HEALTH CARE LIABILITY UPDATE*

* This article is an update to the “Medical Malpractice Update 2004” by Paula Sweeney at the 2004 Advanced Personal Injury Law Course. You can find this article at www.texasbarcle.com/materials/events/3883/57366_01.pdf

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CHAPTER 16
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>-1-</td>
</tr>
<tr>
<td>II. ARBITRATION MAY BE REQUIRED IN TEXAS MEDICAL NEGLIGENCE CASE</td>
<td>-1-</td>
</tr>
<tr>
<td>III. SUMMARY JUDGMENT EVIDENCE</td>
<td>-1-</td>
</tr>
<tr>
<td>IV. VICARIOUS LIABILITY CLAIMS DO NOT REQUIRE SEPARATE EXPERT REPORTS</td>
<td>-1-</td>
</tr>
<tr>
<td>V. NEGLIGENT CREDENTIALING IS A HEALTH CARE LIABILITY CLAIM</td>
<td>2-</td>
</tr>
<tr>
<td>VI. INSURANCE COVERAGE</td>
<td>2-</td>
</tr>
<tr>
<td>A. Multiple Claims and Defendants</td>
<td>2-</td>
</tr>
<tr>
<td>B. The Importance Of The “Claim” Date</td>
<td>3-</td>
</tr>
<tr>
<td>VII. STATUTE OF LIMITATIONS</td>
<td>3-</td>
</tr>
<tr>
<td>A. “Ascertainable Date of Tort vs. Continuing Treatment Rule And Discovery Rule”</td>
<td>3-</td>
</tr>
<tr>
<td>B. Mailbox Rule Applies To Filing</td>
<td>4-</td>
</tr>
<tr>
<td>C. Tolling By Mental Incompetence</td>
<td>4-</td>
</tr>
<tr>
<td>D. Misnomer</td>
<td>4-</td>
</tr>
<tr>
<td>IX. EXCLUSION FROM DISCOVERY OF PLAINTIFF’S MEDICAL RECORDS - THE PHYSICIAN/PATIENT PRIVILEGE</td>
<td>5-</td>
</tr>
<tr>
<td>X. TORT CLAIMS</td>
<td>5-</td>
</tr>
<tr>
<td>A. A Telephone Call Is Not Notice</td>
<td>5-</td>
</tr>
<tr>
<td>B. Minority Does Not Obviate the Notice Requirement</td>
<td>5-</td>
</tr>
<tr>
<td>XI. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF</td>
<td>5-</td>
</tr>
<tr>
<td>XII. CAUSE IN FACT</td>
<td>5-</td>
</tr>
<tr>
<td>XIII. LONG-ARM JURISDICTION; OUT-OF-STATE PHYSICIANS</td>
<td>6-</td>
</tr>
<tr>
<td>XIV. HMO LIABILITY / PREEMPTION</td>
<td>6-</td>
</tr>
<tr>
<td>XV. WRONGFUL DEATH OF A FETUS</td>
<td>6-</td>
</tr>
<tr>
<td>XVI. JURORS</td>
<td>6-</td>
</tr>
<tr>
<td>XVII. THE NON-SUIT RACE TO THE COURTHOUSE</td>
<td>7-</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Cases</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accord Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 212 (Tex. 1996)</td>
<td>8</td>
</tr>
<tr>
<td>Agbor v. St. Luke’s Episcopal Hospital, 952 S.W.2d 503 (Tex. 1997)</td>
<td>2</td>
</tr>
<tr>
<td>Coates v. Whittington, 758 S.W.2d 749 (Tex. 1988)</td>
<td>5</td>
</tr>
<tr>
<td>Fort Worth Osteopathic Hospital v. Reese 148 S.W.3d 94 (Tex. 2004)</td>
<td>6</td>
</tr>
<tr>
<td>I.H.S. Cedars Treatment Center v. Mason 143 S.W.3d 794 (Tex. 2004)</td>
<td>6</td>
</tr>
<tr>
<td>In Re CHCA Conroe, L.P., 2004 WL 2671863 (Tex. App. - Beaumont 2004, n.p.h.) (not designated for publication)</td>
<td>1</td>
</tr>
<tr>
<td>In Re Ledet, 2004 WL 2945699 (Tex. App. - San Antonio 2004, n.p.h.) (not designated for publication)</td>
<td>1</td>
</tr>
<tr>
<td>Lumbermen’s Insurance Corp. v. Goodman, 304 S.W.2d 139, 144-45 (Tex. Civ. App. - Beaumont 1957, writ ref’d n.r.e.)</td>
<td>7</td>
</tr>
</tbody>
</table>
Martinez v. Val Verde County Hospital District, 140 S.W.3d 370 (Tex. 2004) ........... -5-

R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994) .................................................... -5-

Romero v. TIRR, 2004 W.L. 1441049, ___ S.W.3d ___ (Tex. App. - Houston [14th Dist.] 2004, n.p.h.) ................................................................. -4-

Rose v. Garland Community Hospital, 2004 WL 2480381, ___ S.W.3d ___ (Tex. 2004) ... -2-


Sunsinger v. Perez, 16 S.W.3d 496, 500 (Tex. App. - Beaumont 2000, pet. denied) .... -8-

TMLT v. Transportation Insurance Company, 143 S.W.3d 235 (Tex. App. - Dallas 2004, pet. requested) .............................................................. -3-

University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser, 140 S.W.3d 351 (Tex. 2004) ............................................................... -5-
HEALTH CARE LIABILITY

I. INTRODUCTION

This paper is meant as a supplement to the Health Care Liability update done for the State Bar at the Advanced Personal Injury Seminar each Summer. At the Bar’s request, because of its bulk, it is not reproduced in full here, as the Bar assumes that many, if not most, attendees at this seminar have last Summer’s full paper. However, we are more than happy to make a copy of the full paper available to any attendee. Please call or e-mail the author at the address on the cover sheet, and an electronic version will be forwarded to you at no charge. Also, please note one area not covered here: The dozens and dozens, if not hundreds, of cases relating to adequacy of expert reports under both Article 4590i, Section 13.01 and Chapter 74. Though there are many, they are at this point utterly redundant and duplicative of legal principles now well-established.

II. ARBITRATION MAY BE REQUIRED IN TEXAS MEDICAL NEGLIGENCE CASE

_In Re Ledet_, 2004 WL 2945699 (Tex. App. - San Antonio 2004, n.p.h.) (not designated for publication). A mentally incapacitated Alzheimer’s patient fell and was injured in Defendant Retama Manor Nursing Center. RPI’s family brought suit on her behalf. Retama Manor raised an arbitration agreement signed upon admission by Plaintiff’s adult son, seeking its enforcement. The Court of Appeals holds that under some circumstances such agreements can be binding in Texas, and can vitiate the right to trial by jury.

III. SUMMARY JUDGMENT EVIDENCE

_Downing v. Larson_, 2004 WL 2954996, ___ S.W.3d ___ (Tex. App. - Beaumont 2004, n.p.h.). The Defense challenged Plaintiff’s summary judgment evidence on multiple grounds, and the trial court struck Plaintiff’s evidence and granted Summary Judgment. The Court of Appeals reversed, holding that Plaintiff’s experts were adequately qualified to assist the jury, despite the fact that Plaintiff’s primary expert, Dr. Bell, did not use the exact type of synthetic mesh used by the Defendant. He had adequate training and experience to assist the jury with their decision. The Court relied heavily on Rule 702, Tex. R. Evid.

IV. VICARIOUS LIABILITY CLAIMS DO NOT REQUIRE SEPARATE EXPERT REPORTS

Finally, a court has reached an issue that has puzzled practitioners: in cases of pure vicarious liability, such as implied agency, agency by estoppel, _respondeat superior_ and so on, must Plaintiff produce a separate report under Article 4590i, Sec. 13.01 or Chapter 74, Sec. 74.351? And if so, what type of expert would Plaintiff use? A lawyer on the legal issue of agency liability? Lawyers do not qualify as experts under the statutory definitions embodied in 13.01 or 74.351; only physicians do. But physicians are not qualified on the legal ramifications of agency law. This has been a conundrum that has bedeviled parties since the enactment of 13.01. The Beaumont Court, in _In Re CHCA Conroe, L.P._, 2004 WL 2671863 (Tex. App. - Beaumont 2004, n.p.h.) (not designated for publication) addressed the issue, and in a per curiam opinion, stated as follows:
“the conduct by the hospital on which the agency relationship depends is not measured by a medical standard of care. These are principles of agency law on which no expert report is required. …… Plaintiffs have abandoned all claims against the relators except an ostensible agency claim on which a separate report is not required.” [emphasis added].

Finally, this troublesome issue has been resolved by at least one court.

V. NEGLIGENCE CREDENTIALING IS A HEALTH CARE LIABILITY CLAIM

Negligent credentialing is a health care liability claim. The Supreme Court has reversed the Dallas Court of Appeals’ opinion in Rose v. Garland Community Hospital, 2004 WL 2480381, ___ S.W.3d ___(Tex. 2004). In an opinion delivered by Justice Jefferson, the Court held:

“We hold that a claim for negligent credentialing is a healthcare liability claim under the MLIIA.”

Interestingly, in a footnote, the Court states “this Court has never formally recognized the existence of a common-law cause of action for negligent credentialing, but we will assume for purposes of this case that such a claim exists.” The opinion, throughout, carries this assumption forward and implicitly answers the question raised in Agbor v. St. Luke’s Episcopal Hospital, 952 S.W.2d 503 (Tex. 1997) as to whether or not a claim for negligent credentialing exists in Texas. By the Supreme Court’s holding, it now seems clear that a cause of action for negligent credentialing in fact exists. Additionally, the Supreme Court called the claim “negligent credentialing,” not “malicious credentialing.”

As to the merits of the Rose case itself, though all of the conduct occurred prior to Plaintiff’s admission, the Court holds:

“regardless of when the acts occurred, the allegations all revolve around the same basic premise: that the Hospital put Rose at risk by allowing Dr. Fowler to treat her. It makes no sense to conclude that some credentialing claims are subject to the MLIIA and others are not, depending upon what point in time the credentialing decisions occurred.”

“When a Plaintiff’s credentialing complaint centers on the quality of the doctor’s treatment, as it does here, the hospital’s alleged acts or omissions in credentialing are inextricably intertwined with the patient’s medical treatment and the hospital’s provision of healthcare.”

VI. INSURANCE COVERAGE

A. Multiple Claims and Defendants

Declaratory relief was appropriate in favor of carrier against insured physicians who had sought a ruling that they had $1 million in coverage a piece. Columbia Casualty Co. v. CP National, Inc., ___ S.W.3d ___ 2004 WL 2066247 (Tex. App. - Houston [1st Dist.] 2004 pet. denied). The case relies heavily on construction of the language of the particular policy in question.
Here, suit was filed against two physicians at the same facility. The physicians characterized the suit as two “claims,” justifying two applications of the $1 million limits. Conversely, the insurer sought a ruling that the suit constituted a single “claim.”

The Court holds that:

“This, all the medical incidents involve the same patient, at the same facility, during the same period of time, with regard to the same x-ray. All of the acts of malpractice alleged against Drs. Doyan and Pearce allegedly led to a single result that forms the basis of the lawsuit – failure to apprise [Plaintiff] of his lymphoma, leading to a delayed diagnosis and thus to [Plaintiff’s] early death from lymphoma. We hold, therefore, that the medical incidents that form the basis of the lawsuit are related medical incidents under the plain meaning of the policy language” [emphasis added].

Thus, the physicians had less coverage than they sought.

B. The Importance Of The “Claim” Date

The importance of the date of a “claim” under Article 4590i (and presumably Chapter 74, CPRC) is highlighted in *TMLT v. Transportation Insurance Company*, 143 S.W.3d 235 (Tex. App. - Dallas 2004, pet. requested). Therein, Plaintiffs sent a claim letter to one Defendant in 1996 during Defendant’s policy term with the carrier TMLT. In 1999, almost three years later and, after Defendant had changed carriers to Transportation Insurance, suit was filed (the case involved allegations of injury to a minor). The Defendant who received the initial claim letter, a physician, was also a member of a medical group. That entity did not receive notice until shortly before suit was filed.

Notice was *not* imputed to the clinic by the sending of the Notice letter to the physician. Thus, as no “claim” was made during the clinic’s policy term with TMLT, the TMLT policy did not provide coverage for the clinic, once suit was filed, as a matter of law. The successor carrier, Transportation Insurance Company, had the coverage. Thus, the importance of the date of the “claim” is highlighted.

Note the need for thorough analysis here in the context of the “Notice to one is Notice to all” law, now well established, under Section 4.01, Art. 4590i. Although, for purposes of effective 60-day Notice under 4590i/Chapter 74, notice to one defendant is notice to all defendants, for purpose of triggering coverage, actual notice by each defendant is a requisite.

VII. STATUTE OF LIMITATIONS

A. “Ascertainable Date of Tort vs. Continuing Treatment Rule And Discovery Rule”

*Streich v. Lopez*, 2004 WL 1902116 ___ S.W.3d ___ (Tex. App. - Corpus Christi 2004, n.p.h.) reminds us that if there is an ascertainable date of tort, then the continuing treatment rule will not extend the statute of limitations. In this case, Plaintiff had a catheter inserted on November 3, 1999. Any injury, on the facts of this case, occurred on that date. On March 2, 2000, Plaintiff
discovered that the catheter had caused an injury. This is approximately four months after Defendant performed the procedure. Thus, as the opinion states, Plaintiff “had approximately twenty months after discovering his injury to file suit and still fall within the two year limitations period.” The case re-emphasizes two well-established principles:

a. the discovery rule will “toll” limitations only when discovery occurs outside of the limitations period (or so close to its expiration as to make filing of suit practicably impossible within limitations); and
b. the continuing course of treatment doctrine will extend the statute only in cases where no ascertainable date of tort exists.

Plaintiff did not file within limitations, despite discovery well within the two years, and no extension of the statute was merited in his case.

B. Mailbox Rule Applies To Filing

*Bailey v. Hutchins*, 140 S.W.3d 448 (Tex. App. - Amarillo 2004, pet. refused) stands for the proposition that the mailbox rule applies to the filing of malpractice cases.

Plaintiffs mailed their original Petition to the District Clerk by placing it in the U.S. Mail on August 29, 2003. It was received by the District Clerk on September 2, 2003.

Plaintiff’s filed their expert report in compliance with the 180-day rule of Article 4590i, rather than the 120-day rule of Chapter 74. 351(a).

The Court holds that the mailbox rule applies, and that the suit is deemed filed upon mailing. Thus, the 180-day rule applied.

C. Tolling By Mental Incompetence

The mental incompetence of decedent does not toll the statute of limitations for representatives of decedent’s estate. Decedent, alleged victim of medical malpractice, survived for some time after the malpractice, but never regained mental competency and never filed suit. The statute ran before Defendant’s death. After decedent’s death, representatives of decedent’s estate filed suit alleging wrongful death and survival causes of actions.

Although decedent’s mental incompetence would have tolled the statute of limitations for decedent, had he filed suit prior to his death, it did not operate to toll the statute for his survivors, since their claims, Wrongful Death and Survival claims were both statutory in nature, and thus not protected by the Open Courts provision of the Texas constitution. *Romero v. TIRR*, 2004 W.L. 1441049, ___ S.W.3d ___ (Tex. App. - Houston [14th Dist.] 2004, n.p.h.).

D. Misnomer

A Defendant who is sued after the statute of limitations has run, but has notice of the original suit in which the wrong Defendant was named, can still be held liable. The doctrine of *equitable tolling*
of limitations applies in such instances. *Felan v. Humana*, 2004 WL 2997779 ___ S.W.3d ___ (Tex. App. - San Antonio 2004 n. p. h.). Plaintiff sued a *Humana* entity, but the wrong one. In testimony, a Vice President of the correct entity acknowledged having known of the suit against the incorrect entity. This justified equitable tolling of the statute of limitations.

“When *Humana* acquired actual knowledge of the suit facts, it either knew or should have known that it was the intended target of [Plaintiff’s] claims. Accordingly, it would have had as much opportunity to prepare a defense then as if it had been named the original Defendant. But whether or not *Humana* was mislead or disadvantaged by the pleading error is a fact issue that is unresolved by this record.”

**IX. EXCLUSION FROM DISCOVERY OF PLAINTIFF’S MEDICAL RECORDS - THE PHYSICIAN/PATIENT PRIVILEGE**

*In Re Nance*, 143 S.W.3d 506 (Tex. App. - Austin 2004, n. p. h.) affirms the holdings in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), and *Coates v. Whittington*, 758 S.W.2d 749 (Tex. 1988), that the filing of claims involving “routine” mental anguish allegations does not place Plaintiff’s mental health into dispute. In the *Nance* case, Plaintiffs’ decedent’s MHMR records were sought to be discovered by the Defense, and Plaintiffs filed a Motion for Protective Order. The Court of Appeals held that the records were protected under the physician/patient privilege.

**X. TORT CLAIMS**

**A. A Telephone Call Is Not Notice**

*University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004). A phone call from a child’s father to someone at the Medical Center is not a “notice of claim” for purpose of the Tort Claims Act, and will not operate to permit suit against a Tort Claims entity.

**B. Minority Does Not Obviate the Notice Requirement**


**XI. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF**

*Axelrad v. Jackson*, 142 S.W.3d 418 (Tex. App. - Houston [14th] 2004 pet. requested). Following long-standing law, the 14th Court holds that a patient cannot be comparatively negligent for failing to advise a physician of the origin of his or her pain, and further, that a patient cannot be contributorily negligent for having taken lax care of his health over the preceding several years.

**XII. CAUSE IN FACT**

Causation must be reasonably proximate in order to support medical negligence allegations. When a mental hospital patient was discharged, on the same day as her roommate, though the patient’s
discharge was “early,” such “early” discharge could not support allegations of medical negligence arising from her injuries caused in a vehicular accident, when the vehicle was driven by the roommate, more than a day after discharge. This causal nexus was held to be too attenuated to support malpractice litigation. Note that this assumes a duty under the circumstance, which issue the Court did not reach. *I.H.S. Cedars Treatment Center v. Mason* 143 S.W.3d 794 (Tex. 2004).

**XIII. LONG-ARM JURISDICTION; OUT-OF-STATE PHYSICIANS**

A Michigan physician who agreed to prescribe post-operative physical therapy through a Texas healthcare provider had insufficient contacts with Texas in order to be subject to personal jurisdiction in the courts of this state. *Brocail v. Anderson*, 132 S.W.3d 552 (Tex. App. - Houston [14th Dist.] 2004 pet. denied).

**XIV. HMO LIABILITY / PREEMPTION**

The U.S. Supreme Court, in June of 2004, dealt a substantial blow to individuals suffering improper benefits-denial by their HMOs. In *AETNA v. Davila v. Calad*, 124 S.Ct. 2488, 159 L. Ed. 2d 312, 72 U.S.L.W. 4516 (US 2004), Justice Thomas held that claims against HMOs covered by ERISA are preempted by that act, and thus cannot be brought in state court.

In Texas, approximately half of all individuals covered by HMOs are covered by ERISA plans. School teachers, county employees, government employees, police officers among others are not in ERISA plans, and accordingly *Davila/Calad* does not apply to them.

**XV. WRONGFUL DEATH OF A FETUS**

The Supreme Court re-emphasized that there is no cause of action for mental anguish for the wrongful death of a fetus that is not born alive. For the first time, Plaintiffs argued that the Equal Protection clause of the United States Constitution provides them a claim for such fetal deaths. The Texas Supreme Court disagreed. *Fort Worth Osteopathic Hospital v. Reese* 148 S.W.3d 94 (Tex. 2004). The Court also reemphasized that the mother has a cause of action for her physical injuries arising from the death, and for mental anguish arising from the death, though not as a wrongful death claim.

**XVI. JURORS**

A panelist who expresses bias is disqualified as a matter of law. The trial court has no discretion to deny a challenge for cause against such a panelist. Seating such a juror over objection, with the result of an unfavorable verdict, is reversible error.

“In this country, where fair and impartial jurors can be had so readily, there is really no reason why questions of this character should arise, and in all cases where there is a possibility for serious doubt as to the impartiality of a juror, from whatever cause, the trial court, in the exercise of the discretion conferred upon it, should properly discharge the juror.” *Baker v. El Hafî*, 2004 WL 1921232 (Tex. App. - Corpus Christi 2004, pet. requested) (not designated
The quote from the voir dire examination which disqualified the panelist is as follows:

Juror 25: I’m not saying I want to be impartial. If I were in your shoes, I would want to know that I have spent most of my professional career on the defense side.

Counsel: Are you a lawyer?

Juror 25: Yes.

Counsel: Who are you with?

Juror 25: Preston and Calvert.

Counsel: Okay. And you actually defend health care operations.

Juror 25: Correct.

Counsel: Let me ask you: in all fairness, do you think that if this were a horse race so to speak, the plaintiff’s [sic] are starting a little bit behind in your eyes?

Juror 25: I mean – I’m not saying that – I would do my best to be objective. I’m just saying that if I were in your shoes I might consider you towards as the attorney who spend [sic] most of his career defending malpractice lawsuits.

Counsel: You feel like you can relate very much to the defendant’s [sic] lawyers in this case? Is that fair?

Juror 25: That’s correct.

Counsel: You feel like you would tend to look at it from their perspective as more of the plaintiff’s [sic] perspective?

Juror 25: I think it would be natural.

This testimony disqualified venire member 25 as a matter of law. The trial court committed reversible error by failing to grant appellants’ motion to strike. Baker at p. 6.

XVII. THE NON-SUIT RACE TO THE COURTHOUSE

In several recent cases, one of which has made it to the Appellate level, the defense has, based upon conversation with Plaintiff’s counsel, attempted to trump Plaintiff’s right to a non-suit by beating Plaintiff to the courthouse with a Motion for Sanctions and/or to Dismiss.
In the reported case, *Jones v. Khorsandi*, 2004 WL 2002857 (Tex. App. - Eastland, 2004 n.p.h.), Plaintiff’s counsel, in a good faith conversation with Defense counsel, indicated her intent to non-suit her case, as permitted by the Texas Rules of Civil Procedure. Non-suit in Texas is, of course, effective either upon filing or upon a Motion being made orally in open court.

As soon as Defense counsel heard this comment from Plaintiff’s counsel, but without advising her in any way, he “raced” to the courthouse to file a Motion for Sanctions and/or Dismissal based on inadequacy of Plaintiff’s expert report. This was an attempt to make a Motion for Affirmative Relief which eliminates the right to non-suit.

The *Jones* court spoke disapprovingly of Defense counsel’s conduct, and then mooted the discussion by finding that the claim was not a health care liability claim in any event, so that no report was required, and therefore the Motion For Sanctions / To Dismiss, based on the report, was irrelevant.

The solution is obvious: Plaintiff’s counsel who intends to avail him or herself of the right to non-suit should do so without advertising this intent.

**XVIII. PHYSICIAN-PATIENT RELATIONSHIP**

In order to establish a physician-patient relationship, and thus, duty and liability, Plaintiff must show more than merely the existence of a previous physician-patient relationship, though that may be a factor in support of such a relationship.

Plaintiffs, twin premature infants, had been seen while hospitalized at birth by Defendant Gross. Thereafter, Dr. Gross wrote a “Dear Parents” letter to Plaintiffs’ parents emphasizing the need for follow-up care of their vision impairment. In addition to the letter, appointments were scheduled but canceled for various reasons. The majority holds that these factors alone were insufficient to demonstrate the existence of a physician-patient relationship. “The Dear Parents” letter, along with [Plaintiff’s expert’s] opinion that they had created a duty on [Defendant’s] part to ensure follow-up visits, is less than a scintilla of evidence to uphold the jury’s verdict on a vital fact – a continued physician-patient relationship. Without a physician-patient relationship, there can be no duty. *Gross v. Burt*, 149 S.W.3d 213 (Tex. App. - Ft. Worth 2004, pet. filed).”


It is important to remember that termination of the physician-patient relationship is an affirmative defense, and that the burden is thus on the defense to establish such termination, rather than on the Plaintiff to prove the continuation of the relationship.