

Expert Reports and the Texas Medical Liability Act

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Passed in 2003, the Texas Medical Liability Act¹ was the Texas Legislature's response to the concern over rising health insurance premiums.² Health care providers claimed the rising rates were a result of the onslaught of frivolous medical liability claims they were experiencing.³ The Act sought to deter these frivolous claims by placing more controls and limitations on the litigation process and award amounts.⁴ One such control included requiring the plaintiff in a medical liability claim to produce an expert report, tailored for each defendant, within 120-days of the filing of the suit.⁵ For the allegations to overcome a dismissal, the report must support the petition's allegations with the requisite elements of liability—showing that there was an applicable standard of care, the defendant failed to meet that standard, and a causal relationship exists between the failure and harm alleged—and be generated by a qualified medical expert.⁶ With only limited discovery available until the expert report is submitted, the plaintiff chiefly relies on the medical record for evidence to produce the report.

For certain causes of action, this process makes it difficult to procure adequate factual support for the report. For instance, direct liability claims often suffer from causation issues that require heavy discovery to prevail.⁷ For some courts of appeals, this was not an issue as the courts allowed the claim to proceed

¹ See TEX. CIV. PRAC. & REM. CODE, CHAPTER 74: MEDICAL LIABILITY.

² Michael Speer, *The Healthy Benefits of Texas Medical Liability Reform*, D HEALTHCARE DAILY (11 Sep. 2012), <http://healthcare.dmagazine.com/2012/09/11/the-healthy-benefits-of-texas-medical-liability-reform/>.

³ *Id.*

⁴ *Id.*

⁵ See TEX. CIV. PRAC. & REM. CODE § 74.351(a).

⁶ See *id.* § 74.351(r)(6).

⁷ Niti Shah, Andrea Zarikian & Charles Brown, *How to Handle Direct Liability Claims Against Institutional Defendants* (7 Jun. 2012) (unpublished paper presented at Texas Trial Lawyers Association's 23rd Annual Medical Malpractice Conference, Bastrop, TX).

with the expert report only supporting one of the pleaded liability theories.⁸ However, other courts of appeals required that reports include all potential claims at the time of filing and that every liability theory alleged in the petition be supported by the expert report; unsupported theories were dismissed and eventually barred if they were not asserted and supported within 120-days.⁹

The Texas Supreme Court addressed these conflicts in their February 15, 2013 opinion of *Certified EMS, Inc. v. Cherie Potts*.¹⁰ The plaintiff in the case alleged multiple theories of liability, including both direct liability and vicarious liability against defendant Certified EMS.¹¹ The expert report submitted by the plaintiff only supported the vicarious liability claim, but not the direct liability claim.¹² The defendant moved to dismiss the direct liability claim because the expert report was deficient in support of this.¹³ The trial court dismissed the motion, the First Court of Appeals affirmed, and the Texas Supreme Court affirmed, but rejected the reasoning of the trial court.¹⁴ The Texas Supreme Court held that a claimant in a health care liability suit does not have to provide an expert report for each pleaded liability theory.¹⁵ An expert report that factually supports all elements of at least one pleaded liability theory is sufficient to meet the statutory requirements and the case can proceed for every pleaded theory.¹⁶ In reaching its decision, the Court looked to the provisions of the Act, the Legislative intent, the functions of an expert report, and the practical effects.¹⁷

The Court observed that an expert report serves two functions.¹⁸ First, it must inform the defendant of the behavior and facts at issue and, second, it must

⁸ *Id.*

⁹ *Id.*

¹⁰ *Certified EMS, Inc. v. Cherie Potts*, No. 11-0517 (Tex. Feb. 15, 2013), 392 S.W.3d 625 (Tex. 2013).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 7-12.

¹⁸ *Id.* at 8.

provide the trial court with a basis to find that the case has merit.¹⁹ The Court reasoned that if the report sufficiently described the conduct at issue and the trial court was provided necessary support for at least one pleaded liability theory, then the claim is not frivolous.²⁰ Moreover, the Court found that this reasoning was consistent with the Legislature's intent of reducing what they viewed as the onslaught of severe health care liability claims by weeding out frivolous claims in the early stages of litigation.²¹ The Court further opined that, in practice, it is difficult for a plaintiff to be aware of every viable theory within the 120-day period and furthermore, the Act does not prohibit the plaintiff from refining the report upon a deficiency objection.²²

Certified EMS argued that under this holding litigation will be prolonged and defendants will ultimately be required to defend meritless claims. The Court disagreed, citing two reasons. First, the Court found that if the report supported at least one viable theory, the case would proceed regardless. If every theory were required to be supported, then the case would stall over disputes with the pleadings. Second, expert reports are not the only measures used to weed out claim weaknesses; the petition, discovery, and summary judgment are all useful devices in achieving this goal.²³

However, the opinion failed to address several policy concerns. Namely, if an expert report need only support one viable theory, then in effect the expert report may no longer be enough of the deterrent the Legislature intended it to be. The plaintiff would then be free to include what the Legislature looked to be trying to avoid—frivolous, meritless claims from reaching the discovery stage. As the Court noted, there are other devices to deter, but only after the potential barrage of discovery the plaintiff could inflict on the defendant. Having a case stall seems to be something to avoid, but what the Court might see as delaying, the Legislature might see as a systematic approach. On the other hand, the issue of potentially barred

¹⁹ *Id.*

²⁰ *Id.* at 9.

²¹ *Id.*

²² *Id.* at 11.

²³ *Id.* at 10.

theories faced by plaintiffs was a serious impediment. There is a substantial risk in preventing legitimate claims from going forward, but there's also an equally considerable danger of opening the door again to meritless allegations that tie up valuable resources.

Interests in the efficiency of court system might have also had a heavy influence on its decision. Mentioned briefly in the opinion as an aside, the Court expressed concern over the frequency of interlocutory appeals resulting from the Act.²⁴ An interlocutory appeal is available in certain circumstances when the trial court denies relief under a section 74.351(b) objection, which was the case in *Potts*.²⁵ The relevant provision provides for an objection and resulting dismissal when an adequate report has not been served. The Court remarked that if a plaintiff were given more of an opportunity to correct a deficient report, then the potential of the case stalling during an interlocutory appeal on the issue would be a less likely occurrence, which would lead to less time and attention spent by the courts of appeals making these decisions that the trial courts could make.²⁶ Again, this means less of an opportunity by a defendant to quash meritless claims with an objection to an expert report and more potential for subversion of the devices implemented by the Legislature to achieve their goal of guiding and curbing rising insurance premiums.

The potential threat to the justice system of barred claims was an issue that needed to be addressed by the court, but with this solution the decision easily looks to undermine the Legislature's intent with the requirement and could have been influenced by self-regarding interests of the Court. Only time will tell with how the holding will play out in the courts and, ultimately, with the Legislature.

²⁴ *Id.* at 10.

²⁵ *See* TEX. CIV. PRAC. & REM. CODE §51.014(a)(9).

²⁶ *Id.*

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