CHAPTER 74 PLEADINGS AND MOTIONS… NOT AS SIMPLE AS YOU MIGHT THINK

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CHAPTER 8.2

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I. IMPLICATIONS AND CONSIDERATIONS FOR MEDICAL MALPRACTICE PLAINTIFFS WITH CLAIMS AGAINST BOTH MEDICAL PROFESSIONALS AND MEDICAL ENTITIES

One of the initial tasks facing an attorney seeking to file a lawsuit is identifying any potentially responsible parties and determining against which of those parties to file suit. Attorneys often elect to initially name every party that might reasonably be responsible. If the plaintiff is asserting a healthcare liability claim, and the Chapter 74 limitations deadlines are looming, a plaintiff may have no choice but to assert every possible claim and naming all possible defendants. However, if a plaintiff has ample time before the expiration of limitations, it might be wise to take a less aggressive and more calculated approach.

A. Government Defendants and the Irrevocable Election Provisions of Section 101.106

Government employers and their employees enjoy a certain level of immunity from both suit and from liability. Additionally, the Texas Tort Claims Act requires a plaintiff to make an "irrevocable election" to sue either the government employee or the employer when first filing a lawsuit. *See* TEX. CIV. PRAC. & REM. CODE § 101.106.

Section 101.106 mandates that when a plaintiff has claims against both a government employee and employer, the plaintiff must choose which one to pursue, and the filing of a suit against the employee or the employer "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against" the other. *Id.* § 101.106. If the plaintiff fails to make this election voluntarily, and instead sues both the employee and the governmental unit, the employee will be dismissed upon the motion of the government unit. *Id.* § 101.106(e). However, both of these provisions are arguably of little consequence, due to the provisions of Section 101.106(f).

If a plaintiff elects to sue the employee for "conduct within the general scope of that employee's employment" then suit is against the employee in its official capacity. *Id.* § 101.106(f). Upon motion by the employee, the suit must be dismissed unless the plaintiff amends its pleadings to dismiss the employee and name the governmental employer in its stead before the expiration of 30 days following the employee's motion. *Id.*

In construing this requirement in *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011),[1] the Texas Supreme Court observed that, as a general rule, "almost every negligence suit against a government employee" will be subject to this provision; thus when faced with an employee's dismissal motion, generally, "the plaintiff must promptly dismiss the employee and sue the government instead." *Id.* at 381. As such, Section 101.106(f) "statutorily extends immunity to acts of government employees acting within their official capacity" and "foreclose(s) suit against a government employee in his individual capacity if he was acting within the scope of employment." *Id.*; *Williams v. Nealon*, No. 01-05-00553-CV, 2012 WL 2106539, at *2 (Tex. App.—Houston [1st Dist.] June 7, 2012, pet. denied).

Since many hospitals are owned and operated by the government or by governmental entities, Section 101.106 will be germane to suits against those hospitals and their employees. Accordingly, when the defendant healthcare provider is employed by a governmental entity, the suit generally can only be maintained against the employer and not the provider. *See Franka*, 332 S.W.3d at 381.

1. Section 101.106 and Open Courts

Any statute, rule, or law that restricts the parties against whom a plaintiff can bring suit necessarily raises questions of validity under the Open Courts provision of the Texas Constitution. *See* Will Thomas, *Franka v. Velasquez: What Is the Prognosis for Negligent Causes of Action Against Texas Government Employees?*, 64 BAYLOR L. REV. 622, 640 (2012). These concerns are not necessarily unfounded, and anyone questioning the constitutional validity of Section 101.106 certainly would not be the first. *See id* at 645-50. However, as the courts of appeals have begun to apply *Franka*, it does not appear that they find Section 101.106 constitutionally infirm.

The Open Courts[2] provision mandates that "meaningful legal remedies must be afforded to

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[1] *Franka* overruled the medical versus governmental discretion immunity framework outlined in *Kassen v. Hatley*, 887 S.W.2d 4, 10-11 (Tex. 1994), to hold that all suits against a government employee in their individual capacity for actions within the scope of its employment are covered by the Texas Tort Claims Act, and thus must be asserted against the governmental employer. This essentially renders the employee immune. *Franka v. Velasquez*, 332 S.W.3d 367, 381-82 (Tex. 2011).

[2] The Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due

[Texas] citizens, so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993).

Put another way, a statute is unconstitutional if it unreasonably or arbitrarily restricts a claimant's ability to bring a cognizable common-law cause of action "when balanced against the statute's purpose." *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997). Apparently, Texas courts addressing the issue are finding that the restrictions imposed by Section 101.106(f) are not unreasonable.

Although the Texas Supreme Court did not decide whether their interpretation of Section 101.106(f) in *Franka* would withstand an Open Courts challenge because that issue was not raised on appeal, the court arguably foreshadowed how they might rule if the question was properly before them:

> We recognize that the Open Courts provision of the Texas Constitution 'prohibits the Legislature from unreasonably abrogating well-established common-law claims', but restrictions on government employee liability have always been part of the tradeoff for the [Texas Tort Claims] Act's waiver of immunity, expanding the government's own liability for its employees' conduct, and thus 'a reasonable exercise of the police power in the interest of the general welfare.' In any event, no constitutional challenge is made in this case.

Franka v, 332 S.W.3d at 385 (internal citations omitted). The court appears to be implying that it does not believe that its interpretation of Section 101.106(f) in *Franka* would violate the Open Courts provision. *See id.* This is because, although a plaintiff's right to sue a government employee is essentially abrogated, the abrogation is reasonable because it is part of a "tradeoff" for the expanded liability of the government employer. *See id.* Lower courts addressing the issue seem to agree.

In *Williams v. Nealon*, No. 01-05-00553-CV, 2012 WL 2106539 (Tex. App.—Houston [1st Dist.] June 7, 2012, pet. denied), the First Court of Appeals directly addressed the issue, after the supreme court remanded the case for reconsideration in light of *Franka*. *Id.* at *1-2 ("we agree that section 101.106 statutorily extends immunity to acts of government employees acting within their official capacity. The issue we must decide is whether it does so constitutionally").

The *Williams* plaintiff argued that Section 101.106(f) violated the Open Courts provision because the section abrogated his claim against the doctors, leaving him with only a claim against the employer—a claim that was likely not viable under the Texas Tort Claims Act. *Williams v. Nealon*, No. 01-05-00553-CV, 2012 WL 2106539 at *1 (Tex. App.—Houston [1st Dist.] June 7, 2012, pet. denied). Without addressing the viability of the plaintiff's remaining claim, the court of appeals determined that the restrictions imposed by Section 101.106(f) are reasonable, because the restriction is "[i]n exchange for the Tort Claims Act's waiver of sovereign immunity in certain situations" and because it serves the purpose of reducing litigation. *Id.* at *4. The court's ruling tracks very closely the language of the relevant dicta in *Franka*. *See Franka v. Velasquez*, 332 S.W.3d 367, 385 (Tex. 2011). Based on *Franka* and *Williams*, it does not appear that an Open Courts challenge would be successful.

As stated above, Section 101.106(f) requires that an employee be dismissed upon a motion and the governmental employer be named in the employee's stead before the expiration of 30 days following the employee's motion. TEX. CIV. PRAC. & REM. CODE § 101.106(f). Since by its terms Section 101.106(f) does not apply until the employee moves for dismissal, conceivably the motion, the 30 day deadline, or both may be outside the applicable limitations period. *See id.* In that context, the question arises: would limitations bar the suit against the newly named government unit? The Texas Supreme Court has said no. *See Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 401-402 (Tex. 2011).

In *University of Texas Health Science Center v. Bailey*, the plaintiffs, the Baileys, sued their government-employed physician for medical negligence. *Id.* at 397. A little over a year later—and several weeks after limitations had run on the

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course of law." TEX. CONST. ART. I, § 13. The Constitution of the United States mandates that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 2.

The Texas constitutional due process protections both encompass and exceed those guaranteed by the United States Constitution. *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

plaintiffs' claims—the physician moved for dismissal under Section 101.106(f), asserting that its government employer, the University of Texas Health Science Center (the "Center") should be named instead. *Id.* The Baileys complied, amending their pleadings to dismiss the physician and name the Center. *Id.* at 398.

The Baileys and the Center then filed cross-motions for summary judgment arguing as to whether the relation-back doctrine applied to cause the Baileys' amended claims against the Center to relate back to their original filing against the physician. *Id.* at 399. The trial court dismissed the Center, but the court of appeals reversed, finding that the relation-back doctrine applied to save the claims. *Id.* at 399.

The Texas Supreme Court affirmed, but not on relation-back grounds. *Id.* at 401-402. Instead, it held that relation back was not necessary, because the suit against the physician was, "in all respects other than name, a suit against the Center . . . When the Center was substituted as the defendant in [the physician's] place, there was no change in the real party in interest." *Id.* at 402. Therefore, a limitations defense did not apply. *Id.*

B. Rule 28 and Suits Against Doctors and Their Medical Practices

Rule 28 of the Texas Rules of Civil Procedure provides that when any "partnership, unincorporated association, private corporation, or individual" does business under an "assumed or common" name, it may sue or be sued under that name. TEX. R. CIV. P. 28. This rule has implications for medical malpractice plaintiffs, because some physicians elect to use their personal names when naming their practices. Take for example, the Texas Supreme Court case of *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999).

In *Chilkewitz*, the plaintiff patient sued his physician before limitations expired on his medical negligence claims, and named the physician in the petition as "Morton Hyson, M.D." *Id.* at 827. After the statute of limitations expired, the plaintiff tried to amend to add the physician's practice, "Morton Hyson, M.D., P.A." (the "Association"). *Id.* The Association filed a motion for summary judgment on the statute of limitations, arguing that misnomer and misidentification are tolling provisions and therefore do not apply to extend medical negligence limitations periods. *Id.* The Texas Supreme Court agreed that tolling provisions do not apply to medical negligence limitations, but ruled that Rule 28 is still applicable, because it is not a tolling provision. *Id.* at 829.

The court said that although the plaintiff intended to sue just the physician and described only the physician in his pleadings, "his suit against Morton Hyson, M.D. was effective to commence suit against the Association doing business under the name of Morton Hyson, M.D."[3] *Id.* Under Rule 28, "a plaintiff can bring suit against an individual doing business under the name of an association, partnership, or corporation, even if the association, partnership, or corporation does not exist." *Id.* at 828-29. "At the same time, an association, partnership, or private corporation may do business under the name of an individual and may be sued under that assumed name." *Id.* at 829.

The court went on to explain that although tolling provisions are generally not applicable to the absolute two-year medical liability limitations periods, Rule 28 does not operate like a tolling provision. *Id.* at 829, 830. Instead, it is merely a procedural rule that provides that if an entity conducts business under a certain name, it may be sued in that name. *Id.* at 830 (citing TEX. R. CIV. P. 28). "The proper party is sued when that party is sued in its assumed or common name." *Id.* at 830. The court then held that:

> Because the Association conducted business under the name of Morton Hyson, M.D., suit was commenced against the Association when suit was filed naming "Morton Hyson, M.D." as a defendant, and the Association was notified of the suit through its only officer and director, who also did business under the same name.

Id. at 830.

II. RESPONSIBLE THIRD PARTY PRACTICE: PRACTICAL CONCERNS FROM THE PLAINTIFF'S PERSPECTIVE

A. The Procedural Basics of Responsible Third Party Designation

The basic procedure for responsible third party designation under Section 33.004 of the Civil Practice and Remedies Code is fairly straightforward. A defendant has until the 60th day before trial to designate any responsible third parties by filing a motion for leave to designate the parties named therein.[4] TEX.

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[3] In determining that a suit naming the physician was effective to sue the physician's professional association, the court also observed that "at some point before judgment, the plaintiff must amend the petition to add the correct legal name of the actual defendant." *Chilkewitz*, 22 S.W.3d at 829.

[4] Section 33.004 also provides for the designation of parties whose identities are unknown, provided that the defendant claims in the motion that an unknown person committed a criminal act that was the cause of the claimant's injuries and

CIV. PRAC. & REM. CODE § 33.004(a). The trial court may grant a party leave to late-file a designation upon a showing of good cause. *Id.*

The court "shall grant leave" to designate named persons in timely motions unless another party objects on or before the 15th day after the designation motion was served. *Id.* § 33.004(f). For a party's objection to a responsible third party designation to be successful, the objecting party must show:

(1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and
(2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

Id. § 33.004(g).

This initial objection is not a party's only opportunity to attack a responsible third party designation. In language very similar to Texas Rule of Civil Procedure 166a regarding motions for no-evidence summary judgment, Section 33.004 provides that after the parties have been allowed adequate time to conduct discovery, a party may move to strike the responsible third party designation on "the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage." *Id.* § 33.004(l); *compare with* TEX. R. CIV. P. 166a(i). After a party properly moves to strike, the burden then shifts to the defendant advocating the designation to provide evidence regarding the designated person's responsibility for the claimant's injury. TEX. CIV. PRAC. & REM. CODE § 33.004(l).

Once a defendant files a motion for leave to designate, a defendant must be sure to obtain a court order granting leave because a responsible third party designation is not effective without both a motion for leave to designate on file and an order granting the motion for leave signed by the court. *Lawrence v. Bottling Group, L.L.C.*, No. 05-10-00112-CV, 2011 WL 2449513, at *2 (Tex. App.—Dallas June 21, 2011, no pet.); *Valverde v. Biela's Glass & Aluminum Prods.*, 293 S.W.3d 751, 755 (Tex. App.—San Antonio 2009, pet. denied).

the defendant meets certain procedural requirements. TEX. CIV. PRAC. & REM. CODE § 33.004 (j-k).

B. Recent Legislative Changes and the Empty Chair Defense

In 2011, the Texas Legislature made a substantial change to Section 33.004 which changed the responsible third party landscape for claimants. Prior to the amendments, a claimant had 60 days after an effective responsible third party designation to assert claims against the named party, even if the applicable statute of limitations had run. Act of June 11, 2003, 78th Leg., R.S., ch. 204, §4.04, 2003 Tex. Gen. Laws 847, 855-56 (codified as amended at TEX. CIV. PRAC. & REM. CODE §33.004), repealed in part by Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Sess. Law Serv. 758, 760 (West) (repealing TEX. CIV. PRAC. & REM. CODE §33.004(e)). However, effective September 2011, the Texas Legislature deleted this provision. TEX. CIV. PRAC. & REM. CODE § 33.004.

Under the current statute, a claimant cannot amend to add a responsible third party if the statute of limitations has run on the claimant's cause of action against the named responsible third party because, the statute no longer bars the responsible third party's limitations defense. TEX. CIV. PRAC. & REM. CODE § 33.004. As a result, whenever a proper designation is made shortly before or after the applicable statute of limitation has run, fact-finders will be faced with the task of determining the liability of a non-party. It may be that the plaintiff simply did not have time to add the responsible third party, or may already be barred from adding them because the statute of limitations had already run when the party was first designated. Because the responsible third party would not be present to make its own defense, there would exist a classic empty chair scenario. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 419 (Tex. 2011); Justin C. Roberts & Randell C. Roberts, *Can Immune Parties Really Be Responsible?: An Analysis of the Current Interpretation of the Texas Responsible Third Party Statute and Its Vulnerability to Constitutional Challenge*, 43 ST. MARY'S L.J. 559, 569 (2012); Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Liability*, 44 THE ADVOC. 118, 123 (2008).

1. Molinet v. Kimbrell

For medical malpractice plaintiffs, the Section 33.004 responsible third party changes are nothing new because the Texas Supreme Court had essentially already established such changes as status quo for healthcare liability claims in *Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011). Chapter 74 of the Texas Civil Practice and Remedies Code governs healthcare liability claims in Texas. TEX. CIV. PRAC. & REM. CODE §§ 74.001-74.507. Chapter 74 mandates that its provisions control in the event of a conflict with any other law and forbids courts from adopting local rules

that conflict with the Chapter. TEX. CIV. PRAC. & REM. CODE §§ 74.001. Chapter 74 generally sets the statute of limitations for healthcare liability claims at two years, "notwithstanding any other law." TEX. CIV. PRAC. & REM. CODE § 74.251.

The *Molinet* defendant designated certain healthcare providers as responsible third parties after the two-year limitations period had run on the plaintiff's potential claims against the designated providers. *Molinet*, 356 S.W.3d at 409. Relying upon the former Section 33.004, the plaintiff then amended his pleadings to assert claims against the designated providers. *Id.* When the designated providers argued that the plaintiff's claims were time-barred, the plaintiff cited the former Section 33.004, which provided that a claimant could assert claims against properly designated responsible third parties within 60 days after designation even if the applicable statute of limitations had run. *Molinet*, 356 S.W.3d at 409-10.

The Texas Supreme Court disagreed. Citing the "notwithstanding any other law" language in Chapter 74, the court held that the provisions of Chapter 74 trump any conflicting law, and determined that Chapter 74 limitations are absolute and cannot be circumvented by Section 33.004. *Molinet*, 356 S.W.3d at 415-16. The *Molinet* holding was consistent with similar rulings interpreting Section 33.004's predecessors dating back to 1995. *See Chilkewitz v. Hyson*, 22 S.W.3d 825, 826 (Tex. 1999); *Bala v. Maxwell*, 909 S.W.2d 889, 890 (Tex. 1995).

2. The Empty Chair and Due Process

Some commentators believe that this change to Section 33.004 may raise due process concerns. In their article, *Can Immune Parties Really Be Responsible?: An Analysis of the Current Interpretation of the Texas Responsible Third Party Statute and Its Vulnerability to Constitutional Challenge*, Justin C. Roberts & Randell C. Roberts question whether allowing a defendant to name immune persons as responsible third parties runs afoul of substantive due process principles. Roberts, 43 St. Mary's L.J. at 569-70.

Citing *Plumb v. Fourth Judicial Dist. Court, Missoula County*, 927 P.2d 1011 (Mont. 1996), the authors point out that, concerned with the effects of the empty chair defense as it relates to due process, the Montana Supreme Court struck down Montana's version of Section 33.004. Roberts, 43 ST. MARY'S L.J. at 569-70. They observed that the Montana court concluded that the Montana apportionment statute created too high a likelihood that apportionment would not be reliable, since a party not present to defend itself would likely be assigned too high a share of liability, thereby unfairly reducing the plaintiff's recovery. Roberts, 43 ST. MARY'S L.J. at 70 (citing *Plumb*, 927 P.2d at 1019-20)).

In Texas, the dissenting justices in *Molinet*, as well as other Texas appellate courts, have expressed concern over fairness issues raised by the empty chair defense.

Writing on behalf of herself and Justice Medina, Justice Lehrmann expressed concerns over the obstacles that the empty chair will pose to claimants:

> Under the Court's reading of the statute, which ignores the impact of section 74.251(b), health care liability defendants will be in a position to force plaintiffs to "prove the liability of the party defendant (or defendants), while at the same time defending the empty chair." The distortion inherent in such a procedure has been noted: "A plaintiff ... has no knowledge, possession, or control of evidence that a [responsible third party] could use to protect himself from a finger-pointing defendant. The empty chair defense, therefore ... places an impossible burden upon plaintiffs to represent [the responsible third party's] interests as well as their own, while giving defendants a great advantage in diminishing their own liability by allowing them to allocate fault to [the responsible third party]. The result would likely be an inaccurate diminution of fault allocated to defendants and an increase of fault attributed to unrepresented [responsible third parties]."

Molinet v. Kimbrell, 356 S.W.3d 407, 419 (Tex. 2011) (Lehrmann, J., dissenting) (quoting Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Liability*, 44 THE ADVOC. 118, 123 (2008); Nancy A. Costello, *Allocating Fault to the Empty Chair: Tort Reform or Deform*, 76 U. DET. MERCY L.REV. 571, 597 (1999)).

Justice Lehrmann's and Justice Medina's concerns are echoed by the Fourteenth Court of Appeals in a substantially similar context. *See In re Arthur Andersen*, 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, no pet.). *In re Arthur Andersen* was just one of many cases that arose from the demise of Enron. In that particular case, several Enron investors sued the accounting corporation, Arthur Anderson, claiming it intentionally aided Enron in hiding Enron's losses and defrauding its investors. *Id.* at 474. In response, Arthur Anderson claimed that it too was the victim of deception, and attempted to designate several financial institutions it claimed aided Enron and provided the fraudulent information on which Arthur Anderson based its calculations. *Id.*

The *Arthur Andersen* plaintiffs objected to the designation, claiming "that the financial institutions were irrelevant to the lawsuit" and that "their causes of

action and petition did not implicate the financial institutions." *Id.* at 474. The Houston court disagreed, saying "the financial institutions play[ed] a pivotal role" in plaintiffs' claims and that the jury could not decide the case without looking to the actions of the institutions to some degree. *Id.* at 481. Based on this conclusion, the court determined that Arthur Anderson had the right "to present the complete set of intertwined facts and issues germane to [its] claims, to *one* factfinder, in *one* proceeding, rather than in two separate suits" and thus, the trial court should have allowed the designation. *Id.* at 486-87 (citing *Jones v. Ray*, 886 S.W.2d 817, 822 (Tex. App.—Houston [1st Dist.] 1994, no writ)). The court further stated:

> The denial of that right would introduce the 'empty chair defense,' and thereby skew the progress and entire conduct of the proceedings-with the resultant potential to affect the outcome of the litigation profoundly, and to compromise the presentation of the parties' respective claims or defenses in ways unlikely to be apparent in the appellate record.

Id. at 487.

The court's opinion in *In re Arthur Andersen* poses a very interesting question when viewed in light of the changes to Section 33.004. Although it does not expressly address due process, *In re Arthur Andersen* certainly determines that the when the *Arthur Anderson* defendant was denied its right to designate responsible third parties, the presence of the empty chairs so seriously impacted the fairness of the proceedings with respect to the defendant, that mandamus was required to correct the error. *See Arthur Andersen*, 121 S.W.3d at 487. In contrast, the changes in Section 33.004 allowing defendants to designate responsible third parties after the statute of limitations has run will often inject the empty chair defense into litigation in a way that some would argue impacts the fairness of the proceedings with respect to the plaintiffs.

It will be interesting to see how the courts resolve this inconsistency when faced with the issue. However, like Roberts and Roberts observed, the Texas Supreme Court may have already forewarned litigants of the stance it will take if Section 33.004 is challenged on constitutional grounds:

> In response to the "imbalanced" apportionment scheme decried by the [*Molinet*] dissent, the court may have foreshadowed the outcome of a constitutional challenge by stating that such imbalances "are matters to be addressed by the [l]egislature."

Roberts, 43 ST. MARY'S L.J. at 578 (*quoting Molinet v. Kimbrell*, 356 S.W.3d 407, 416 (Tex. 2011)).

3. The Section 33.004(d) Procedural Safeguard

When drafting the new Section 33.004, the Texas Legislature recognized that abolishing a plaintiff's ability to amend to add properly designated parties after limitations had run creates the opportunity for a defendant to take advantage of the responsible third party statute and the statute of limitations.

The Texas Legislature apparently realized that when a limitations statute is looming on a plaintiff's potential and un-asserted claims, a defendant could drag its proverbial feet and wait to produce evidence that might cause a plaintiff to amend to assert those claims until after limitations has run.

Thus, the legislature enacted a procedural safeguard that restricts a defendant's ability to designate responsible third parties after the expiration of limitations. Under the new Section 33.004, if a defendant has failed to comply with its obligations, if any, under the Texas Rules of Civil Procedure to disclose that a person may be designated as a responsible third party, the defendant may not designate a responsible third party with respect to a claimant's cause of action after the applicable limitations period has expired. TEX. CIV. PRAC. & REM. CODE § 33.004(d). This change has the potential to benefit medical malpractice plaintiffs because no such safeguard existed under *Molinet* and its predecessors. *See Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011); *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999); *Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995).

Nevertheless, this safeguard may not provider much relief to plaintiffs facing a limitations period about to expire. However, it does provide a bit of a cushion for those plaintiffs with time to spare under the applicable statute of limitations—provided they quickly do whatever is necessary to invoke the defendant's obligation to disclose the existence of the potential responsible third party such as by promptly issuing appropriate discovery requests.

III. CERTIFIED EMS, INC. V. POTTS: AN IMPORTANT CLARIFICATION TO THE MEDICAL MALPRACTICE EXPERT REPORT REQUIREMENTS

On February 15, 2013, the Texas Supreme Court issued an opinion that significantly affects the expert report requirements in cases involving health care liability claims. *See Certified EMS, Inc. v. Potts*, No. 11-0517, 2013 WL 561471 (Tex. Feb. 15, 2013). In *Certified EMS v. Potts*, the Texas Supreme Court considered whether the expert reporting requirements of Section 74.351 of the Texas Civil Practice and Remedies Code required a separate expert report to

support every asserted cause of action or liability theory. *Id.* at *2. The court ruled that "an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case." *Id.* at *6. The Court concluded that an expert report that satisfies the requirements under the Act, "even if as to one theory only, entitles the claimant to proceed with a suit against the physician or health care provider." *Id.* at *4. "A report need not cover every alleged liability theory to make the defendant aware of the conduct that is at issue." *Id.* at *4. In so finding, the supreme court disapproved of any conflicting options, which arguably include *Methodist Charlton Medical Center v. Steele*, 274 S.W.3d 47 (Tex. App.—Dallas 2008, pet. denied) and similar cases.[5] *Id.* However, because the results of several other opinions do not conflict with the *Potts* holding, they remain current authority although their reasoning may or may not be in exact accord.[6]

[5] *See, e.g., Hendrick Med. Ctr. v. Miller*, No. 11-11-00141-CV, 2012 WL 314062 (Tex. App.—Eastland Jan. 26, 2012, no pet.) (finding that expert report was deficient as to vicarious liability claims against hospital, thereby warranting dismissal of those claims); *Peloza v. Cuevas*, 357 S.W.3d 200 (Tex. App.—Dallas 2012, no pet.) (dismissing informed consent cause of action that first asserted after the 120-day deadline, reasoning that informed consent was a different cause of action from negligence and therefore required a new expert report); *Fung v. Fischer*, 365 S.W.3d 507 (Tex. App.—Austin 2012, no pet.) (holding that expert report addressing physician's conduct was not sufficient to implicate the direct actions of the clinic); *MSHC the Waterton at Cowhorn Creek, LLC v. Miller*, No. 06–12–00056–CV, 2012 WL 6218001 (Tex. App.—Texarkana December 14, 2012, no pet.) (expert report implicating health care providers' conduct was sufficient to support vicarious claims against the employer-hospital, but insufficient as to direct claims against the hospital); *River Oaks Endoscopy Ctrs, L.L.P. v. Serrano*, No. 09-10-00201-CV, 2011 WL 303795 (Tex. App.—Beaumont Jan. 27, 2011, no pet.) (granting dismissal of direct liability claims against surgery center because, although sufficient as to vicarious liability claims, the expert report was insufficient as to the direct liability claims); *Petty v. Churner*, 310 S.W.3d 131 (Tex. App.—Dallas 2010, no pet.) (upholding dismissal and finding that vicarious and direct liability claims involved different liability theories and therefore required independent expert reports to support each claim); *Beaumont Bone & Joint, P.A. v. Slaughter*, No. 09–09–00316–CV, 2010 WL 730152 (Tex. App.—Beaumont Mar. 4, 2010, pet. denied) (drawing distinction between direct and vicarious liability claims and holding that expert report supporting vicarious claims were insufficient to support direct claims); *Lone Star HMA, L.P. v. Wheeler*, 292 S.W.3d 812, 814 (Tex. App.—Dallas 2009, no pet.) (finding that expert report implicating the conduct of the treating physician was insufficient to support claims against the employer hospital); *RGV Healthcare Assocs, Inc. v. Estevis*, 294 S.W.3d 264 (Tex. App.—Corpus Christi 2009, pet. denied) (expert report that implicated only the employer-rehabilitation facility's vicarious liability was insufficient to support direct liability claims, and therefore dismissal of those claims was proper); *Steele*, 274 S.W.3d at 50 (finding that because every claim must be supported by a timely expert report or it is subject to dismissal under Section 74.351, a plaintiff cannot amend to add new causes of action after the expiration of the 120-day expert reporting deadline); *Azle Manor, Inc. v. Vaden*, No. 2–08–115–CV, 2008 WL 4831408 (Tex. App.—Fort Worth Nov. 6, 2008, no pet.) (requiring expert report to support both vicarious and direct liability claims); *Farishta v. Tennet Healthsystem Hosp. Dallas, Inc.*,224 S.W.3d 448 (holding that a plaintiff could not recover for particular injuries not addressed in her expert report); *Maxwell v. Seifert*, 237 S.W.3d 423, 426 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that amending petition to assert new claim for failure to disclose risks claim did not restart the 120-day period as to the new claim).

[6] *See, e.g., Nexion Health at Duncanville, Inc. v. Ross*, 374 S.W.3d 619 (Tex. App.—Dallas 2012, pet. denied) (relying on *Certified EMS, Inc. v. Potts*, 355 S.W.3d 683, 693 700 (Tex. App.—Houston [1st Dist.] 2011) and finding that an expert report need not link each breach of the applicable standard of care to the alleged injury nor cover every specific act of negligence); *Laurel Ridge Treatment Ctr. v. Garcia*, No. 04–12–00098–CV, 2012 WL 3731748 (Tex. App.—San Antonio Aug.29, 2012, pet. filed) (determining that because the expert report was sufficient as to one theory of liability, the court did not need to address whether the report was sufficient with regard to the other liability theories); *Sw. Gen. Hosp., L.P. v. Gomez*, 357 S.W.3d 109 (Tex. App.—San Antonio 2011, no pet.) (expert report addressing the conduct of treating physicians was sufficient to support vicarious liability claims against the hospital employer without specifically naming employer in the report); *Kingwood Specialty Hosp., Ltd. v. Barley*, 328 S.W.3d 611 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that the 120-day expert report deadline resets as to every new defendant); *Pedroza v. Toscano*, 293 S.W.3d 665 (Tex. App.—San Antonio 2009, no pet.) (upholding a denial of a Section 74.351 dismissal, reasoning that testifying experts are not limited to the liability theories asserted in the expert report); *Suleman v. Brewster*, 269 S.W.3d 297 (Tex. App.—Dallas 2008, no pet.) (holding patient who sued for claims relating to skin care allegations could amend to add new cardiology-based claims); *Schmidt v. Dubose*, 259 S.W.3d 213 (Tex. App.—Beaumont 2008, no pet.) (permitting a plaintiff to avoid dismissal of liability theories not addressed in the initial expert report and finding that no new cause of action was asserted by the new theories); *Puls v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 92 S.W.3d 613 (Tex. App.—Dallas 2002, pet. denied) (claimant asserting vicarious claims against hospital for negligence of perfusionists during surgery could amend to add vicarious claims against the hospital for the actions of its nurses in providing post-operative care).

The *Steele* case addressed the effect of the 120-day expert report deadline in Section 74.351 of the Texas Civil Practice and Remedies Code on a plaintiff's ability to add new claims against existing defendants. *Steele*, 274 S.W.3d at 49–51. The court of appeals in *Steele* held that Section 74.351 requires a plaintiff to serve an expert report on each health care provider for "each health care liability *claim*" within 120 days of filing the original lawsuit against the provider. *Steele*, 274 S.W.3d at 50 (emphasis in original). Under *Steele*, a timely expert report had to be served for every cause of action and for every defendant. After *Potts*, the holding in *Steele* is no longer viable.

The *Potts* case involved a patient who claimed she was sexually and verbally assaulted by a nurse during her stay at Christus St. Catherine's Hospital. *Potts*, 2013 WL 561471, at *1. Certified EMS was the staffing service that placed the nurse at the hospital. *Id.* The patient sued Certified CMS, asserting both direct and vicarious liability claims against it. *Id.* Certified EMS sought dismissal under the expert report provisions of Section 74.351 of the Texas Medical Liability Act (the "Act"). *Id.* It claimed that because the patient's expert reports did not address how Certified EMS was directly negligent, the patient's direct liability claims against it should be dismissed. *Id.* The trial court denied the Certified EMS's motion to dismiss. *Id.* at *2.

The First Court of Appeals upheld the trial court's decision, finding that "if the claimant timely serves an expert report that adequately addresses at least one liability theory against a defendant health care provider, the suit can proceed, including discovery, without the need for every liability theory to be addressed in the report." *Certified EMS, Inc. v. Potts*, 355 S.W.3d 683, 693 700 (Tex. App.—Houston [1st Dist.] 2011) *aff'd on other grounds*, No. 11-0517, 2013 WL 561471 (Tex. Feb. 15, 2013). However, the First Court of Appeals limited its reasoning and holding to different liability theories for one cause of action. *Id.* at 700. Put another way, under the court of appeals' reasoning, the *Potts* claimant could continue her negligence suit under multiple theories regarding the breach of the standard of care since she served an expert report sufficient to support at least one negligence theory, but she could not assert an entirely new cause of action:

> Because the lawsuit by Potts may proceed against Certified EMS under at least one liability theory for the cause of action concerning the nurse's improper sexual contact with Potts, Potts may proceed with any and all liability theories for *this* cause of action, regardless [of] whether those other liability theories were shown in an adequate expert report.

Id. (emphasis added)

The First Court's reasoning does not appear to run afoul of *Steele* and several of its progeny—since the *Steele* claimant sought to add an entirely new cause of action (a negligent hiring, supervision, training, and retention claim) to her existing simple negligence/breach of the standard of care claim. *Steele*, 274 S.W.3d at 48. However, *Steele* does not survive the Texas Supreme Court's *Potts* decision. Although the supreme court affirmed the court of appeals' result, it utilized a different reasoning—one that invalidates the *Steele* opinion. *Potts*, 2013 WL 561471, at *2.

The issue before the supreme court in *Potts* was: "Must a claimant in a health care liability suit provide an expert report for each pleaded liability theory?" *Id.* The court determined that "No provision of the Act requires an expert report to address each alleged liability theory." *Id.* at *3. In so holding, the court reasoned that the purpose of the expert report requirements is twofold: first, to inform the defendant of the conduct of which the plaintiff complains, and second, to provide the trial court with a method of determining whether a medical malpractice plaintiff has a meritorious claim. *Id.* "A report need not cover every alleged liability theory to make the defendant aware of the conduct that is at issue." *Id.* The court explained that the legislative intent behind the Act was to reduce litigation, in part, by reducing frivolous claims. "If a health care liability claim contains at least one viable liability theory, as evidenced by an expert report meeting the statutory requirements, the claim cannot be frivolous. The Legislature's goal was to deter baseless claims, not to block earnest ones." *Id.* at *5.

Given the court's reasoning, it is interesting to note that the analysis is reflective of the arguments that the *Steele* claimant made in her petition for review to the supreme court—that the 120 day expert report deadline prevented the *Steele* claimant from asserting a negligent hiring, supervision, training, and retention claim that was not discovered within the 120 day window. In so arguing, the *Steele* claimant pointed out to the supreme court that, even if a plaintiff immediately served her expert report and could therefore engage in full discovery, an unscrupulous defendant could refuse to produce evidence of the undiscovered claim, and thereby avoid all liability, if the defendant was successful in resisting discovery beyond the 120 day deadline. Althought the Texas Supreme Court denied the petition for review in *Steele*, the Supreme Court ultimately agreed with this reasoning in *Potts*:

> It may be difficult or impossible for a claimant to know every viable liability theory within 120 days of filing suit, and the Act reflects this reality. It strictly limits discovery until expert reports have been provided, and we have held that the statute's plain language prohibits presuit depositions authorized under Rule 202 of the Texas Rules of Civil Procedure . . . Discovery can reveal facts supporting additional liability theories, and the Act does not prohibit a claimant from amending her petition accordingly. Under Certified EMS's reasoning, a claimant would have to serve an expert report each time a new theory is discovered. Not only would that be impractical, it would prohibit altogether those theories asserted more than 120 days after the original petition was filed—effectively eliminating a claimant's ability to add newly discovered theories."

Potts, 2013 WL 561471, at *5.

In addition to acknowledging that requiring only one competent expert report serves the legislative purpose of deterring meritless claims, the court opined that requiring only one competent report would reduce litigation:

> To require an expert report for each and every theory would entangle the courts and the parties in collateral fights about intricacies of pleadings rather than the merits of a cause of action, creating additional expense and delay as trial and appellate courts parse theories that could be disposed of more simply through other means as the case progresses.

Id. at *5.

Presumably, in so finding, the Texas Supreme Court is referencing an increase in the number of appellate cases due to the interlocutory appeal provision contained in the Civil Practice and Remedies Code that allow for interlocutory review every time a defendant is denied any relief sought under the provisions of Section 74.351. TEX. CIV. PRAC. & REM. CODE §54.014(a)(9). Prior to *Potts* and pursuant to *Steele*, a claimant was required to submit a new expert report every time it added a newly discovered cause of action against an existing defendant. *See Steele*, 274 S.W.3d at 50. This could lead to multiple interlocutory appeals. *Potts* arguably has the effect of reducing the number of interlocutory appeals, because once a viable expert report is produced as to at least one liability theory, no Section 74.351 dismissal can be had. *Potts*, 2013 WL 561471, at *2.