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Supreme Court of Texas.
In Re Jack Jorden, M.D., et al.
No. 06-0369.

September 26, 2007

Appearances:
R. Brent Cooper, Cooper & Scully, P.C., Dallas, Texas, for petitioner.
William H. 'Bill' Liebbe, Law Office of Bill Liebbe, P.C., Tyler, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 06- 0369 in re: Jack Jorden, M.D.
COURT MARSHAL: May it please the Court. Mr. Cooper will present argument for the relator and relator will reserve five minutes for rebuttal.

## ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. The issue in this case is a narrow one and that is whether the stay on discovery for Chapter 74.351(s) imposed into an expert report is filed applies to discovery under Rule 202. There are two statutes that I believe are important for the Court's consideration of this matter. The first is Chapter 74.351(s), which is in tab 1 of the handout that we provided to the Court yesterday. The operative and key language in Section 74.351(s) is as follows: Until the claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a healthcare liability claim is stayed. There are three exceptions that are not applicable here but that is the operative language. All discovery in a healthcare liability claim is stayed until an expert report is filed. Now the second statute that we believe is very important for this Court's consideration is Chapter 74.002 and essentially what it says is to the extent there is any conflict between Chapter 74 and any rule of civil procedure, rule of evidence, or other

rule of court, the provisions of Chapter 74 will control over the rule of evidence, rule of civil procedure, or rule of court.

JUSTICE O'NEILL: How about Rule 13? I mean, what if you had a situation where someone simply could not tell? You know, there, there may be disputes in this case as to whether you've reached that point or not but obviously the Courts of Appeals are split because of the obvious unfairness that you've had a situation where someone could not prove their claim without taking a pre-suit deposition.

MR. COOPER: Well, I, I think there is a couple of avenues that are available, your Honor. First, Rule 202 which is the rule in Texas that addresses pre-suit discovery provides for two forms of discoveries. Rule 202 which I believe is tab number 5 in our handout-- if you'll look at 202.1, it provides for oral depositions, it also provides for written depositions. If you look [inaudible] 74.351(s), it allows actually written depositions to be taken prior to the filing of an expert report.

JUSTICE O'NEILL: But you have to file a suit first and you can't file a suit first unless you comply, comply with Rule 13.

MR. COOPER: Well, you can-- I believe you can go ahead and take pre-suit written depositions under Rule 202 to get the information which a plaintiff might need because-- and I think, that would be one way to harmonize 74.351(s) which allows written depositions before the expert report and Rule 202.1 which allows both written depositions and oral depositions. Second -

CHIEF JUSTICE JEFFERSON: How do you, how you do [inaudible] written discovery if a case hadn't been filed yet?

MR. COOPER: I'm not talking about written discovery, your Honor. I'm talking about written depositions -

CHIEF JUSTICE JEFFERSON: That's what I'm talking about.

MR. COOPER: Well, actually, if you look under Rule 202 which allows for written depositions to be taken, a court reporter would be contacted. There would be the written questions attached to the subpoena who would be served upon [inaudible] which is the way that typically depositions upon written questions are taken ordinarily under Rule 200.

CHIEF JUSTICE JEFFERSON: Of course, 202 allows you to take oral depositions, too.

MR. COOPER: It does but you have a prohibition, I believe, in Rule-- Chapter 1-- 74.351(s) on the taking of oral deposition. Now, the second part, your Honor, regarding if there is some problem with the medical records and of course, the plaintiff is able to get their medical records -

CHIEF JUSTICE JEFFERSON: So you would expand in 351(s) to depositions are written questions of 200 to also include 202.

MR. COOPER: - which provide for written depositions. I think that is a fair harmonization of those two rules of a procedure as well as Chapter 74.351(s).

CHIEF JUSTICE JEFFERSON: What about the issue that Rule 202 is not a healthcare liability claim? It's a potential claim, it's an investigating [inaudible] even come under benefits of [inaudible].

MR. COOPER: Okay, but the Court of Appeals and I think that was the, the primary focus that the Court of Appeals addressed and what the Court of Appeals said was there was a distinction between a potential cause of action versus a cause of action. And if you look at their opinion they make the following statement, consequently a potential cause of action is a cause of action as that term is defined at common law and the Court concluded that, therefore, the plain language of

74.351(s) does not support a conclusion that the legislature intended to characterize a potential cause of action as a healthcare liability claim. Well, with all due respect to the Twelfth Court of Appeals, if a potential cause of action is a cause of action then it is a healthcare liability claim. If you look at tab 3 of our handout, it defines a claim. Section 74.351(r)(2) defines a claim as a healthcare liability claims. Then if you go to tab 4, the definition of healthcare liability claim is contained at 74.001(a)(13) which defines a healthcare liability claim as a cause of action. So if a potential cause of action is a cause of action as the Court of Appeals held, then it is a healthcare liability claim and it is subject to the prohibitions contained in 74.351(s).

JUSTICE HECHT: [inaudible]-- if I didn't know anything else about this statute and I just had you in front of me [inaudible] -

MR. COOPER: Sure.

JUSTICE HECHT: - I would think that I would be entitled to take two depositions no matter what. It says, "May take not more than two depositions." If it said, "May not take more," I would think, well, maybe there's something else in the statute that makes me-- that impacts on this. But when it says, "May take not more," it kind of sounds, I have the right to do that and you say that this has to be harmonized with (s) and of course, we wouldn't do that if we need to but it starts out notwithstanding any other sections. So you might say notwithstanding (s), party may take not more than two depositions for that repor-- reporters [inaudible] what? That kind of reads like you have the absolute right to take two depositions.

MR. COOPER: Well, again, I think in construing the statute that the Court is required to get-- attempt to give a fact to each and every provision of the statute under the, the Code Construction Acts -

JUSTICE HECHT: Unless one says, "Don't worry about the rest of this," which this would sort of says.

MR. COOPER: Well, except though you have provisions in Subsection (s) which talks about discovery being stayed except for the three forms of discovery that are listed in, in one, two, and three. There have been two cases and I'm sure the Court is aware that have addressed the application of (u) and (s), the In Re Miller case out of Beaumont and the In Re and I'm [inaudible] mispronounce it H-U-A-G Huag or hog, case out of Houston, and both of them said that when you read those two provisions together that the depositions that are referred to in (u) refer to the depositions that are allowed under Subsection (s) and essentially they said, "There would be part depositions of non-parties; otherwise, the legislative intent of the statute would be defeated." Now going on, this, this Court as far as the, the cause of action -

JUSTICE : How do we know, how do we know that [inaudible] legislative intent be defeated?

MR. COOPER: Well, one of the-- if you look at the, the legislative history, and we have it quoted in our briefs, the whole purpose of the expert report requirement was to prevent extensive discovery from being taken -

JUSTICE : No, it was, it was to prevent plaintiff from just suing everybody, everybody [inaudible] which is what went on.

MR. COOPER: Well, I believe this was also to prevent a lot of discovery being taken before there was this determination that there was a bona fide case to proceed because I think some of the-- with, with due respect, your Honor, some of the testimony that came out during the, the hearings for House Bill 4 were that, I believe, some 80% of healthcare liability claims were dismissed with no indemnity,

yet there was a lot of attorney's fees and expenses associated with those claims.

CHIEF JUSTICE JEFFERSON: So you think it's important for us to consider legislative history in this case?

MR. COOPER: Legislative history is one issue that can be considered if it is instructive on the intent of the legislature.

CHIEF JUSTICE JEFFERSON: And then in considering legislative history, what are we to make of the fact that there was a lot of discussion on Rule 202? It's in and it's out and there's a testimony that the legislature considered and in the end it seems like they sort of put up their hands and said, "We're not sure about this," and you couple that with the fact that one of the purposes of, of the 74 was to, to prevent frivolous lawsuits from [inaudible] trial. So what are we taking-- you know, if you look at both of those it would support arguably the proposition that frivolous depositions can be taken.

MR. COOPER: Well, two things I'm going to address. First-- the first issue is the, the legislative history itself and there was a-- an extensive revision of the bills particularly those involving Rule 202. The, the Court of Appeals, the Twelfth Court of Appeals gave particular weight to some of the testimony of the witnesses who testified for the bills which we believe this Court's prior decision say-- that says, "The testimony of the witnesses really is indicative of what the legislators themselves thought or intended when they passed the bill." The Eastland Court of Appeals in the In Re Raja case which is currently before this Court said, "The legislative history is somewhat confusing and is not instructive," because what, what-- the legislative history can be read either way. For example, the legislature could have said, "The reason we don't need the prohibition on Rule 202 is because we have 74.351(s) which says, 'All discovery in a healthcare liability claim is stayed and a healthcare liability claim means a cause of action."' So all discovery is stayed and we don't need the prohibition. Then you can also make the argument that Mr. Liebbe is making is well, there is some intent by leading it out that, you know, perhaps it was to be there. The Eastland Court said, "It is confusing. We don't think that it's particularly instructive and did not give great weight." But they said this, they said that it's, it's ironic and it's hard to believe that the legislature would attempt to limit discovery after a lawsuit has been filed in order to try to address the medical malpractice crisis, but they're not going to limit discovery at all before the lawsuit is filed. This -

JUSTICE GREEN: Well, well, what if you don't know? I mean, some-- we've seen some cases up here where it's pretty close, at least I think so about whether it's a healthcare liability claim or not -

MR. COOPER: Okay.

JUSTICE GREEN: - and so wouldn't-- and, and a lot of discretion is given to the trial court under Rule 202, the preliminary requirements to be met in order to get this type of discovery, why wouldn't that be permitted?

MR. COOPER: Okay, two things, your Honor. First is, I think if there is a question you've got the medical records which the plaintiff's entitled to. If there's a question, I believe, they're entitled to the Rule 202 written deposition but second, the In Re Raja Court said that if the medical records are sparse, if they are incomplete that that is one of the factors that the trial court should take into consideration in determining whether or not the report represents an objective good faith effort to file the report. So if there is not much information, the medical records do have gaps in

them, that is one of the factors that the trial court should take into consideration and should put in the order that affects the determination whether or not the report represents an objective good faith effort to comply with the report requirements as set forth in (r)(6) objective -

JUSTICE GREEN: [inaudible] if somebody comes to a trial court and petition for a Rule 202 seeking this type of discovery, you have to have some sort of a preliminary determination as to whether it falls within the healthcare plan or not?

MR. COOPER: Well, obviously, to determine whether or not Chapter 74 would be applicable, there would have to be a determination that it was a healthcare liability claims.

JUSTICE GREEN: So yes?

MR. COOPER: Yes. Obviously, in this case, there was no question because it was only doctors and hospitals that there were sued or that were named as potential parties in the Rule 202 petitions.

JUSTICE O'NEILL: What if they sue everybody in the records? It can't tell what happened. Sue everybody in the records, then get the discovery that's allowed?

MR. COOPER: I'm, I'm not saying that at all, your Honor. What I'm saying is that you've got the medical records, I'm saying you can take written depositions under Rule 202 and then if there is some question later on and, and you decide to file a lawsuit against someone and the question is whether or not your report is an objective good faith ba - basis or attempt at the expert report, you have that available to you as well in order to get past the expert report requirement. That, to me, is in harmonization of Rule 202 with Chapter 74.

JUSTICE MEDINA: There, there are many protections since HB 4 for doctors and people in the medical field services. What's the harm in allowing a couple of depositions under this rule which is -

MR. COOPER: Well, -

JUSTICE MEDINA: I don't see a harm there especially when it's not substantially clear in my mind whether or not these depositions can be taken or not.

MR. COOPER: - Well, I-- again, the harm is the legislature I think clearly express an intent under Chapter 74.351(s) for most all discovery -

JUSTICE MEDINA: But it didn't clearly address this 202 as Justice Jeff - Chief Justice Jefferson said. It was talked about then left out.

MR. COOPER: Well, I-- with, with all due respect, I think when you look at the definition of a healthcare liability claim which is a cause of action and when it says all the discovery with respect to a cause of action is stayed, I would argue on the clear language of the statute [inaudible] the legislature has fairly, clearly expressed their intent.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument now from the real party in interest.

COURT MARSHAL: May it please the Court. Mr. Liebbe will present argument for the real party in interest.

ORAL ARGUMENT OF WILLIAM H. "BILL" LIEBBE ON BEHALF OF THE RESPONDENT

MR. LIEBBE: May it please the Court. The question today is not whether a plaintiff who contemplates a healthcare liability claim can

avoid the limitations of discovery under 74.351(s) by asking for pre-suit depositions under 202. The real issue in this case is whether this Court will bestow a gift upon these parties that was requested to the legislature in 2003 but was not bestowed upon them. At stake in this case is whether our civil justice system will support the notion that justice is predicated upon the discovery of truth or whether wrongdoers -

JUSTICE O'NEILL: Let me ask -

MR. LIEBBE: - may stay justice by hiding facts. Yes, ma'am? [inaudible]

JUSTICE O'NEILL: On page 1 of-- I guess this is the relators brief, they, they list some of the questions that you want in the, in the deposition and that's what the guidelines, protocols, etc. the hospital has, were they followed, why can't these same inquiries be made on a deposition on written questions?

MR. LIEBBE: We could get some of those under deposition or written question if 202 were allowable under 74.351. But more importantly, the things that we don't know in this case is that we, we know that that Nancy Allan should have had a stress test either before discharge or within three days. We know that CDC was contacted but that never occurred. She died before that was done and this-- we know what the standard of care is. The standard of care is, is an EKG stress test within three days. That was not done. Now, did Dr. Jorden, when he scheduled the CDC, did he tell CDC it had to be done in three days? If he did, then Jorden is not going to be a party to this potential claim ever at all. Did CDC ignore that? Did Dr. Jorden fail to inform them? And those are things I can't really get with a deposition on written question.

JUSTICE O'NEILL: Well, how about interrogatories?

MR. LIEBBE: I don't think that Rule 202 allows me to do interrogatories, your Honor.

JUSTICE O'NEILL: Well, the, the Subsection (s) does.

MR. LIEBBE: It's an interesting argument that Mr. Cooper made. He, he said on the one hand, Chapter 74 prohibits Rule 202 depositions but on the other hand he says, "But you can do 202 depositions but you can't do oral depositions." I, I think that that is, is an extremely inconsistent application. The reality is, as was pointed out, that the trial judge has discretion to limit the number of depositions and the scope of the depositions and the questions that can be asked.

CHIEF JUSTICE JEFFERSON: I guess the question is, "How in-- how would you be harmed if we were to harmonize the supervision of the rule on the statute." And the way Mr. Cooper suggests and say yes, you may not know the-- whether you have a claim or not but you can arrive an answer through these sort of written questions or interrogatories. And if that satisfies the purpose of preventing you from filing a frivolous lawsuit, then why shouldn't that be the way we, we resolve the case?

MR. LIEBBE: Well, the harm would come in, in, in two different ways. Number one, written discovery is not the same as oral deposition. In all the -

CHIEF JUSTICE JEFFERSON: But 202 depositions aren't the same as a lawsuit, either. I mean the purpose is -

MR. LIEBBE: Right.

CHIEF JUSTICE JEFFERSON: - just to give enough information to the plaintiff to decide whether or not they have a claim. It's not intended to be wide-ranging and full in scope like as the lawsuit deposition.

MR. LIEBBE: I think that we would necessarily have to read into the statute and make additions to the statute beyond the legislative

intent to allow any type of pre-suit discovery within the context of Chapter 74 but the more disturbing thing to me personally is the idea that if we had to perpetuate the testimony of the dying cancer victim, we would have to do that by written question and clearly that would not serve justice in, in any form or fashion if -

JUSTICE WAINWRIGHT: Coun - Counsel.

MR. LIEBBE: Yes, sir.

JUSTICE WAINWRIGHT: Counsel, that, that may be so. Our primary task here today is not to do what we think serves justice. Our primary task is to do what the legislature said. "There's been a lot of discussion about intent and one well-known jurist, Felix Frankfurther, wrote when Counsel talk about the intention of a legislature, I was indiscrete enough to say I don't care what their intention was. I only want to know what the words mean." Part of the discussion today highlights how confusing legislative history can be and inconclusive. Probably just [inaudible] 351(s) and say, it only allows those three types of discovery here and there's no need to harmonize the 202 because the legislature passed the statutes and says this is the law. We're not about justice here today narrowly speaking about what did the legislature say which it didn't.

MR. LIEBBE: Importantly, Chapter 74 only applies after a healthcare liability claim letter is sent and after a law-- and 7351 as applies only after a lawsuit is filed. The -

JUSTICE WAINWRIGHT: You make that argument and then the other side points out that Chapter 74 uses the term "Healthcare Liability Claim" -

MR. LIEBBE: Yes.

JUSTICE WAINWRIGHT: - at least twice -

MR. LIEBBE: Yes.

JUSTICE WAINWRIGHT: - to a further claims that are not filed.

MR. LIEBBE: I would submit there's -

JUSTICE WAINWRIGHT: So I don't think you could say that categorically, not in Chapter 74.

MR. LIEBBE: Chapter 74 applies to healthcare liability claims and causes of actions. Rule 202 is not a healthcare liability claim and is not a cause of action and in that way the justice -

JUSTICE BRISTER: It's not a walk in the park.

MR. LIEBBE: Pardon?

JUSTICE BRISTER: It's not a walk in the park. The reasons we have lawyers and subpoenas and stuff there is because somebody thinks they've got potential claim or cause of action.

MR. LIEBBE: Yes, we, we believe we may have.

JUSTICE BRISTER: The cause of action is always-- it is there of whether it's potential or whether you recognize it or not. I mean, if, if a plaintiff has a cause of action and never knows it and statute limitations run that doesn't mean there wasn't a cause of action.

MR. LIEBBE: Yes, sir. Yes, your Honor, you're absolutely correct.

JUSTICE BRISTER: So why is this limited to after it's filed?

MR. LIEBBE: Because although a cause of action may exist for Dr. Allan in the death of his mother, he doesn't have enough facts to know whether cause of action exist in the first place and if, if it does exist and he can't find out if it exist, I cannot file his case for him.

JUSTICE BRISTER: I, I agree with you that, you know, it sounds like they're certainly going to be cases where you can't tell and if the statute says you can't find out, you're going to be in between a rock and a hard place but, you know, nobody has asked us to tell you this is unconstitutional but as a result to dispute it whether that's

true here so -

JUSTICE WAINWRIGHT: Did you ask the trial court for the three-- any of the three types of discovery under 351(s)?

MR. LIEBBE: I did not.

JUSTICE WAINWRIGHT: So if the trial court-- if you had asked and trial court would've had ordered it, then you may be getting the information you think you need but you haven't asked.

MR. LIEBBE: And I did not ask because Chapter 74 has never been invoked in this case. No suit has been filed. We never filed a healthcare liability claim letter. So we can't proceed under Chapter 74 because Chapter 74 has never been invoked.

JUSTICE WAINWRIGHT: We-- we'll have to look at this more clearly but 74.051(a) says that there needs to be a written notice of a healthcare liability claim and uses that term in quotes and specifically in the statute that notice has to be given at least 60 days before filing suit. So Chapter 74 uses healthcare liability claim there to refer to a potential claim. You have to give notice of it 60 days before filing suit and there's at least one other place where Chapter 74 suggest that a healthcare liability claim does not have to be a lawsuit. So I understand that your argument that it does have to be but Chapter 74 has examples that run counter to that argument.

MR. LIEBBE: If I, if I may, Chapter-- Section 74.051 does not say you have to give notice of a potential healthcare liability claim. It says, "You must give notice of a healthcare liability claim at this phase of the game ..."

JUSTICE WAINWRIGHT: Now that's, that's what I said but by saying you have to give notice of that claim at least 60 days before filing suit -

MR. LIEBBE: Yes.

JUSTICE WAINWRIGHT: - that means you have to give notice of a claim before it is filed -

MR. LIEBBE: Exactly.

JUSTICE WAINWRIGHT: - which is the argument at least from petitioner what we have here. Some-- you believe you have a claim, you don't know who to sue and you're trying to get discovery to find out who to sue.

MR. LIEBBE: We have not, first off, given a notice of healthcare liability claim because quite honestly, I don't know if this is a healthcare liability claim that has merit or not. I don't know the circumstances around this-- the events and I don't know who is responsible, if anybody. At the end of the day, if I'm allowed this discovery, nobody-- there's, there's a real chance that nobody will ever get sued because there, there is a real chance there may not be a healthcare liability claim.

JUSTICE HECHT: And on, on that subject, if you can't take this discovery, you're not going to file the claims?

MR. LIEBBE: I can't, your Honor, not in good conscience, I mean, not and in compliance with Rule 13.

JUSTICE HECHT: Okay.

JUSTICE BRISTER: What would the-- if you claimed under Rule 13 there is a reasonable basis for filing your claims? You would still have 120 days, it could still take two-- this disposition after it was filed and then file a report. What would keep you from doing that?

MR. LIEBBE: Well, with the limited nature of written discovery and finding out information, the, the problem is going to be I may or may not get information that will allow me to prepare a dispositive expert report but before I can get to that point, I have to sign a pleading

that says that this is a healthcare liability claim that has basis and fact and, and your, your Honor, I cannot, in good conscience, do that.

JUSTICE BRISTER: But, but before we, before we sanction [inaudible] opposing counsel-- one of-- opposing counsel pointed out, one of the things to be taken to effect is, how much could you find out? And if the answer is you couldn't find out from the records, you're not supposed to be sanctioned, are you?

MR. LIEBBE: Well, I think I'll get sanctioned if I file a case that says, "Somebody breached the standard of care and I don't know that they did."

JUSTICE HECHT: It says "to the best of their knowledge, information, and belief formed after reasonable inquiry" but you don't think it's a reasonable inquiry if you ask all the questions you can.

MR. LIEBBE: I believe that it is a reasonable inquiry if I can ask all the questions I can but I think the time to do that is before I send a claim and -

JUSTICE HECHT: And troublesome part of that truth is is wouldn't it behoove every plaintiff in every case to take [inaudible] discovery before filing suit?

MR. LIEBBE: [inaudible]

JUSTICE HECHT: But the question is -

MR LIEBBE: [inaudible]

JUSTICE HECHT: - "Doesn't these exceptions follow the rule?"

MR. LIEBBE: It does not, your Honor.

JUSTICE HECHT: And how does it not?

MR. LIEBBE: I have been representing plaintiffs in medical malpractice cases in this state for 20 years. This is the very first time I have ever filed a petition for Rule 202 depositions because most of the time the record can reveal and does reveal who breached the standard of care in a causal relationship.

JUSTICE HECHT: That's, that's fine but if we now say you can take all the discovery you want, you just have to do it before you file a suit, because after you file a suit you can't take any more discovery until an expert report is filed.

MR. LIEBBE: We have to remember, though, that simply because I file a 202 petition doesn't mean I get to automatically take deposition. There's a gatekeeper there and, and that I think quite frankly the Texas legislature and especially the Senate recognize the gatekeeper function there. That trial judge has to be convinced first off that we qualify under Rule 202 and it's going to be in the interest of justice and will, and will-- it will save-- preserve justice, etc. and then -

JUSTICE HECHT: But -

MR. LIEBBE: - if I convince him to that point, the trial judge can limit me to the number, to the scope and the amount of time.

JUSTICE HECHT: But if you were a plaintiff and you knew that the rule was, whether it made any sense or not, that you could take unlimited discovery before you file a suit but after you file a suit you're limited to paragraph (s), wouldn't you take more discovery or at least try to take more discovery whenever a suit was filed?

MR. LIEBBE: If, if I needed information and facts to be able to comply with Rule 13 and give my expert enough facts to, to write a dispositive report, yes, your Honor, I would seek discovery.

JUSTICE WAINWRIGHT: I'm-- got a question or two about your interpreting legislative history. You talked about how it can be hard to decipher. As I understand it in the legislature in the bill form, there was a provision that said, "No 202 pre-suit depositions with

healthcare liability claims and then that provision ended up not being in the final statute." So the argument seemed to be that a negative pronouncement in the statute that a bill that ends up not being in the statute suggest the opposite of the negative pronouncement, that is, because the-- this provision that said, "You can't get pre-suit depositions was taken out, that suggest that you can take pre-suit depositions especially with as you would argue Rule 202 on the books." That, that seems kind of curious to me because let's take another example, what if the legislature had a bill in front of it that said, "Taxes shall not rise by 10% that did not make it in the final statute, does that mean that taxes shall rise by 10%?"

MR. LIEBBE: I don't know about the tax law, your Honor.

JUSTICE WAINWRIGHT: But the fact that a negative pronouncement in the bill doesn't make it into a statute, doesn't, doesn't give any weight to the argument that the opposite should occur, does it?

MR. LIEBBE: I think that what we have to remember is what was in existence prior to the, to the legislative session in 2003 and that was this Court's rule promulgated in 1999, that allowed 202 depositions including 202 depositions in medical malpractice cases. The legislature was clearly aware of that. And in the first bill they said, "All right, we're going to prohibit and then we're going to allow restricted ones," and then in the end result they came full circle with do everything and left it as it where it was -

JUSTICE O'NEILL: No, but -

MR. LIEBBE: - again reversed.

JUSTICE O'NEILL: - not, not strictly. I mean they also expanded permissible [inaudible] written discovery as well.

MR. LIEBBE: Uh-hmm.

JUSTICE O'NEILL: Because the House Bill, the original House Bill, version only allowed the medical records and tangible things and so they considered 202, then when they decided not to put 202 in, they expanded the, the type of written discovery that is permissible to include interrogatories, depositions, or written questions that had not been in the original version.

MR. LIEBBE: What they -

JUSTICE O'NEILL: So as they took away one, they-- I mean, I don't-- I have a difficult time reading anything in the legislative intent here. You can argue it around the square.

MR. LIEBBE: Well, here's, here's the interesting thing. Remember, remember Government Code Section 22.004 says that your rules remain in effect unless and until modified by the legislature. 74.351(s) does not modify any rule of procedure at all. It says "You can only use these rules of procedure and rules of discovery prior to the expert report." To say that Rule 202 cannot be taken ever in a, in a medical malpractice investigation would be clearly a modification of Rule 202 that was promulgated by this Court under 202 and would necessarily have to be done pursuant to any compliance with Section 22.004 of the Government Code. It is telling and it's very, very important to note that in the first two versions for the House Bill in the House, they specifically invoked Rule 22.004 of Government Code but then when they pulled out the provisions of-- after hold - holding Restriction 202, they also pulled out the reference and the invocation of Section 22.004 of the Government Code.

JUSTICE BRISTER: But they did, as opposing counsel points out in 002 say this chapter controls including overrules of procedure -

MR. LIEBBE: Only if -

JUSTICE BRISTER: - and we don't usually-- it is true we frequently

say, "Well, they didn't mean to mess with our procedures," we don't usually say that when they say, "Yes, we do mean to mess with your procedures" because that gets us in a fight with the people that framed this.

MR. LIEBBE: That provision only applies, however, if there is a conflict between the statute and the rule and we should always remember that the purpose and goal here is, is to construe statutes to-- such as to avoid a conflict if that can be done and Justice Worthen in the Allan opinion did exactly that. He pointed out that, that Chapter 74 applies to healthcare liability claim and this is not a healthcare liability claim under 202.

JUSTICE O'NEILL: Let me ask you real quickly -

MR. LIEBBE: Yah.

JUSTICE O'NEILL: - if, if we disagreed on your construction about potential healthcare liability claim versus healthcare liability claim, do you lose?

MR. LIEBBE: Yes. More importantly, my client will never know.

JUSTICE O'NEILL: Well, my understanding of where the posture is now, you could go back and you could take depositions on written questions.

MR. LIEBBE: I don't see how-- where in Rule Chapter 74 -

JUSTICE O'NEILL: Well, your opposing counsel has conceded that to that extent that you don't conflict. To that extent you-- so you could take depositions on written questions.

MR. LIEBBE: Well, I, I, I would submit that if-- that either 202 is, is allowed or 202 is not allowed. To sit here now, at this point in time, four or five years after, after the legislature passed to say, "Okay, we're going to allow some 202 in the form of written questions and maybe some interrogatories but not 202," I, I don't see where that is in the statute or the legislative history.

JUSTICE O'NEILL: The argument would be you have to harmonize them when you can and that would be a way to harmonize them.

MR. LIEBBE: It, it may also be harmonized by, by determining that there is no conflict between Chapter 74 and Rule 202 and I would point out to the Court that, that while 202 may be ancillary and incident to an anticipated suit, it is not itself an independent suit as this Court said in 1965 and that is because for three reasons. Number one, Rule 22-- 202 petition does not assert any claim or cause of action. 202 depositions may never lead to a suit because the facts [inaudible] may determine that there was no merit and Number three, 202 petitions cannot result in obtaining any relief or recovery whatsoever. If granted a 202 petition simply allows you to discover facts and I would point out that there are a number of, of federal cases that have reached the same conclusion, Page versus Liberty, and these are all 2006 US District Lexis citations, 73745, Sawyer, Lexis 44026, Davidson 40654, Mayfield and George 16338. And while I'm touching on the topic of the Federal Court, I'm wondering that if-- you cannot discover facts to determine if you have a lawsuit and therefore you are deprived of your ability to bring a suit.

JUSTICE O'NEILL: I hear you say that but-- and that sounds good but I still haven't heard why depositions on written questions [inaudible]. I mean, you may-- oral depositions would be better.

MR. LIEBBE: Yeah.

JUSTICE O'NEILL: I know that you'd like it more but I haven't seen concretely yet in this case why depositions on written questions would not-- you know, to me if you took the depositions on written questions and then it didn't give you the information you need, then you could

rely on the provision of House Bill 4 that says, "You know, this can unduly restrict in the manner of this, you know, [inaudible] claim," but, but it seems to me these statutes set up a structure that are difficult and their barriers but I keep hearing from you that if, if you, you can't take everything, you can't do anything.

MR. LIEBBE: Well, another way to look at this is that if the legislature had intended that we could only take 202 depositions by written questions, I think that they would have done so just as in the second version where they said we could take a 202 deposition if records weren't provided or the, or the facts were not sufficient in the records to deter-- make a determination. But the reality is, the legislature didn't do the prohibition in the first, in the first phase, didn't do the restricted at all and didn't add in a section that said, "Okay, we're going to allow 202 but only by written question" and so I think we're left here to look at the legislative history and in the, in the plain language of the statute as Justice Hankinson In Re Huag pointed out.

CHIEF JUSTICE JEFFERSON: Counsel, your time has expired.

MR. LIEBBE: I'm sorry.

CHIEF JUSTICE JEFFERSON: Are there any, any other questions? Thank you, Counsel.

MR. LIEBBE: Thank you, your Honor.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF PETITIONER

MR. COOPER: Very briefly. Counsel said, "Rule 202 depositions either are allowed or not allowed and one of the reasons that the 202 language or prohibition made have been taken out of the statute was because of the interpretation [inaudible] here and that is certain 202 depositions are being allowed, that is, written depositions, but others are not being allowed consistent with Section 74.351(s)." Now, Counsel -

JUSTICE BRISTER: Of course, the reason people don't do depos on written questions is because opposing side's lawyer writes the answers -

MR. COOPER: But there's -

JUSTICE BRISTER: - and I'm concerned you've got a-- you got a firm 120- day deadline here, 180 days -

MR. COOPER: Twenty.

JUSTICE BRISTER: - 120 days. So you agree that under (u) they could take this deposition after a case was filed?

MR. COOPER: We believe that under (u) consistent with In Re Miller.

JUSTICE BRISTER: (u), (u), that's right. You think that's only non-parties.

MR. COOPER: Non-parties, right.

JUSTICE BRISTER: But assuming some Court construed that it, it doesn't say that but it applied to parties that would not be much help if the defendant doctor's attorney stalled the deposition till the 119th day.

MR. COOPER: Obviously, there's provisions to go to the Courts to seek orders from the trial court requiring that opponents to be -

JUSTICE BRISTER: All of which takes time. I mean, you know, you don't have to answer for 20 days plus Monday and -

MR. COOPER: Correct.
JUSTICE BRISTER: - etc.
MR. COOPER: Correct. But again, Counsel -
JUSTICE BRISTER: There will, there will be cases where you just can't tell from the records.
MR. COOPER: Well, I don't know and I'm not so sure this is one of those cases because Counsel, what he said earlier was what did Dr. Jorden tell Tyler Cardiovascular Consultants about when she should come or vice versa. Now, first off, June 9th, there's written orders about appearing, that would be in the medical records but certainly why wouldn't written depositions to Tyler Cardiovascular Consulting-- Consultants or to Dr. Jorden reveal what was said to each other regarding when Ms. Allan should appear for her stress test? I mean that seems to me to be clearly the type of information that could be obtained from written questions. What was said generally is recorded-- in, in most medical records is recorded when there's referral. This doesn't seem to be, to me, to be the type of case where you would need oral depositions in order to find out this information.
JUSTICE BRISTER: But why would -
JUSTICE BRISTER: [inaudible] not, not saying that, that your lawyer can't take his own client's deposition before she dies -
MR. COOPER: Well, -
JUSTICE BRISTER: [inaudible]
MR. COOPER: - what I'm saying is there, there are ways around that.
JUSTICE BRISTER: Such as?
MR. COOPER: Such as, first off, if he is concerned about his client passing away, there is, there is obviously under Rule 202, I mean, excuse me, 1-- 74.351 as limitations of what you can do before your expert report is filed. If you're concerned about your client passing away, you can immediately file your expert report, get that information together prior to the time you file your lawsuit and file your expert report with your lawsuit which is done in many occasions and immediately notice your client for the deposition and take the deposition. Other thing which is done but we see all the time is where you do these daily live videos about what the plaintiff's life was like when that person is not there to testify. We have those presented in our cases that are out there which have allowed the admissions of those types of evidence in order to show what the plaintiff was like [inaudible] time he or she expired.
JUSTICE BRISTER: Okay.
MR. COOPER: I'm sorry. Justice Johnson?
JUSTICE JOHNSON: But why would, why would we allow written depositions and not oral depositions? They are really not very satisfactory.
MR. COOPER: Well, we're assuming-- I assumed that even though the parties are under oath, somehow they're not going to tell the truth. Well, if, if they're not very satisfactory, why do we have interro -
JUSTICE JOHNSON: [inaudible] tell the truth so it may not even answer the question and that's what an oral deposition is. You ask the question and they dodge it. You ask the question, they dodge it and finally you get an answer and in written depositions, you just don't have those opportunities. So why, why is a written deposition and not an oral deposition when you have-- when you haven't find out some fairly intricate, probably dispositive, maybe dispositive facts and someone who's not-- don't want to give you that information?
MR. COOPER: Well, two things, Justice Johnson. First off, I

believe that if the party does not answer or the, the opponent doesn't answer, there are procedures to go back to the trial court and compel them to answer.

JUSTICE JOHNSON: Pushing on down the road with more time and more time and more time. That's, that's what happens.

MR. COOPER: That may be the case. That may be the case but there are procedures to compel an answer under oath and I, I guess the other issue is if, if interrogatories and if written depositions are such useless means of discovery, then why do we still have them in the rules of civil procedure?

JUSTICE JOHNSON: Many times they were used on the party, I mean, you know where you're really trying to cross-examine, you know, it may be practical matters.

MR. COOPER: Obviously here, we're just trying to find out limited information. We're not trying to do a full-blown deposition. Okay.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you. This cause is submitted and the Court will take a brief recess.

COURT MARSHAL: Rise.

2007 WL 5321664 (Tex.)