In the
Court of Appeals
Fifteenth District of Texas at Toyahville

No. 15-11-00043-CV

ADAMS JUDE UNIVERSITY MEDICAL HOSPITAL; KARTIK SHARMA, M.D.; ANDREW M. SIMPSON, M.D.; and AUSTIN BERRIOS, M.D., Appellants

v.

GARRY and KEYA GEORGE Individually, and as Next Friends of LACY GEORGE, a minor, Appellees

On Appeal from the 450th District Court
Luna County, Texas
The Honorable Phillip Langley
Trial Court No. 37920

Before Tucker, S., Wright, D. and Franks, L.
Opinion by Chief Justice Tucker

MEMORANDUM OPINION

Garry and Keya George filed a medical malpractice lawsuit as next friends of their fourteen-year-old daughter Lacy George. This is an interlocutory appeal of a trial court's denial of a plea to the jurisdiction filed by Adams Jude University Medical Hospital (Hospital), and de-

nials of motions to dismiss filed by doctors Kartik Sharma, Andrew M. Simpson and Austin Berrios.

The Hospital argues that George's allegations claiming its employees misread an X-ray do not constitute use of tangible property sufficient to waive governmental immunity pursuant to the Texas Tort Claims Act. Sharma complains that the trial judge erred in finding the 120-day deadline for filing an expert report unconstitutional as applied to George due to the death of her attorney prior to expiration of the deadline. Berrios suggests the trial court erroneously failed to dismiss claims of direct negligence because Sharma's expert report only addressed issues of negligent supervision. Finally, Simpson asserts he was not properly served with the lawsuit until after the expiration of the 120-day deadline, and although a copy of the expert report was provided prior to this date, service at that time was ineffectual, and dismissal was required because he was not a party to the lawsuit at that time. We affirm the trial court's denials of the plea to the jurisdiction and motions to dismiss filed by Sharma and Berrios. We reverse the trial court's order denying Simpson's motion to dismiss, and remand to the trial court for entry of orders of dismissal of George's claims against Simpson, and for further proceedings consistent with this opinion.

I. Factual and Procedural History.

After suffering seven months of intermittent flu-like symptoms, Lacy George was diagnosed with Crohn's disease at the age of twelve. Despite aggressive treatment by a gastroenterologist at the Hospital, at fourteen, George developed an intestinal abscess requiring surgery. Doctor Kartik Sharma, a surgeon at the Hospital, removed the intestinal abscess along with the diseased segment of her bowel, and completed the anastomosis successfully on February 3, 2010. Sharma immediately prescribed 500 milligrams of the antibiotic metronidazole every eight hours to prevent infection. Resident doctor Andrew M. Simpson oversaw George's post-operative care. Although generally weak from surgery, George was released on February 6 with instructions to continue the usage of metronidazole as prescribed for eight additional days. She was scheduled for a follow-up visit in two weeks.

George's recovery at home proved dismal. She remained weak after surgery, a symptom which her parents believed was caused by a restricted liquid diet. They began to panic on February 9 when George experienced difficulty swallowing liquids, fever, cough, and throat and

chest pain. George's parents reported these symptoms to Simpson, who ordered bloodwork and chest and neck X-rays. Simpson received the results of the tests on February 10, consulted with the resident director and radiology specialist Austin Berrios, and reassured George's parents that the X-rays were undeterminative. Believing George's symptoms could be a possible flair-up of her Crohn's disease due to increased white blood cell count, or a bacterial infection, Simpson increased the dosage of metronidazole to 550 milligrams for the next week until George's follow-up appointment. By the time of the appointment on the 20th, George's difficulty swallowing had progressed into an inability to eat, resulting in an eight-pound weight loss. She complained of unbearable throat and chest pain. After consulting with Berrios, Simpson ordered another X-ray, more bloodwork, and a throat culture.

Lab examination of the throat culture revealed presence of *Candida albicans*, a common yeast that had mutated into a fungal infection of George's esophagus and lungs. Simpson prescribed anti-fungal medication Diflucan to treat the infection. However, because George was an immunocompromised Crohn's disease patient, she developed esophageal perforations requiring additional surgery. The surgery caused esophageal strictures, or narrowing of the esophagus. As a result, George will experience chronic difficulty in swallowing, which could keep her from getting enough fluids and nutrients, and an increased risk of regurgitation and choking.

George's parents began to research *Candida albicans* online. To their surprise, they discovered such infections are a growing problem post-surgery due to prescription of antibiotics, which kills friendly bacteria naturally occurring in the human body that commonly wards off *Candida albicans*. They consulted attorney Drew Stevens, a solo practitioner, and gastroenterologist Dillion Smith from nearby Mary Immaculate Hospital. Smith opined that the initial X-ray of George's neck and chest showed signs of the infection, which, coupled with the complaint of difficulty swallowing, should have led Simpson and Berrios to the conclusion that *Candida albicans* infection could have been possible. Smith further believed that Sharma's prescription of 500 milligrams of metronidazole, the normal dosage for a healthy adult, was excessive considering George's ninety-seven-pound frame. According to Smith, the alleged over-prescription of metronidazole killed the friendly bacteria in George's already immunosuppressed body and caused the progression of the fungal infection. She believed Simpson's

increased dosage of metronidazole, which was approved by Berrios, and the failure to properly read the February 10 X-ray amounted to medical negligence, causing the spread of the infection.

The George family sued the Hospital, Sharma, Simpson, and Berrios on April 7, 2010. In their complaints against the Hospital, they claimed that Hospital employees[1] misused the February 10 X-ray derived from the State's X-ray machine by failing to properly assess George's condition. All three doctors were sued individually. Specifically, Sharma and Simpson were sued for negligence in over-prescribing the metronidazole, and Simpson and Berrios were sued for failing to properly diagnose the condition due to allegedly misreading the February 10 X-ray, and for Simpson's additional prescription of metronidazole approved by Berrios. A claim for negligent supervision was also brought against Berrios. Smith believed that if the February 10 X-ray had been properly read, the infection would not have had the additional ten days to spread, could have easily been contained with Diflucan, and would not have led to the esophageal complications George experienced.

All parties were properly served with the lawsuit except for Simpson, who had since relocated and left his residency with the Hospital. Stevens obtained an expert report from Smith with respect to the allegations against the Hospital, Simpson, and Berrios. The report, with Smith's curriculum vitae, was served by sending a copy to attorneys for the Hospital and Berrios on July 7, 2010. Stevens discovered that Simpson had obtained a residency at the University of Texas Southwestern Medical Center, and sent a copy of the report by certified mail return receipt requested to Simpson's new business address. The green card returned on July 20 indicates the documents were signed for by Jan Brighton, head of the mail room at University of Texas Southwestern Medical Center. With respect to complaints against Sharma, Stevens believed it was prudent to obtain an expert report from another surgeon. He had discussed the case with several surgeons at Mary Immaculate Hospital.

However, in an unfortunate twist of fate, Stevens suffered a serious heart attack and passed away on July 25, 2010. On August 17, a trial court appointed attorney Greg Bishop to assume control of Stevens' law practice in order to protect the interests of Stevens' clients.

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[1] The issue of application of Texas Civil Practice and Remedies Code Section 101.106 was not raised below and is not an issue in this appeal.

Bishop came across George's case, discovered that the Hospital had filed a plea to the jurisdiction on August 15, and that Sharma and Berrios had filed motions to dismiss on the same date. Bishop obtained a different process server and properly served Simpson with the lawsuit on August 19. On August 26, Bishop obtained an expert report from surgeon Thad Moseley at Mary Immaculate Hospital and served the report and his curriculum vitae on Sharma. Simpson filed a motion to dismiss on August 28. The trial court set all pleas and motions for a hearing on September 14.

In its plea, the Hospital argued that it was protected by sovereign immunity, which was not waived by Section 101.021(2) of the Texas Tort Claims Act. Sharma's motion to dismiss, filed pursuant to Section 74.351(b) of the Texas Civil Practice and Remedies Code, argued that he had not been served with the required expert report and curriculum vitae by August 5, 2010, the 120th day from the date the original petition was filed. Berrios complained that Smith's affidavit failed to address direct negligence, and argued for dismissal of that claim. Simpson complained that he was not a party to the suit until after the 120-day time period under Section 74.351(b) had expired and that no expert report had been properly served as contemplated by the statute. After a hearing, the trial court denied the Hospital's plea to the jurisdiction, as well as all of the motions to dismiss, prompting this interlocutory appeal.

II. Hospital's Plea to the Jurisdiction Was Properly Denied

A. Standard of Review

Whether the trial court had subject-matter jurisdiction is a question of law that we review de novo. *City of Waco v. Lopez*, 259 S.W.3d 147, 150 (Tex. 2008). In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Sovereign immunity from suit defeats a trial court's jurisdiction and is properly asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004). A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We construe the pleadings liberally in George's favor, look to

the pleader's intent, and accept the factual allegations as true. *Miranda*, 133 S.W.3d at 226 (Tex. 2004).

It is undisputed that the Hospital is a political subdivision of the State of Texas, and that the doctors involved were employees of the State. A governmental entity is immune from suit except to the extent waived by the Texas Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001(3)(B), 101.021. Under the current version of the TTCA, a governmental unit's sovereign immunity is waived for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id.* § 101.021(2). That is, to state a claim under section 101.021(2), the plaintiff must allege that (1) property was used or misused by a governmental employee and (2) the use proximately caused personal injury or death. *Archibeque v. N. Tex. State Hosp.-Wichita Falls Campus*, 115 S.W.3d 154, 158 (Tex. App.—Fort Worth 2003, no pet.). The Texas Supreme Court has defined "use" as "to put or bring into action or service; to employ for or apply to a given purpose." *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001).

At this jurisdictional stage of the proceedings, we are not permitted to address the merits of this case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). George need not *prove* that the Hospital's actions did constitute a use of tangible property for this Court to affirm the trial court's order. *Austin Indep. Sch. Dist. v. Guitierrez*, 54 S.W.3d 860, 863 (Tex. App.—Austin 2001, pet. denied). Rather, because the trial court denied the plea to the jurisdiction, finding that the pleadings sufficiently alleged use of tangible property caused George's injuries, "the burden is on the governmental unit to show the employee's actions did not constitute a use of tangible property." *Tex. Tech Univ. Health Sci. Ctr. v. Jackson*, No. 08-10-00363-CV, 2011 WL 4396879, at *4 (Tex. App.—El Paso Sept. 21, 2011, no pet.) (citing *Guitierrez*, 54 S.W.3d at 863).

B. Pleadings Alleged Negligent Use of Tangible Property Pursuant to the TTCA

The Hospital argues that an allegation of misdiagnosis based upon a negligent reading of the initial X-ray does not constitute use of tangible property, but rather, a misuse of information. In support, the Hospital cites several cases holding that "information is not tangible property." *Redden v. Denton County*, 335 S.W.3d 743, 751 (Tex.

App.—Fort Worth 2011, no pet.) (recognizing split in authority, but finding misreading of an (electrocardiogram) EKG graph did not constitute use of tangible property) (citing *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 178–79 (Tex. 1994)).

The Hospital's reliance is based heavily on our sister court's opinion in *Redden*. Redden, an inmate at Denton County Jail, informed jail personnel of his history of coronary heart disease and began complaining of chest pain and other signs and symptoms of cardiac ischemia. *Redden*, 335 S.W.3d at 744. EKG testing was performed on June 10, 19, 30 and on July 9, but, allegedly, no assessment was made by qualified medical personnel. *Id.* Redden died from a heart attack on July 9. *Id.* The plea to the jurisdiction filed by the Denton County Jail alleged that tangible personal property was not used "because the machine was working properly and the only machine-related complaint brought by Appellants pertained to the misinterpretations of the printouts by infirmary personnel." *Id.* at 745. In finding that "the EKG machine itself did not injure Redden," our sister court agreed with Denton County and affirmed the trial court's granting of the plea to the jurisdiction. *Id.* at 751.

To reach this conclusion, *Redden* attempted to distinguish the Texas Supreme Court's opinion in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30 (Tex. 1983), on which the Georges rely heavily in their briefing. Salcedo presented at El Paso Hospital District's emergency room with severe chest pain. *Id.* at 31. An EKG was administered, and although classic patterns of a heart attack could be seen, Salcedo was released. *Id.* He died shortly after returning home. *Id.* Salcedo's wife sued the hospital, alleging that they "misused the equipment and tangible property. . .by improperly reading and interpreting the electrocardiogram graphs and charts produced by such equipment." *Id.* at 32. Finding that the allegations stated a cause of action under the TTCA, the Court reversed the trial court's granting of the hospital's plea. It reasoned that because "[r]eading and interpreting are purposes for which an electrocardiogram graph is used or employed in diagnosing myocardial infarction, . . . Mrs. Salcedo has alleged her loss was proximately caused by the negligence of the hospital district's employees in the use of tangible property." *Id.* at 33.

Redden recognized a split in authority between courts holding "implicitly or explicitly, that *Salcedo* is still the applicable law," and those believing that the case was overruled by *Whitley*. *Redden*, 335 S.W.3d

at 746. We find *Whitley* is easily distinguishable. Whitley was riding a bus operated by the Dallas Area Rapid Transit Authority when he became the subject of verbal harassment by a fellow passenger. 104 S.W.3d at 542. The bus driver deposited Whitley in a bad neighborhood to diffuse the situation, assuring Whitley that he would soon return for him. *Id.* at 541-42. The bus driver did not return, and the verbally abusive passenger, with supporters in tow, located Whitley and attacked him. *Id.* at 542. Whitley's petition alleged that his injuries arose from the use of a motor driven vehicle because the driver "ejected him in a remote and dangerous area of Dallas," allowed the abusive passenger to disembark at the next stop, and failed to return to Whitley. *Id.* The court held that since the injuries did not arise from the use of the bus, but "from the bus driver's failure to supervise the public," Whitley's pleadings would not support a waiver of immunity under the TTCA. *Id.* at 542-43.

Extrapolating from *Whitley*, the court in *Redden* wrote "[h]ence, there exists an argument that an EKG machine's readings furnish only a condition—information—that makes an injury possible and that, if the EKG machine is operated properly, it is not 'misused' if its readings are improperly interpreted." 335 S.W.3d at 749. We respectfully decline to adopt such a narrow interpretation of the TTCA as espoused in *Redden*, and disagree with our sister court's application of *Whitley* to support its position. *Whitley's* focus was upon the requirement of proximate cause, i.e., the lack of a nexus, which required "more than mere involvement of property" between the use of the bus and the injuries sustained by Whitley. 104 S.W.3d at 543. It does not stand for the proposition that *Salcedo* is no longer good law, as *Redden* asserts. If the use or misuse of tangible property proximately causes the injury, there is waiver of governmental immunity.

Redden also concluded that "the supreme court began to narrow *Salcedo*" after the legislature's revision of the section from "some condition or some use of tangible property" to "condition or use of tangible" property, even though the revision also included a legislative comment that the "Act [was] intended as a recodification only," with no substantive change in the law intended. 335 S.W.3d at 748. As an example of this alleged narrowing of *Salcedo*, *Redden* cites to *York*. Again, we respectfully find our sister court's reasoning unpersuasive in this case. *York* found that the allegations of misuse of property "by failing to note in [patient's] medical records the events of" the day the patient broke his hip, "failing to memorialize in writing numerous

other observations concerning [patient's] condition made by [patient's] parent when visiting" him, and in failing to follow recommendations in the notes to get an X-ray, did not constitute the use of tangible personal property which proximately caused the injuries. 871 S.W.2d at 176. Upholding *Salcedo*, the court supported its finding that an EKG is tangible property. *Id.* at 178. However, it held that a claim of failure to record or document could not constitute use or misuse of tangible property. *Id.* at 178-9.[2]

In this case, George's petition states:

> On February 10, 2010, an X-ray was conducted on the neck and chest of Lacy George. The results of this X-ray show evidence of fungal infection. Doctors Sharma and Berrios negligently failed to properly interpret the X-ray and instructed George that the X-ray was inconclusive. As a result, the fungal infection spread for ten days prior to George's follow-up appointment. Had the X-ray been properly read on February 10, it could have been contained with routine treatment with relative ease. Instead, because the X-ray was misread, the infection spread, causing esophageal perforations requiring further surgery and resulting in lifelong disability to George. The Hospital's negligent use and/or misuse of the X-ray machine by improperly reading the tangible X-ray produced, and failure to properly diagnose George on February 10, proximately caused George's extensive injuries

Even after the revisions of the TTCA, the court has clarified "[u]nquestionably, an electrocardiogram is tangible personal property. Although 'tangible' is not defined in the Tort Claims Act, there can be little doubt that tangible personal property refers to something that

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[2] Next, the Hospital points to *Redden*, and several other opinions from our sister courts, and argues that *Salcedo* was limited to its facts by *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342 (Tex. 1998). *Bossley* referred to *York*, 871 S.W.2d at 178, to reach the statement that "*Salcedo* was limited to its facts." *Bossley*, 968 S.W.2d at 342. A plain reading of *York* reveals that the case does not limit *Salcedo* to its facts; it merely distinguishes the case from the facts in *York*. 871 S.W.2d at 178.

has a corporeal, concrete, and palpable existence." *York*, 871 S.W.2d at 178; *see Tex. Tech Univ. Health Sci. Ctr. v. Lucero*, 234 S.W.3d 158, 163-64 (Tex. App.—El Paso 2007, pet. denied) (holding that misuse of an abdominal CT scan and the related failure to diagnose a bile leak that resulted in the patient's death stated a claim under the TTCA). As in *Salcedo*, we find that the X-ray produced constituted tangible property. We hold George's allegation that negligent use in reading and interpreting the X-ray was a proximate cause of her injuries was sufficient to state a cause of action under the TTCA. We are encouraged in our holding because, despite opportunities to do so, the Texas Supreme Court has not overruled *Salcedo*.[3]

The Hospital's point of error complaining of the denial of their plea to the jurisdiction is overruled.

III. Denial of Sharma's Motion to Dismiss was Proper

Section 74.351 of the Texas Civil Practice and Remedies Code provides:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. …
>
> (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care

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[3] In *Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989), the court wrote:

> The fact that both the amended and codified versions of the waiver provision preserved the "condition or use" language considered by this court in . . . *Salcedo* indicates a legislative adoption of the construction given in those cases. "The rule is well settled that when a statute is re-enacted without material change, it is presumed that the legislature knew and adopted the interpretation placed on the original act and intended the new enactment to receive the same construction." *Coastal Industrial Water Authority v. Trinity Portland Cement Division*, 563 S.W.2d 916, 918 (Tex. 1978).

> provider, shall, subject to Subsection (c), enter an order that:
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> (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and
>
> (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(West 2011).

Sharma argues that the trial court erred in failing to grant his motion to dismiss because he had not been served with an expert report by August 5, 2010, the 120th day from the date the original petition was filed. George responds, as she did in the trial court, that Section 74.351, as applied, violates her rights under the Open Courts provision of the Texas Constitution. TEX. CONST. art. I, § 13. Article I, Section 13 of 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 course of law." *Id*.

This provision, commonly referred to as the "Open Courts" provision, is premised upon the rationale that the Legislature lacks the power to make a remedy by due course of law contingent on an impossible condition. *Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 355 (Tex. 1990); *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex. 1985). It acts as an additional due process guarantee granted in the Texas Constitution, prohibiting legislative bodies from withdrawing all legal remedies from anyone having a well-defined common law cause of action. *Sax v. Votteler*, 648 S.W.2d 661, 664-65 (Tex. 1983). The Open Courts provision guarantees "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." *Trinity River Auth. v. URS Consultants, Inc*., 889 S.W.2d 259, 261 (Tex. 1994) (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 448 (Tex. 1993)).

A. Standard of Review

We review a trial court's ruling on a motion to dismiss under Section 74.351(b) for an abuse of discretion. TEX. CIV. PRAC. & REM. CODE

ANN. § 74.351(b); *Am. Transitional Care Ctrs. of Tex. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001). Pure questions of law, however, such as the constitutional challenge here, are reviewed de novo because the trial court has no discretion in determining what the law is or how to apply the law to the facts. *In re Jorden*, 249 S.W.3d 416, 424 (Tex. 2008); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). If a statute operates unconstitutionally, the trial court has no discretion to apply it. *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (finding failure to comply with expert report statute did not violate due process right and trial court did not abuse discretion in dismissing claim).

When reviewing the constitutionality of a statute under an Open Courts challenge, we begin with the presumption that the statute is constitutional. *Sax*, 648 S.W.2d at 664; *see Gutierrez*, 111 S.W.3d at 66. The party challenging the constitutionality of a statute must demonstrate that it fails to meet constitutional requirements. As the party challenging Section 74.351 "as applied," George is required to demonstrate the statute is unconstitutional when applied to the particular set of facts or circumstances presented. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995). To establish an "as applied" Open Courts violation, George must show: (1) that she has a cognizable common law cause of action that is being restricted and (2) that under the circumstances of this case, the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007); *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997). The stated purpose of Section 74.351's expert report requirement is "to stem frivolous suits against health care providers." *Lewis v. Funderburk*, 253 S.W.3d 204, 205 (Tex. 2008).

B. As Applied, Section 74.351 Violated the Open Courts Provision

Pursuant to Section 74.351(a), an expert report and *curriculum vitae* must be filed and served on the opposing party within 120 days after the original petition is filed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). The statute does not grant the trial court the discretion to grant an extension of time due to exigent circumstances.[4] *Id.*; TEX.

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[4] The parties may agree in writing to an extension of time, and the trial court may grant a thirty-day extension if a party files a defective expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (c).

CIV. PRAC. & REM. CODE ANN. § 74.351; *see also Ogletree v. Matthews*, 262 S.W.3d 31, 319-320 (Tex. 2007) (if no report is served within 120 days, "the [l]egislature denied trial courts the discretion to deny motions to dismiss or grant extensions.").

George argues that section 74.351 is unconstitutional as applied to her because it violates her rights by requiring the trial court to dismiss her suit even though service of the expert report was impossible due to Stevens' death. Sharma contends that serving the report was not impossible because George could have filed and served the expert report by August 5, 2010, after Stevens' death.

When reviewing the constitutionality of a statute under an Open Courts challenge, we begin with the presumption that the statute is constitutional. *Sax v*, 648 S.W.2d at 664; *see Walker*, 111 S.W.3d at 66. The party challenging the constitutionality of a statute must demonstrate that it fails to meet constitutional requirements. *Walker*, 111 S.W.3d at 66.

The purpose behind Section 74.351's expert report requirement is not to create a "gotcha"; it is to "stem frivolous suits against health care providers." *Lewis*, 253 S.W.3d at 205; *Am. Transitional Care Ctrs.*, 46 S.W.3d at 877; *Perry v. Stanley*, 83 S.W.3d 819, 825 (Tex. App.—Texarkana 2002, no pet.); *Gill v. Russo*, 39 S.W.3d 717, 719 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Here, the parties do not dispute that George's medical negligence claim is a well-recognized common law cause of action and that Section 74.351 restricts this cause of action. *See*, *e.g.*, *Humphreys v. Roberson*, 83 S.W.2d 311 (1935). Therefore, the issue in this case is whether the restriction is unreasonable or arbitrary when balanced against the purpose and basis of Section 74.351.

When faced with other facial and as applied challenges, Texas courts have consistently held that Section 74.351 does not violate the Open Courts provision of the Texas Constitution. *See*, *e.g.*, *Stockton v. Offenbach*, 336 S.W.3d 610 (Tex. 2011) (no Open Courts violation because plaintiff did not exercise due diligence in attempting to serve disappearing doctor); *Bankhead v. State*, 314 S.W.3d 464 (Tex. App.—Waco 2010, pet. denied) (no Open Courts violation when pro se inmate plaintiff was not entitled to appointed counsel to help obtain an expert report); *Ledesma v. Shashoua*, No. 03-05-00454-CV, 2007 WL 2214650, at *8-9 (Tex. App.—Austin Aug. 3, 2007, pet. denied) (mem. op.) (no Open Courts violation where claimant served expert

report, but trial court found report inadequate and refused extension to correct deficiencies); *Fields v. Metroplex Hosp. Found.*, No. 03-04-00516-CV, 2006 WL 2089171, at *4 (Tex. App.—Austin July 28, 2006, no pet.) (mem. op.) (no Open Courts violation where claim dismissed when claimant served expert report late); *Herrera v. Seton N.W. Hosp.*, 212 S.W.3d 452 (Tex. App.—Austin 2006, no pet.) (no Open Courts violation when plaintiff inadvertently failed to serve the expert report); *Thoyakulathu v. Brennan*, 192 S.W.3d 849 (Tex. App.—Texarkana 2006, no pet.) (dismissal under section 74.351 did not violate due process when plaintiff failed to timely serve expert report because his facsimile machine malfunctioned on the day of the deadline); *Gill v. Russo*, 39 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (even though pro se inmate plaintiff could not afford an expert, requirement that he serve an expert report did not violate Open Courts provision).

This case involves exceedingly rare circumstances, and there are only two cases that are factually similar. In *Palosi v. Kretsinger*, an expert report was not filed due to the unexpected death of the plaintiffs' attorney after the filing of suit, but prior to the 120-day deadline. No. 04-08-00007-CV, 2009 WL 331894, at *1 (Tex. App.—San Antonio Feb. 11, 2009, no pet.). Because of that failure, the trial court dismissed the plaintiffs' cause of action with prejudice. *Id.* On appeal, the plaintiffs argued that portions of Section 74.351 violated the Open Courts doctrine. The court held that the Open Courts doctrine did not apply because the plaintiff's claim failed the first prong of the test because a survivorship action is not a common law cause of action. *Id.* at *7. However, *Palosi* does not provide any guidance in this case because, unlike the plaintiffs in *Palosi*, Georges's cause of action is well recognized in common law.

The second case is *Doan v. Christus Health Ark-La-Tex.* 329 S.W.3d 907 (Tex. App.—Texarkana 2010, no pet.). That case is factually identical to ours in that Doan's attorney passed away twenty days before the expiration of the 120-day time period, unbeknownst to Doan, and another counsel was not appointed to take over his practice until the time period expired. *Id.* at 909. However, our sister court in *Doan* concluded that because the expert report could be filed in the 100 days between the filing of suit and her attorney's death, it was not impossible to file the report within the time period allowed by the statute, and that because compliance with the statute was not impossible, Section 74.351 did not violate the Open Courts provision since the

legislature did not make a remedy contingent on an impossible condition. *Id.* at 912. We decline to accept the circular reasoning of our sister court, which ignores the practicality on which the Open Courts challenge was based. In this opinion, our sister court wrote:

> We seriously doubt that the Legislature envisioned that this rule would summarily deny this claim—the purpose of the statute was to deter frivolous claims. But, in this matter, the Legislature removed all discretion from the judicial system, which inevitably leads to harsh and unintended results.

Id. at 912. We agree.

In this case, at the time of Stevens' death, George was still within the 120-day period granted by Section 74.351. As a minor, George would not be expected to file an expert report, and her parents, who did not know of Stevens' death, also should not have been held to such requirement since it would give George less than the 120 days granted by Section 74.351, and would essentially require her counsel to file and serve the report as soon as possible "just in case" he should die or become incapacitated at an inconvenient time. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a).

Stevens was a sole practitioner that was working alone on this case, and he had secured several options for expert opinions from surgeons at Mary Immaculate Hospital. After his death and prior to Bishop's appointment, only George's parents had the legal authority to file and serve the report. However, because they were unaware of Stevens' death, they had no reason to act or to obtain other counsel. Under these limited circumstances, we find that it was effectively impossible for George to file and serve the report after Stevens' death, and requiring her to do so would be arbitrary and unreasonable.

The unique facts of this case distinguish this case from previous facial and "as applied" constitutional challenges to Section 74.351. If Section 74.351 is mechanically applied here, without regard to the circumstances of the case, George would be denied her day in court, not because of inadvertence, or anyone's negligence or mistake, or the last-minute failure of a fax machine, but rather because her solo-practitioner attorney unexpectedly died prior to the deadline, and she had no reason to know of his death. "Such a result is rightly described as 'shocking' and is so absurd and so unjust that it ought not be possible." *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984) (citing *Hays v.*

Hall, 488 S.W.2d 412, 414 (Tex. 1972); *Gaddis v. Smith*, 417 S.W.2d 577, 580, 581 (Tex. 1967)). Under the limited circumstances of this case, deferring to the legislative imposition of Section 74.351's dismissal requirement "would amount to an abdication of our judicial duty to protect the rights guaranteed by the Texas Constitution, the source and limit of legislative as well as judicial power. This we cannot do." *Nelson*, 678 S.W.2d at 923. Accordingly, under the Open Courts provision, we hold that, as it was applied in this case, section 74.351(a) and (b) of the Civil Practice and Remedies Code is unconstitutional to the extent it would eliminate George's ability to seek recovery under these specific circumstances.

At the time of Stevens' death, Doan still had eleven days to comply with Section 74.351. Bishop was appointed on August 17. Less than eleven days later, he obtained an expert report from surgeon Thad Moseley and served the report and his curriculum vitae upon Sharma. Accordingly, we affirm the trial court's denial of Sharma's motion to dismiss.

IV. Denial of Berrios' Motion to Dismiss was Proper

Berrios complained that Smith's affidavit failed to address direct negligence and argued for dismissal of that claim. Smith's expert report set forth in great detail negligent acts committed by Simpson. After providing a statement of Simpson's acts, the report simply stated, "Berrios failed to properly supervise the negligent acts and omissions committed by Simpson. The degree of supervision by Berrios fell below the standard of medical care and was a proximate cause of George's injuries."[5] Berrios argues that while the petition contains claims of direct negligence, specifically referring to Berrios' negligence in improperly interpreting the X-ray and approving and/or failing to recognize an overdose of metronidazole, these claims were not adequately addressed in the expert report in reference to Berrios. We agree, but we do not reach the conclusion that "the expert report was so inadequate with respect to direct negligence as to constitute no expert report requiring dismissal," as asserted by Berrios.

Although "[i]ntermediate courts of appeals are split concerning whether an expert report adequate as to at least one liability theory within a cause of action is sufficient to permit other liability theories

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[5] No complaint was made as to the sufficiency of the expert report with regard to negligent supervision claims.

within the same cause of action to proceed although the expert report is deficient with respect to the other theories," we find that the trial court was not required to dismiss the direct negligence claims against Berrios. *Certified EMS, Inc. v. Potts*, No. 01–10–00106–CV, 2011 WL 1938264, at *11 (Tex. App.—Houston [1st Dist.] May 19, 2011, pet. filed) (discussing and citing to split among the courts); *see Lopez v. Brown*, No. 14-10-01144-CV, 2011 WL 3503326, at *5 n.6 (Tex. App.—Houston [14th Dist.] Aug. 11, 2011, no pet.).

Under Section 74.351(a), the plaintiff's obligation is to serve an expert report meeting section 74.351(r)(6)'s requirements with respect to "each physician or health care provider against whom a liability claim is asserted." The word "claim" is defined to mean "a health care liability claim." *Id.* § 74.351(r)(2). The phrase "health care liability claim" is defined as a "cause of action against a ... physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care...." *Id.* § 74.001(a)(13). As stated in *Certified EMS*,

> By focusing on a cause of action rather than particular liability theories that may be contained within a cause of action, the plain language does not require an expert report to set out each and every liability theory that might be pursued by the claimant as long as at least one liability theory within a cause of action is shown by the expert report.

2011 WL 1938264, at *7. Therefore, we find the trial court properly denied Berrios' motion to dismiss.

V. Denying Simpson's Motion to Dismiss was Error

Simpson was not served with the lawsuit until after the expiration of the 120-day time period under Section 74.351(b). However, prior to the expiration of the time period, Stevens sent a copy of Smith's expert report via certified mail return receipt requested to Simpson's new business address. The green card returned on July 20 indicates the documents were signed for by Jan Brighton at University of Texas Southwestern Medical Center. Section 74.351 requires a claimant to serve an expert report with curriculum vitae within the deadline upon "each party or the party's attorney." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). Simpson argues that because he was not required to answer the suit until after the expiration of 120 days from the date George's petition was filed, he was not a party to the lawsuit at any

time before the expiration date, service at that time was ineffectual, and dismissal was required.

For the reasons stated by our sister court in *Zanchi v. Lane*, we find that Simpson was a party to the suit by virtue of the fact that he was named in George's petition. No. 06-11-00036-CV, 2011 WL 3849728, at *7 (Tex. App.—Texarkana Sept. 1, 2011, no pet.). Yet, cases addressing similar factual situations find service of an expert report prior to service of citation is ineffectual, but for the reasoning—which we do not employ—that a person is not a party until served with citation. *Yilmaz v. McGregor*, 265 S.W.3d 631, 637 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (citing *Ex Parte Bowers*, 886 S.W.2d 346, 349 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd w.o.j.); *see Dingler v. Tucker*, 301 S.W.3d 761, 766-67 (Tex. App.—Fort Worth 2009, pet. denied); *Ramos v. Richardson*, 2008 WL 1822763, at *3 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied). After analyzing these cases, we find that the methods of service under Texas Rule of Civil Procedure 106 should be favored as opposed to Rule 21a in this instance, that Simpson was not properly served with the expert report under that rule, and reverse the trial court's denial of Simpson's motion to dismiss.

Section 74.351 does not define the term service. When interpreting a statute, our objective is to ascertain and follow the legislature's intent. *Sultan v. Mathew*, 178 S.W.3d 747, 749 (Tex. 2005). "To discern that intent, we consider the objective the law seeks to obtain and consequences of a particular construction." *Id.* The term "party" is not defined in section 74.351. Section 74.001 provides that "[a]ny 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." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (Vernon 2005).

Several courts have determined that the term "serve" in Section 74.351 is the same as "service" under Rule 21a.[6] *Goforth v. Bradshaw*,

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[6] We note that Rule 21a applies only to "[E]very notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21." TEX. R. CIV. P. 21a. Rule 21 applies to "[e]very pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea, or other form of request." TEX. R. CIV. P. 21. Although the Rule does not explicitly apply, we believe that service under this Rule would be sufficient as long as the expert report was served after citation.

296 S.W.3d 849, 853 (Tex. App.—Texarkana 2009, no pet.) (citing *Amaya v. Enriquez*, 296 S.W.3d 781, 783 (Tex. App.—El Paso 2009, pet. denied); *Poland v. Ott*, 278 S.W.3d 39 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.); *Kendrick v. Garcia*, 171 S.W.3d 698, 704 (Tex. App.—Eastland 2005, pet. denied)). None of those cases contemplate whether service under Rule 21a can be achieved prior to service of citation.

The problem with applying Rule 21a is that service is "complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service." *Id.* The evidentiary effect of this portion of the rule is to create a presumption of service in compliance with the rule. *See In re E.A.*, 287 S.W.3d 1, 5 (Tex. 2009) (recognizing existence of presumption). This presumption vanishes when evidence is introduced opposing this presumption. *Id.* Second, the rule provides, "A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service." TEX. R. CIV. P. 21a. Here, the certificate of service avers that service was upon Simpson via certified mail return receipt. According to established Rule 21a case law, it then becomes the opposing party's burden to show that the notice was not, in fact, received. *In re E.A.*, 287 S.W.3d at 5. We do not believe that such a burden should be placed on a party who is not yet under any obligation to answer the suit, and we doubt that it was the legislature's intent to do so. We decline to adopt the application of Rule 21a to Section 74.351 in this instance.

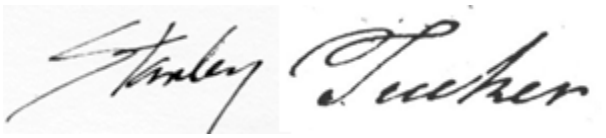
The question of a proper method of service under Rule 74.351 still remains. We note that in service of citation cases, the appellate courts have almost unanimously ruled that when there is service by certified mail, if the return receipt is not signed by the addressee, the service of process is defective. *See Sw. Sec. Servs., Inc. v. Gamboa*, 172 S.W.3d 90, 93 (Tex. App.—El Paso 2005, no pet.) (service defective when return receipt signed by someone other than addressee); *Ramirez v. Consol. HGM Corp.*, 124 S.W.3d 914, 916 (Tex. App.—Amarillo 2004, no pet.); *All Commercial Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723, 727 (Tex. App.—Fort Worth 2003, no pet.); *Keeton v. Carrasco*, 53 S.W.3d 13, 19 (Tex. App.—San Antonio 2001, pet. denied); *Webb v. Ob-*

erkampf Supply of Lubbock, Inc., 831 S.W.2d 61, 64 (Tex. App.—Amarillo 1992, no writ*); Am. Universal Ins. Co. v. D.B. & B., Inc.*, 725 S.W.2d 764, 765–67 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *Pharmakinetics Labs., Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ). There is a reason to employ Rule 106 methods in the limited circumstance presented by this case. Whereas Rule 21a contemplates that service of citation has been completed, and that the court has the party's correct address, Rule 106 does not. Since George did not properly employ any method of service described in Rule 106, and the record does not establish that Simpson received actual notice of the report,[7] we find that service of the expert report was ineffectual because Simpson was not served with the lawsuit until after the 120-day expiration date.

We sustain Simpson's point of error and conclude the trial court abused its discretion in failing to dismiss George's claims against him.

VI. Conclusion

We affirm the judgment of the trial court denying the Hospital's plea to the jurisdiction and the motions to dismiss filed by Sharma and Berrios. We reverse the trial court's order denying Simpson's motion to dismiss and remand the cause to the trial court with instruction to dismiss claims against Simpson and for further proceedings in accordance with this opinion.



Stanley Tucker
Chief Justice

Date Submitted: November 11, 2011
Date Decided: November 16, 2011

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[7] The fact that nothing indicates Simpson received actual notice of the report distinguishes this case from *Zanchi*. Our well-reasoned sister court wrote, "Because actual notice [of the report] was accomplished, and no harm resulted from any alleged failure of authority…to sign for the report, we find that service here was in compliance with Rule 21a." Our sister court aptly noted that the purpose of Rule 21a is to provide actual notice. This is the same purpose Rule 106 seeks to accomplish.