construe the time period for which a due diligence exception applies. In *Stockton*, the Plaintiff asked the Texas Supreme Court to view the 120-day period for serving the expert report like a limitations period to which the due diligence doctrine should apply. When grappling with this concept, however, the Texas Supreme Court stated that the four-month delay in which Stockton did "nothing" to serve the 120-day expert report after moving for substituted service "would be analogous to a plaintiff in a tort action waiting two years for a court to act on a pending motion for substituted service."

In an apparent effort to emphasize that point, the Court clouded its analogy by citing its holding in *Ashley v. Hawkins* – a tort case in which the Court concluded that an unexplained eight-month gap in service activity following the expiration of limitations did not constitute due diligence as a matter of law. [34]

This dicta may be significant because, perhaps, the Court might be signaling that it will apply the due diligence standard proportionately to the time allowed. Meaning, the Court will allow a longer gap in the service of citation after the expiration of the two year statute of limitations, than the gap in the service of an expert report after the expiration of the 120-day deadline.

Or, perhaps the Court is flagging that, if an unexplained delay of eight months is too long as a matter of law to serve a petition after the expiration of the two year statute of limitation (8 months / 24 months = 33%), then an unexplained delay of forty days will be too long as a matter of law to serve an expert report after the expiration of the 120-day deadline (40 days / 120 days = 33%).

[34] *Ashley v. Hawkins*, 293 S.W.3d 175, 180-81 (Tex. 2009).

Or, perhaps Justice Medina and his brethren on the Court are just talking hypothetical, theoretical, and/or intellectual "smack" because they are loath to ever craft a due diligence exception to the 120-day expert report deadline of Chapter 74.351(a).

III. CONCLUSION

The bias in favor of health care providers and their insurers, and the persecution of medical malpractice victims and their lawyers, continues at the highest court in the State. Beware of the *Carreras* trap. And, don't count on receiving any benefit from a *Stockton* excuse.