Affirmed and Opinion filed February 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01144-CV

ANTONIO GARCIA, JR., Appellant

V.

PALESTINE MEMORIAL HOSPITAL, n/k/a MEMORIAL MOTHER FRANCES HOSPITAL, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 20,530B

O P I N I O N

Appellant Antonio Garcia, Jr., sued appellee, Palestine Memorial Hospital, seven years after his abdominal surgery at the Hospital, alleging that a surgeon, Dr. Presley, left a surgical needle inside him.[1] The trial court granted the Hospital's traditional motion for summary judgment on the basis of limitations, and its motion to dismiss for Garcia's failure to file an expert report as required by section 13.01(d) of the Medical Liability and Insurance

[1] Garcia's suit also named the Texas Department of Criminal Justice ("TDCJ") and Dr. Presley as defendants. After granting summary judgment and the Hospital's motion to dismiss, the trial court severed the cause of action against the Hospital to make the judgment in favor of the Hospital final.

Improvement Act. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d) (Vernon Supp. 2002). We affirm.

Statute of Limitations

The Medical Liability and Insurance Improvement Act has an absolute two-year limitations period and abolishes the discovery rule for medical malpractice claims. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2002); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985). Garcia did not sue the Hospital until July 9, 1999, seven and a half years after the date of the surgery and more than five years after the date the statute of limitations expired.[2]

But the two-year statute of limitations violates the open courts provision if it cuts off a cause of action before the party knows or reasonably should know that he or she is injured. TEXAS CONST. art. I, § 13; *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985). However, a plaintiff may not obtain relief under the open courts provision if he did not use due diligence and sue within a reasonable time after learning about the alleged wrong. *Shah v. Moss*, No. 00-0091, 45 Tex. Sup. Ct. J. 247, 250, 2001 WL 1628537, at *9 (Dec. 20, 2001). Because the Hospital argues that Garcia's delay in filing suit after discovery was unreasonable as a matter of law, we do not address whether Garcia had a reasonable opportunity to file suit within the statutory period. *See Fiore v. HCA Health Servs. of Tex., Inc.*, 915 S.W.2d 233, 237 (Tex. App.—Fort Worth 1996, writ denied).

Reasonableness of any delay in filing suit after learning of the alleged tort is a question of fact unless the evidence shows that the delay is excessive, in which case the question is decided as a matter of law. *See Shah*, 45 Tex. Sup. Ct. J. at 254; *Hall v. Dow Corning Corp.*, 114 F.3d 73, 77 n.16 (5th Cir. 1997) (applying Texas law to find a fifteen-month delay in bringing suit unreasonable under the open courts provision).

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[2] *See Shah v. Moss*, No. 00-0091, 45 Tex. Sup. Ct. J. 247, 249, 2001 WL 1628537, at *3 (Dec. 20, 2001) (requiring limitations period to start on date alleged tort occurred, if it is ascertainable).

In reviewing a trial court's summary judgment, we resolve all doubts against the movant, and review the evidence in the light most favorable to the nonmovants. *Shah*, 45 Tex. Sup. Ct. J. at 250. The undisputed summary judgment proof established the following chronology:

- On Jan. 7, 1992, Dr. Presley performed an operation on Garcia at the Hospital.
- In February 1998, Garcia discovered through the results of an x-ray that a foreign object was inside him.
- On July 9, 1999, Garcia filed the present lawsuit against Dr. Presley, TDCJ and the Hospital.

Garcia knew of the foreign object sixteen months before he brought suit against the Hospital. The other summary judgment evidence bearing on the reasonableness of this delay includes the following:

- Garcia was incarcerated at the time of the 1992 surgery, was paroled in 1994, and had his parole revoked in 1995 and was again incarcerated.
- While he was in the custody of the TDCJ, he could not demand that doctors remove the foreign object because that decision rested with the TDCJ.
- In March of 1998, Garcia asked the doctor who discovered the foreign object in his stomach to sign an affidavit.
- In January 1999, Garcia filed a *pro se* federal lawsuit against Dr. Presley and several employees of TDCJ requesting the removal of the foreign object.
- By May 19, 1999, Garcia had the assistance of an attorney, who dismissed the federal lawsuit and wrote a letter to Garcia on July 1, 1999, indicating that he was preparing a lawsuit against the Hospital.

On these facts we conclude that, as a matter of law, Garcia did not file his suit against the Hospital within a reasonable period of time. *See Shah*, 45 Tex. Sup. Ct. J. at 254 (holding a seventeen-month delay was unreasonable as a matter of law when plaintiff offered no legitimate explanation accounting for delay); *Voegtlin v. Perryman*, 977 S.W.2d 806, 813 (Tex. App.—Fort Worth 1998, no pet.) (finding nineteen months untimely as a matter of law); *Fiore*, 915 S.W.2d at 238 (finding delay of more than one year unreasonable

when plaintiff offered no explanation for delay).[3]

We conclude that the open courts provision does not save Garcia's claims from being time-barred, and overrule his first point of error. Because we also conclude the trial court correctly dismissed the lawsuit on the ground that Garcia failed to file an expert report, we address Garcia's second point of error.

Failure to File Expert Report

Section 13.01(d) of the Medical Liability and Insurance Improvement Act requires a plaintiff asserting a health care liability claim to submit an expert report, along with the expert's curriculum vitae, for each defendant physician or health care provider no later than the 180th day after filing suit. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d). This rule enables courts to determine more quickly which suits are frivolous. *See American Transitional Care Centers of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 876-77 (Tex. 2001). We review the trial court's dismissal of Garcia's suit on the basis of section 13.01(e)(1) under an abuse-of-discretion standard. *See id.* at 878.

Garcia argues the trial court erred in dismissing the suit because the doctrine of *res ipsa loquitur* obviates any need for him to file an expert report under section 13.01(d). As a general rule, *res ipsa loquitur* does not apply in medical-malpractice cases. TEX. REV. CIV. STAT. ANN. art. 4590i, § 7.01 (limiting *res ipsa loquitur* in medical malpractice to the limited classes of cases to which it applied as of August 29, 1977); *Palacios*, 46 S.W.3d at 880. However, leaving a surgical instrument in a patient's body has been recognized as one of the exceptions to the general rule. *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990). The reason for such an exception is that the nature of the alleged malpractice and

[3] Other courts held the reasonableness of the delay was a question of fact for the jury, if the delay was not so excessive under the particular facts of each case. *See, e.g., DeRuy v. Garza*, 995 S.W.2d 748, 753 (Tex. App.—San Antonio 1999, no pet.) (holding ten months not per se unreasonable when plaintiff was recuperating for three months, consulted an attorney six months later, and filed suit three months later); *Gagnier v. Wichelhaus*, 17 S.W.3d 739, 745-46 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (holding ten months not per se unreasonable when defendants delayed in providing plaintiff with medical records, and plaintiff was recovering, consulting with an attorney, and investigating her claim).

injuries are plainly within the common knowledge of laymen, requiring no expert testimony. *Id*. But even if expert testimony (and consequently an expert report) is not needed to show evidence of the standard of care and breach,[4] an expert is still required to show causation. *See Steinkamp v. Caremark*, 3 S.W.3d 191, 199 (Tex. App.—El Paso 1999, pet. denied); *Kalteyer v. Sneed*, 837 S.W.2d 848, 853 (Tex. App.—Austin 1992, no writ). This is especially true when, as here, the defense alleges that a prior abdominal surgery may have been the source of Garcia's abdominal pain.[5]

Consequently, Garcia was required to file the expert report as to the element of causation, even if he could rely on *res ipsa loquitur* to get to a jury on the other elements of his negligence cause of action.[6] We hold that the trial court did not abuse its discretion in dismissing the lawsuit under section 13.01(e) (1) and affirm the trial court's judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed February 7, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[4] *See, e.g., Steinkamp v. Caremark*, 3 S.W.3d 191, 197 (Tex. App.—El Paso 1999, pet. denied).

[5] In its motion for summary judgment, the Hospital states, "It is undisputed that Plaintiff had at least one surgery prior to January 7, 1992 in which metal surgical sutures were placed in Plaintiff's abdomen." The only reference to a prior surgery in the summary judgment evidence is in a question during Garcia's deposition regarding his ability to have surgery performed in 1991 and 1992 while he was incarcerated.

[6] Garcia also complains that the trial court erred in denying his request for a thirty-day extension to file the report under section 13.01(g), but he pointed to no evidence of any mistake or accident. In the absence of such evidence, Garcia failed to establish that he was entitled to an extension under 13.01(g). *See Landry v. Ringer*, 44 S.W.3d 271, 275 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Additionally, Garcia's response to the motion to dismiss indicates that a thirty-day extension would not have been sufficient. He states that his release on parole would give him the opportunity to seek independent medical treatment and provide the defendant with the medical expert report. His release date, however, was scheduled for *two* months later. We find no abuse of discretion.