NO. 02-06-00188-CV

IN THE SECOND DISTRICT COURT OF APPEALS
FORT WORTH, TEXAS

ASHRAF FARISHTA, INDIVIDUALLY AND AS NEXT FRIEND
FOR INAYA FARISHTA,

APPELLANT,

V.

TENET HEALTHSYSTEM HOSPITALS DALLAS, INC.,
D/B/A TRINITY MEDICAL CENTER,

APPELLEE.

BRIEF OF AMICUS CURIAE
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TO THE HONORABLE SECOND COURT OF APPEALS:

Amicus Curiae The Texas Trial Lawyers Association submits this brief in support of the motion for rehearing made by Appellant Ashraf Farishta, individually and as next friend for Inaya Farishta. Appellee and underlying defendant Tenet Healthsystem Hospitals Dallas, Inc., d/b/a Trinity Medical Center had moved the trial court for a partial summary judgment to limit Farishta's damages to those specifically enumerated in her § 74.351 report. The trial court erroneously granted the motion, and this court erroneously affirmed. *See Farishta v. Tenet Healthsystem Hospitals Dallas, Inc.*, -- S.W.3d --, 2007 WL 174417 (Tex. App.--Fort Worth Jan 25, 2007).

INTEREST OF AMICUS CURIAE AND DISCLOSURES PURSUANT TO TEX. R. APP. P. 11

TTLA is a statewide trade association formed to advance the cause of those who are damaged in person and property and who must seek redress therefor at law; to resist the constant efforts that are now being made to curtail the rights of such persons; to encourage cooperation between lawyers engaged in the furtherance of such objectives; and through such cooperation to promote justice and human welfare and protect the rights of the citizens of the State of Texas. TTLA is committed to the balanced and impartial administration of justice and seeks to ensure that the judicial system produces results that are fair to all parties, not only plaintiffs. TTLA believes the citizens of Texas are entitled to no less.

No fee was paid or promised in association with the preparation and filing of this brief.

ARGUMENT AND AUTHORITIES

Texas Civil Practice & Remedies Code § 74.351 requires the claimant in a medical malpractice action to serve on the defendant an expert report not later than the 120th day after the date the original petition. The purpose of the report is to inform the defendant of the specific *conduct* the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit. *Am. Transitional Care Ctrs. of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001); *Gallardo v. Ugarte*, 145 S.W.3d 272, 277 (Tex. App.--El Paso 2004, pet. denied); *Ballan v. Gibson*, 151 S.W.3d 281 (Tex. App.--Dallas 2004, no pet.). By definition, a Chapter 74 report is prepared and served *before* the commencement of discovery. Thus, a report need not--and indeed cannot--marshal all the plaintiff's proof. *See Palacios*, 46 S.W.3d at 878. The Legislature enacted the requirement to ensure that another medical professional has at least preliminarily concluded that the defendant's actions fell below the applicable standard of care so as to reduce the filing and prosecution of medical malpractice lawsuits that do not have a good faith basis in law or fact. *See Palacios*, 46 S.W.3d at 876-77. Expert reports produced during discovery and the Chapter 74 report serve distinctly different purposes. The Chapter 74 report was never intended to define or restrict each aspect of the plaintiff's claims and every nuance that may arise during discovery.

The court has erred in two ways in its interpretation of Chapter 74. First, it went outside the four corners of the report in considering Tenet's Motion to Dismiss, and second, it used Farishta's Chapter 74 expert report "in a trial or other proceeding," in contravention of the clear language of Chapter 74.

I. The "four corners" rule prohibits the trial court--and this court--from considering matters outside the report itself when determining its adequacy.

The court has erred in going outside the four corners of Farishta's expert report in reaching its judgment. The court specifically states in its opinion:

> *Comparing his reports to the alleged and pled results* of the breach of the standard of care, it is seen that the report fails to address "illness," other than the specifically enumerated illnesses, and fails to address "developmental impairment." Hence, these alleged results of the breach of standard of care as pled have not been properly addressed through an expert report and should be dismissed.

Farishta, 2007 WL 174417 *6 (emphasis added). The Texas Supreme Court has explicitly and forcefully forbidden such departure from the plain language--the "four corners"-- of the report. The Supreme Court's seminal *Palacios* opinion holds that no court may go outside the four corners of the report for any purpose, nor may any court draw any inference either in favor of or against the report. Because the statute focuses on what the report discusses, the only information relevant to the inquiry is within the four corners of the document. *Palacios*, 46 S.W.3d at 878. Conclusions about the adequacy of the report must rely entirely on the content of the report itself. Neither this court nor the trial court were free to look at Farishta's

Amended Petition in judging the adequacy of the report, and both courts have erred in so doing.

Over 50 Texas state cases have reinforced the "four corners" doctrine, three of them from this court. In two of those cases, the rule operated to require dismissal of the claimant's case: *Ehrlich v. Miles*, 144 S.W.3d 620 (Tex. App.--Fort Worth, 2004, pet. denied); *Robinson v. Murthy*, 2003 WL 22026593 (Tex. App.--Fort Worth, Aug. 29, 2003, no pet.) (not designated for publication). But in one case, *Petrus-Bradshaw v. Dulemba,* 158 S.W.3d 630 (Tex. App.--Fort Worth, 2005, pet. ref'd), as in the case at bar, the result of the four corners test favored the claimant, and precluded dismissal. In *Petrus-Bradshaw,* this Court carefully studied the claimant's expert report, and concluded, from the content of the report alone, that the report provided "ample information to inform Dr. Dulemba of the specific conduct that Petrus-Bradshaw has called into question and to provide the trial court a basis to conclude that Petrus-Bradshaw's claims have merit." *Petrus-Bradshaw*, 158 S.W.3d at 633.

In the present case, as in *Petrus-Bradshaw,* unless one goes *outside* the four corners of Farishta's report, the report is manifestly adequate to inform Tenet and the court of the conduct Farishta has called into question and to provide a basis for the trial court to conclude that her claims have merit. No more is required.

II. The plain language of the statute prohibits use of the expert report in summary judgment proceedings.

This court further erred in affirming the dismissal of any damages claims asserted in Farishta's pleadings and not specifically enumerated in her expert's Chapter 74 report. By definition, in order to strike those damage claims, the court had to have before it the report itself. Yet, under the plain language of § 74.351, such use by any court is prohibited. The statute provides:

> (k) Subject to Subsection (t), an expert report served under this section:
>
> 1. is not admissible in evidence by any party;
>
> 2. shall not be used in a deposition, trial, or other proceeding; and
>
> 3. shall not be referred to by any party during the course of the action for any purpose.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351.

The rules of statutory construction provide that courts (1) must presume that the Legislature intended a just and reasonable result; (2) may consider the statute's object, the circumstances under which it was enacted, common law and former statutory provisions, including laws on same or similar subjects, and the consequences of a particular statutory construction; (3) must construe all portions of a statute or statutory scheme to be effective, if possible; and (4) must not confine their review to isolated statutory words, phrases, or clauses, but must instead examine the entire act. *See* TEX. GOV'T CODE ANN. §§ 311.011, 311.023(3), (5) (Vernon

2005); *Meritor Auto, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *City of Seabrook v. Port of Houston Auth.*, 199 S.W.3d 403, 430 (Tex. App.--Houston [1st Dist.] 2006, pet. filed). Most important, however, is the "plain language" rule. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in ascertaining legislative intent, the most important consideration in statutory interpretation, courts begin with the plain language of the statute).

Should those rules be necessary, then the plain language rule clearly applies. The court need not engage in statutory construction, or try to determine the legislative intent behind a statute. The Legislature has said that the report "shall not be used in a . . . trial or other proceeding" *and* that it "shall not be referred to by any party during the course of the action for any purpose." *Id.* There is no room in a statute of such crystalline clarity for interpretation of any kind. The plain language rule controls. Thus, neither this court nor the trial court were permitted to consider the report in considering Tenet's attempt to limit Farishta's damages proof.

If the legislative intent here is relevant, which it ought not to be, then it must be noted that the purpose of Subsection (k) was to protect plaintiffs from such assaults on their lawsuits. Requiring an early expert showing was designed to demonstrate that some qualified physician had reviewed the lawsuit, found negligence, and causally connected that negligence to plaintiff's damages. No correlation between the report and a claimant's pleadings, either at the time of filing of the report or at the time of any later amendments to those pleadings, was to be

permitted. *See* Aff. of Sen. David Sibley, attached hereto as App. A. The statute was designed to prevent precisely the trap sprung on Farishta: the functional equivalent of a no evidence motion for summary judgment without any meaningful discovery being permitted. Claimants were never meant to have to marshal all his proof at the early filing deadline for the expert report, nor to be bound in their proof to the content of the report. *See Palacios*, 46 S.W.3d at 878. ("A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute.")

Both this court and the trial court have conflated the legal requirements for the testimony of those experts who will be called at trial with the requirements for Chapter 74 reports. This court's interpretation of expert report requirements does not take into account the evolving nature of a lawsuit and its associated compensatory damages. For instance, what happens if a party decides to change experts or their theory of the case as the case progresses to trial? The court's holding in this case--which turns a threshold showing into a ceiling on damages--could be construed as a bar to such a course of action by a litigant and would contravene established legal precedent. A Chapter 74 report was never intended to be a complete and final blueprint of a litigant's case, as is clear from both the statute and the Supreme Court's ruling in *Palacios.*

Prayer

For the foregoing reasons, TTLA asks the Court to grant the motion for rehearing to consider the issues set forth above and, upon rehearing, to issue a new opinion and judgment in this case reversing the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this ____ day of March, 2007 I mailed a true and correct copy of *Brief of Amicus Curiae Texas Trial Lawyers Association* by first class U.S. Mail to the following counsel of record:

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APPENDIX

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Affidavit of Sen. David Sibley, Aug. 6, 1999	A