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Supreme Court of Texas.
Debbie Stockton, as Parent and Next Friend of William Stockton, A Minor,
Petitioner,
v.
Howard A. Offenbach, M.D., Respondent.
No. 09-0446.

March 25, 2010.

Appearances:

Robert J. Talaska, The Talaska Law Firm, Houston, TX, for petitioner: Debbie Stockton.
Peter M. Kelly, Law Office of Peter M. Kelly, Houston, TX, as amicus curiae for: Texas Trial Lawyers Association, for petitioner.
Michael A. Yanof, Stinnett Thiebaud & Remington, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 09-0446, Debbie Stockton as parent and next friend of William Stockton, a minor, v. Howard A. Offenbach, M.D.

MARSHAL: May it please the Court, Mr. Talaska will present argument for the Petitioner and Mr. Kelly will present argument for the [inaudible].

ORAL ARGUMENT OF ROBERT J. TALASKA ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT TALASKA: May it please the Court.This case presents a situation where it was

impossible to comply with the medical malpractice statutes requirements of serving an expert report upon the defendant.

JUSTICE DAVID M. MEDINA: Mr. Talaska, let me help you out here. This seems to me that this, everything was you said impossible, I'm not sure about that, but it seems that quite a bit was done to try to perfect service. There was December, January, April, the Court sought to get permission from the trial court coordinator to get a hearing before the judge. For whatever reason, that didn't take place. I want to hear this due diligence argument which seems you know may be able to carry the day for you.

ATTORNEY ROBERT TALASKA: The due diligence argument in this case has to do with all of rule, the medical malpractice statute does not say service has to be accomplished pursuant to Rule 21a. However, some of the appellate courts have picked up the word service should be by Rule 21a. By picking up Rule 21a, Rule 21a inherently has a due diligence exception engrafted into it. That's part of the rules in all of the rules that have to do with deadlines that are not jurisdictional allow for there to be equitable relief coming from the courts if a condition cannot be made. In this particular case, using due diligence, we were unable to serve in a timely manner. The due diligence exception has to do with if you are trying to make reasonable efforts consistently trying to accomplish your goal of serving and working through that process and that gives you a tolling during that time limit, as the Court is well aware, that is what the due diligence allows is for a tolling of deadlines.

JUSTICE DAVID M. MEDINA: What about the language in the statute? It says 120 days.

ATTORNEY ROBERT TALASKA: The 120 days, that is what the legislature has put in there and in terms of the need to serve the report, but, again, looking at 21a, whether it's serving a lawsuit or anything else, there is that due diligence that is just factored in. It comes from the courts. It's not statutory. The courts have the ability to engraft that in there just as the appellate courts have said that 21a has to be engrafted in the way to serve.

JUSTICE EVA GUZMAN: Since that 120 days is triggered after the filing of the claim, is there some diligence required in ascertaining the location of your potential defendant before you file the claim so as not to trigger, I know this was a minor's injury and actually quite a few years had elapsed since the injury from the date the claim was filed?

ATTORNEY ROBERT TALASKA: Yes, I believe and if you look through the record, the record is replete with efforts prior to the lawsuit in trying to locate this defendant.

JUSTICE NATHAN L. HECHT: Why didn't you delay further until you found him? Why start the clock running?

ATTORNEY ROBERT TALASKA: Because it was after nearly a year and a half of attempts working through the insurance council because we've had prior cases with this doctor, who is a bad actor.

JUSTICE NATHAN L. HECHT: But you don't have to start the clock right? I mean, you could have waited a year or two or maybe even--

ATTORNEY ROBERT TALASKA: There are statute of limitations. There are deadlines and if we are the--

JUSTICE NATHAN L. HECHT: But it wasn't coming up. It looked to me like the child was 8 at the time, so there was still at least two years left on.

ATTORNEY ROBERT TALASKA: The child was born in '89 so the child was coming up to 18.

JUSTICE NATHAN L. HECHT: Oh, the child was coming, so was, but he could still file for himself.

ATTORNEY ROBERT TALASKA: Yes.

JUSTICE NATHAN L. HECHT: After that.

ATTORNEY ROBERT TALASKA: Yes.

JUSTICE NATHAN L. HECHT: So there was still time left to sue?

ATTORNEY ROBERT TALASKA: Yes, but what happened after a year and a half of coming on to a dead-end, a dead trail could not find him. There was nothing else that we could do to attempt to find him. As we said in our brief, the trail had run cold and what were we to do? Just wait 'til 19 years and 364 days and not find him and then file the petition? We thought it was in the child's best interest and in the public policy best interest to get the case on file and then invoke the provisions that are there for defendants who can't be located or can't be named and that we knew we would try to serve him and we immediately within six weeks after filing the petition, filed a motion for substituted service. Knowing that that mechanism is there in the law, it would allow us to bring the defendant into the court system by having him served in that manner.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the Health Care Liability Act have that same provision anywhere for substituted service?

ATTORNEY ROBERT TALASKA: No.

CHIEF JUSTICE WALLACE B. JEFFERSON: It doesn't contemplate the inability to find the doctor?

ATTORNEY ROBERT TALASKA: It does not. There is nothing mentioned of that and that's the problem. There's one case that --where they were able to serve the petition and citation on the defendant, then the defendant left the country and they couldn't file an expert report. We never had that opportunity and that case was dismissed. We never had that opportunity to serve a report. What I understand from the Dallas court of appeals has suggested is that under Rule 21a, we somehow served the report by publication. I will submit to you in unequivocal terms that is an impossibility. I don't know of any way to serve a report by publication. What, by serving the defendant by publication, that would allow after the appropriate time ran for us to then get an answer and then serve the report as is required.

JUSTICE EVA GUZMAN: Was there some delay by the trial court an issue?

ATTORNEY ROBERT TALASKA: There was. There was, and--

JUSTICE EVA GUZMAN: And is there anything that you could have done to compel the trial courts more efficient resolution of the motion?

ATTORNEY ROBERT TALASKA: Yes, from the time, and we do have evidence in the record both in the terms of an affidavit from one of our lawyers as well as our secretary in saying that there were multiple phone calls put into the court and basically when you file a lawsuit and then ask for substituted service, there is no mechanism, there is not a defendant in place. There is no mechanism to make the court give a ruling.

JUSTICE EVA GUZMAN: A mandamus action to compel the court to rule?

ATTORNEY ROBERT TALASKA: Mandamus action to force the court to rule, but that is then a discretionary ruling where then that she could deny. It's not that she would, that the any mandamus would have only forced her to rule as opposed to rule to allow substituted service.

JUSTICE EVA GUZMAN: It's not the best way to get the court's attention, but it is a mechanism.

ATTORNEY ROBERT TALASKA: Yes, yes and what the court said is not yet, they told us not yet and then it was in November and we do have and I could not determine if it's, it should be part of the court's

file, but I did not actually see it in the record, which I would like to supplement. We have written a certified letter to Judge Tabalowski prior to the expiration of 120 days saying you still haven't signed the motion, please sign the order so we can serve by publication. We're trying to be diligent and then on November 13, we also sent a letter saying you still haven't ruled on this and then she asks for and, again, we have been calling--

JUSTICE HARRIET O'NEILL: And that was my question that apparently the judge thought that there was something missing to be able to allow the motion, that the attempts had not been articulated in the motion, perhaps, that in some way the motion was defective.

ATTORNEY ROBERT TALASKA: Yes, at no point did the court suggest it was defective or incomplete until November when they said file a supplemental motion and I assume they, I wasn't personally involved, but tell us what you did and then we put forth the steps both before the lawsuit and trying to find as well as once we invoked the court's powers and the ability to serve through a licensed service processor. So we did call the court repeatedly and it was like not yet, it's too early. It's too soon and so what--

JUSTICE EVA GUZMAN: You tried to set it for a hearing to actually go before the [inaudible].

ATTORNEY ROBERT TALASKA: She would not set it for a hearing. You can't have a hearing, not yet. We were delayed on that.

CHIEF JUSTICE WALLACE B. JEFFERSON: The report was served though on the insurer, is that correct?

ATTORNEY ROBERT TALASKA: Yes. Yes. This is--

CHIEF JUSTICE WALLACE B. JEFFERSON: Within 120 days?

ATTORNEY ROBERT TALASKA: Yes, we've, here's exactly what happened with the report. Prior to the case in trying to find this doctor, we did work with the insurance company and their adjustor trying to find them. They were unsuccessful. We gave them a copy of the report about a year and a half actually before we filed the petition and then when we filed the petition. We also included the report and when we asked for service on the defendant, we asked him to serve the petition as well as the report and then after using due diligence, the processor server came back and said I can't find him. And so, what I think is really important to this case to understand the due diligence and the impossibility here is if we look at the real timeline as to what happened, because in reading the Dallas Court of Opinions as well as the respondent, it seems to be that gosh, if we had filed the motion for substituted service earlier or mandamused her to get a ruling, we would have been able to get this all done within 120 days. This record establishes that that was an impossibility. Our motion for substituted service was filed first when the court, again, we had called, wrote letters to say what's happening with our motion, can you sign it for us so we can get it out. But in looking from the time the court said okay, send us a supplemental motion, which we filed on November 28, the court first signed it on December 20th and this is all done within the Dallas county clerk's office, the citation was issued on March 13th. The citation by publication requires it to be published for four weeks and then the defendant gets time after that before the answer is due. So from the time we filed the supplemental motion on November 28 until the answer actually became due was around 150 days.

JUSTICE NATHAN L. HECHT: What was the three-month delay in issuing the 109 service?

ATTORNEY ROBERT TALASKA: It's all within the court system that the, she signs the order for the citation and then it goes internally to the clerk's office where they come up with the citation and then get it.

JUSTICE NATHAN L. HECHT: You can't just walk over to the clerk's office and ask for the citation to issue?

ATTORNEY ROBERT TALASKA: That was not, no,that we were not able to do that because we have to have the order. We didn't get the order signed until December. We got notice, of course, that the holidays

December 20. We got notice of it after the holidays and we did try to move the ball, but getting that citation through the Dallas County court system--

JUSTICE NATHAN L. HECHT: I just don't understand why on the 20th of December you couldn't just walk down to the clerk's office and get the citation issued once you had the order.

ATTORNEY ROBERT TALASKA: There is--I'm not aware of a means to do that where the court issued the citation and went to the clerk's office and there's not a way to expedite that that I'm aware of.

JUSTICE EVA GUZMAN: Counsel, this is a more practical question. When I was on the trial bench, lawyers needed a ruling for some reason [inaudible] came to the clerks. They brought it to the court's attention. They set a hearing. There are mechanisms in place to get a ruling from a judge in a more efficient manner, if you will. So I guess I don't understand [inaudible] context of your facts why it is that you couldn't just bring it to the court's attention?

ATTORNEY ROBERT TALASKA: I appreciate that and it is a practical question. I appreciate you bringing up your time at the trial bench and having being a 22 board-certified, a 22-year board certified lawyer, the reality is it doesn't work that way. I mean, we can call the court and say set it for a hearing. It's within their power, no, not yet. We're not going to set it. For us to mandamus it, again, even if we took those steps and it still took that long for the trial court to get the citation out and to serve by publication. And this whole concept of 21a served by publication, as this Court well knows, that is just basically putting on the defendant on notice that a case has been brought against him. It is not, in fact, the rule specifically prohibits serving, you cannot send the petition for the service by publication so there is no means to serve a report by publication. You can serve the defendant to get an answer into the case and then when he answers, you can serve the report.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Talaska. Your time has expired. Are there any further questions? We'll hear from you on rebuttal and now we will hear from the amicus counsel.

ORAL ARGUMENT OF PETER M. KELLY ON BEHALF OF THE PETITIONER

ATTORNEY PETER KELLY: May it please the Court. I'm here on behalf of the Texas Trial Lawyers Association to address the legal mechanism by which we put due diligence into this particular statutory construct. Basically, it's by analogy to the statute of limitations. The statute of limitations is very similar to the statute here. Both are directories. In the statute of limitations it says the suit must be brought or the plaintiff must bring. Here it's also a directory statute that says shall be served. Now it's interesting though in the statute of limitations it says the plaintiff must bring suit as a two-step process, one of which is filing and the other of which is serving. So bringing of a suit, filing and serving. Now filing can be--

JUSTICE DAVID M. MEDINA: Mr. Kelly. Mr. Kelly.

ATTORNEY PETER KELLY: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: So what do we do with the 120 days? Is that just a guideline for us? You're telling, it seems like it's not a benchmark.

ATTORNEY PETER KELLY: Well it is a benchmark for what must happen by the 120 days. We don't have the filing as in the statute of limitations, but if you go too deep into the recesses of Texas history back to 1891 in the Ricker case, then beyond that to the Veramendi case, when they talk about what must be done to toll the statute of limitations, there must be a manifestation of intent to serve. Now we refer to that now as due diligence because it's by proof of due diligence that we show that manifestation of intent to serve.

JUSTICE DAVID M. MEDINA: But why don't we just look at the Texas Medical Liability Act whether it was a perceived notion that perhaps there's some type of crisis there and they want to stop frivolous

litigation so we're going to say 120 days, get it done by then. You don't have an expert report filed. The case is over.

ATTORNEY PETER KELLY: Well I will refer you to the Mokkola case from one of the Houston Courts of Appeals which discusses the legislative history and it particularly quotes Representative Nixon, who after all is also a trial lawyer, and he said we want this to be a hard-and-fast deadline just like the statute of limitations. Now if we take that statement and also apply the presumption that the legislature acts with full knowledge of what this Court has done and the common law of the State of Texas what we see is he wants it to be like the statute of limitations and that's what the legislature intended. They wanted it to operate like the statute of limitations where you have the same thing where there is a tolling or a meeting of the statutes, a meeting of the deadline by a manifestation of the intent to get process, by going to the clerk and getting processed. I've been working on a 50-state survey trying to figure out precisely how other states deal with this and some of them say that all you have to do is request service of process and that in and-whether it's actually done or not-is enough to toll the running of the limitations. Others say delivery of process to the sheriff. None say that the tolling of limitations has to accomplished by the actual service and even in the case in certain states, for instance, in New York says, service of process has to be done within 60 days. Even that has sort of the manifestation of intent or due diligence exception to it.

JUSTICE NATHAN L. HECHT: But you would say even if it weren't impossible as long as you were being diligent, that would be good enough?

ATTORNEY PETER KELLY: Yes, I don't think there has to be showing. I mean, you know perhaps in the context of a constitutional challenge, you might have to show impossibility, but in terms of the jurisprudence of the court and the long history in the state of Texas of allowing this manifestation of intent, the manifestation of intent to serve the defendant should be sufficient to toll the running of limitations or is sufficient to the toll of limitations and it should be sufficient to toll the running of that 120 days or perhaps not toll it, but meet the requirement.

CHIEF JUSTICE WALLACE B. JEFFERSON: You agree that the statute is not satisfied if you serve the insurer and not the doctor or do you not agree with that?

ATTORNEY PETER KELLY: I think that the purpose of the statute and this is another comparison to the statute of limitations, the statute of limitations, the purpose is temporal imperative, to cut off stale claims. So it even makes more sense to be stricter in terms of deadlines in the statute of limitations. In this context and as this Court recently noted, the purpose is to prevent the bringing of frivolous claims and so it focuses on the substance of what's being served not precisely the timing of what's being served. So the timing of the service is actually subordinate to the substantive what's actually being served.

CHIEF JUSTICE WALLACE B. JEFFERSON: So my answer is, the answer is or what is the answer to this question? Is it sufficient to serve the insurer or not because if it were, then we wouldn't have to worry about this 120-day timeline because it was served on the insurer within that timeframe?

ATTORNEY PETER KELLY: My personal opinion is yes, it is necessary. It has not been presented to this Court and I think there is a way to get there through the doctor and through the application of virtual representation where this Court has allowed the insurer to step in as a real party in interest [inaudible] several years ago.

JUSTICE DAVID M. MEDINA: That can't be right. That can't be right. I mean that's only after the, the insured has to go through its analysis of whether or not this is even a covered risk, whether or not the doctor's insured under its policy and so you have a period of time for them to make that decision and in the interim, you got time is running, 120 days is running so that can't be the answer.

ATTORNEY PETER KELLY: But if the answer turns out to be yes, then the service should be sufficient. The delivery to the insurance company should qualify as service. It has met the substantive purpose behind the rule.

JUSTICE DALE WAINWRIGHT: That suggestion, however, runs into a bit of a hurdle at least in the language of the statute. "A claimant shall not later than the 120th day after the date the original petition was filed serve on each party," and then it indicates which agent of the party can be served. It says "or the party's attorney." It doesn't say insurer in there. It doesn't say their neighbor. It says party or party's attorney. It's fairly strict language. On the one hand, we don't want defendants dodging and hiding in order to let the 120 days lapse. On the other hand, we don't want claimants being lax in any way when the legislature has used this type of strict language. So what's, in that context, what's the answer?

ATTORNEY PETER KELLY: Well, there's, it's a two-part answer. First of all, that when you're talking about in allowing, I agree the language of the statute is very strict and when you're talking about allowing service on the insurance company to serve, that to meet the requirement, that is engrafting an equitable exception onto the language of the statute, which this Court has the power to do. But what we're talking about here, the particular facts of this case in terms of service, we're not talking about engrafting inequitable exceptions, actually sort of straight statutory interpretation of what does it mean to serve. And what the Court has held in the past going back to 1871 is that serving is a manifestation of the intent to obtain prompt service. So we're not asking for in terms of the statutory construction, the engrafting of an equitable exception or a rebalancing of policy interests. Now I will admit if we are asking for a service on the insurance company to be or delivery to the insurance company to qualify, in that case it is engrafting of equitable exception, but that's not necessary for the resolution of this case. What's necessary for the resolution of this case is just a straightforward interpretation following what this Court has been saying for hundreds of years about what constitutes service, which is and the reason it's the manifestation of intent is you have situations like this--people dodging service.

JUSTICE DALE WAINWRIGHT: Right.

JUSTICE PHIL JOHNSON: Mr. Kelly.

ATTORNEY PETER KELLY: Yes, Your Honor.

JUSTICE PHIL JOHNSON: I know your time's run out, but this is a little different than the statute of limitations because here, as Justice Hecht mentioned earlier, you have the choice of when to file and trigger your 120 days. The statute of limitations is objectively out there. How do you deal with that in the construct here because it could have been a delay of the filing of a suit could delay, we're talking about due diligence, how do you figure that part in your construct?

ATTORNEY PETER KELLY: Well, actually I don't think it affects the analysis or the argument at all because let's say it's not a minor involved and you have a two-year statute of limitations.

JUSTICE PHIL JOHNSON: You wait until the last minute, I mean, that's no question, but here you did not. Here you didn't wait until the last minute. So don't you have to figure that some way into your analysis?

ATTORNEY PETER KELLY: Well, I don't think that it fits into the analysis here because the suit was filed and, as Mr. Talaska indicated, they had exhausted their remedies, they couldn't find it. At that point, it became necessary to invoke the power of the court to even get the ball rolling. Further delay, further staleness of the claim isn't going to enhance the claim and, in fact, for prompt resolution of the dispute, you want to have your witnesses with fresh memory, you want to be able and--

JUSTICE PHIL JOHNSON: You would at least require then some diligence before filing the suit that tried to locate the defendant?

ATTORNEY PETER KELLY: I don't think that would be required in this particular circumstances. I don't think there, I mean, I'm not aware of any policy or statutory imperative or suggestion that the suit be filed by a particular time. There's a deadline in filing.

JUSTICE DALE WAINWRIGHT: The practical reason is you may risk missing the 120- day deadline.

That's the practical reason to consider his point.

ATTORNEY PETER KELLY: But at this point and this is where impossibility might come into it. If you don't know where he is what's really the difference between filing it in 2007 as opposed to 2010?

JUSTICE DALE WAINWRIGHT: It gives you time to try to find him.

ATTORNEY PETER KELLY: Which you've already done, which has already been done for two or three years and sort of the vague hope that a drug-addicted doctor might reappear on the scene.

JUSTICE DALE WAINWRIGHT: Granted, in this case, apparently efforts to try to find the doctor began in October 2005 and the lawsuit wasn't filed 'til 2007. So there was some attempts prior to filing. That's in the record.

ATTORNEY PETER KELLY: But there's also nothing in the legislative intent behind the statute or nothing to indicate that you should promptly file the suit. In fact, you should file, I think the policy is the suit should be filed when the cause of action is right and the cause of action is right, there is nothing prohibiting the plaintiff from filing the suit when it is. And this, it's not extraneous, but it's the fact that the defendant may not be able to be located at the time should not prohibit the filing of the suit. In fact, you should be able to get a default judgment against them.

JUSTICE HARRIET O'NEILL: Well and my understanding is nobody's posited anything further that this plaintiff could have done if it had waited any longer correct?

ATTORNEY PETER KELLY: Right.

JUSTICE HARRIET O'NEILL: I mean, they hired an investigator. They've done just about everything they could do. There's nothing to show that if they had waited two or three years, they could have done some further diligence.

ATTORNEY PETER KELLY: Mr. Offenbach, Dr. Offenbach has not shown up yet and there's nothing to indicate that further delay would have led to a better result on this particular instance.

JUSTICE DON R. WILLETT: Is it clear when the doctor retained counsel?

ATTORNEY PETER KELLY: I don't think the doctor did retain counsel. I think the insurance company has retained counsel on behalf of the doctor and I don't think there's anything in the record to indicate that there is a formal attorney-client relationship between defense counsel and the doctor yet. In fact, I think it's a contractual, the defense counsel has appeared in accordance with the contract, which allows him to appear on behalf of the doctor, but I'm not aware of any grantive authorization by the doctor to appear on behalf of.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Kelly. The Court is now ready to hear argument from the Respondent.

JUSTICE PHIL JOHNSON: Counsel, do you represent the doctor?

ORAL ARGUMENT OF MICHAEL A. YANOF ON BEHALF OF THE RESPONDENT

ATTORNEY MICHAEL YANOF: I do represent the doctor.

JUSTICE PHIL JOHNSON: Why? How?

ATTORNEY MICHAEL YANOF: Pursuant to his insurance contract.

JUSTICE PHIL JOHNSON: But when you were hired by the carrier, you filed an answer on behalf of the doctor now? You're his lawyer? So we can get past that.

ATTORNEY MICHAEL YANOF: Upon proper service, yes.

JUSTICE PHIL JOHNSON: Right, I mean, so we can get past that question.

ATTORNEY MICHAEL YANOF: Yes.

JUSTICE PHIL JOHNSON: You represent the doctor.

ATTORNEY MICHAEL YANOF: Yes.

JUSTICE DALE WAINWRIGHT: Is there any indication in the record that your client was intentionally dodging service, anything in the record that shows that?

ATTORNEY MICHAEL YANOF: The short answer is no. I think his whereabouts were unknown and I don't mean to play semantics with it, but I think it's abundantly clear at the moment suit was filed that the whereabouts of Dr. Offenbach were unknown and very clearly unknown.

JUSTICE EVA GUZMAN: Well if you've got a statute that-- of limitations period that's running and the whereabouts are unknown, cannot be found for whatever reason, maybe they're homeless, on drugs, you will never be able to find them, doesn't that make it impossible to comply with the 120-day deadline if you've got a statute that keeps running?

ATTORNEY MICHAEL YANOF: I don't think it becomes "impossible." I think in this case when a proper motion for substituted service was filed, which is what the supplemental motion for substituted service was, when that proper motion was filed with evidence in it of the attempts to serve the doctor and that his whereabouts were unknown which were all facts that were known before the lawsuit was filed, that order was signed in three weeks. That's clear in the record. So a proper motion for substituted service when filed with the court was signed in three weeks.

JUSTICE HARRIET O'NEILL: Well, my understanding is that the trial court indicated that it was going to grant the motion. It just requested supplementation and so if the trial court had made that indication within the 120-day period, which apparently was requested to be done- it could have been done within that timeframe. That was more a function of the trial court isn't that right?

ATTORNEY MICHAEL YANOF: But the case law is pretty clear on due diligence that attorneys can't simply rely on representations from the clerk that the order will be signed or even that the order has been signed. The case law is it is the attorney's responsibility to get the defendant served and no matter what representations are made to that attorney, it's the attorney's responsibility to get it front of the trial judge and get an order signed. Now if the trial judge refuses to set it for hearing or refuses to sign an order, then we have a true impossibility situation, but my experience working in trial courts has been much like Justice Guzman's that hearings are granted daily on those matters to get them signed.

JUSTICE DAVID M. MEDINA: Yeah, but, unfortunately, not everyone is as great as Justice Guzman or us up here and you do have renegade trial judges for whatever reason refuse to follow basic rules, setting hearings, forcing people to go to trial for whatever reason when they are not ready to go to trial and sometimes there is an abuse of discretion here and that takes me to this question. If, on review, the 120 days has elapsed and the court reviews it, do they review it on de novo standard review or an abuse of discretion? By the analogy of Mr. Kelly and other side there, it seems to me that it would be an abuse of discretion. They did everything that it possibly could do. I don't believe impossibilities because Northern Iowa Kansas so anything is possible, but here it seems like they've done everything they could do and so if we review that on okay what did the trial judge look at. Is it abuse in discretion standard or is it de novo standard?

ATTORNEY MICHAEL YANOF: I think that the findings that the judge made are an abuse of discretion standard and the basis on which the trial court denied the motion to dismiss, that's abuse of discretion. That's what the Dallas court of appeals applied in this case. The problem with the analysis by Petitioner is they ignore the fact that it is undisputed that the Respondent was not served; neither Respondent nor his attorney was served within 120 days of filing suit. That is the undisputed finding of fact in the trial court and the trial court simply said and it's in the reporters' record she said, "I think the intent of the statute was fulfilled; therefore, I'm denying the motion."

JUSTICE DAVID M. MEDINA: What impact, if any, does it have by putting the insurance carrier on notice?

ATTORNEY MICHAEL YANOF: I think in this particular case, it has, it's not sufficient. It's not sufficient first because the statute says you have to serve the party or the party's attorney.

JUSTICE DAVID M. MEDINA: I agree with that, but you're here. It has to have some impact.

ATTORNEY MICHAEL YANOF: Well, I'm here because the lawsuit was served by publication and that's how we came into the lawsuit if that's what you're asking.

JUSTICE DAVID M. MEDINA: Well sometime before that, I understand the insurance carrier was put on notice and I agree, that's not sufficient, but you're here. I mean at some point you made a decision, the carrier made a decision, okay, there's coverage for this guy. We need to make an appearance.

ATTORNEY MICHAEL YANOF: There's an additional reason that serving the insurance adjustor when he was served is not sufficient. Even if the doctor had been served when the insurance adjustor was served, that would not be sufficient under the statute because it was pre-suit. Pre-suit is not sufficient service and numerous courts have addressed this because the deadline to object to the report gets triggered off of serving that report. When you serve it pre-suit, the doctor or his attorney has no responsibility to make an appearance or object to that report so even if that report had been served when it was served on the adjustor, on the defendant himself, that still would not be service under the statute. So and the--

JUSTICE HARRIET O'NEILL: What would you have done differently if you were the plaintiff here?

ATTORNEY MICHAEL YANOF: What would I have done differently? You know, in fairness to Petition and the Court asked a couple of questions about should they have waited to file suit, I'm not sure it's fair to quibble with the attorney on when suit is filed. There are numerous reasons to go ahead and file or wait to file or whatever the case may be. The supplemental motion for substituted service that was filed after the 120-day deadline is undisputedly a sufficient motion for substituted service that any trial court who is not completely abusing its discretion would grant.

JUSTICE HARRIET O'NEILL: So you're saying you would have filed a more complete motion for substituted service.

ATTORNEY MICHAEL YANOF: I would have filed it on day one.

JUSTICE HARRIET O'NEILL: So doesn't that presume a due diligence analysis? So you'd agree that we would look at due diligence under Rule 21?

ATTORNEY MICHAEL YANOF: Well, no. Not for-- I think you look at it for an impossibility argument.

JUSTICE HARRIET O'NEILL: Well, I thought that was more for open courts. If there's a due diligence, if Rule 21a applies, then due diligence is sufficient correct?

ATTORNEY MICHAEL YANOF: Well, it's sufficient for limitations. It is, 74.002a of the statute says notwithstanding any other law that there can be no rule or statute that conflicts with Chapter 74's

provisions.

JUSTICE HARRIET O'NEILL: So you said there is no due diligence exception.

ATTORNEY MICHAEL YANOF: I do not believe there's a due diligence exception.

JUSTICE HARRIET O'NEILL: So it wouldn't matter then if the motion for substituted service had been filed with all the proper stuff. It just doesn't matter.
ATTORNEY MICHAEL YANOF: Well, I believe it's relevant for two reasons. I believe it's relevant, number one, because it likely would have resulted in citation by publication being issued within three weeks of that motion being filed, which is what happened eventually and had petitioner been more diligent in getting things in place, then service very well could have been accomplished within 120 days. That's not due diligence. That's simply they cannot satisfy the impossibility standard, but I will take it a step further. Even under a due diligence standard, a petitioner has kind of come to the conclusion and just thrown out there if the court recognizes a due diligence exception, well, of course, we complied with that. It is petitioner's burden even if this Court were to recognize a due diligence exception to explain every delay between the time of filing the petition, citation being issued and service of the petition and with it the report here. There is a three-month delay, a four-month delay during that 120-day time period when the only thing that happens is a bare-bones motion for substituted service, not laying out any of the attempts to serve the Respondent. That's all that happens within 120 days and a call to the clerk to see if an order has been signed.

JUSTICE NATHAN L. HECHT: The report was sent to the adjustor before suit was filed.

ATTORNEY MICHAEL YANOF: Yes.

JUSTICE NATHAN L. HECHT: And ultimately it was the insurer who retained counsel on behalf of the physician.

ATTORNEY MICHAEL YANOF: Yes.

JUSTICE NATHAN L. HECHT: And so I suppose the adjustor who retained counsel could have sent the report to the counsel whenever counsel was retained?

ATTORNEY MICHAEL YANOF: It could have, not necessar--, there's certainly not evidence in the record that that happened.

JUSTICE NATHAN L. HECHT: It seems unusual as an adjustor that you would have a report, you would call somebody to represent the doctor, but not send him the report.

ATTORNEY MICHAEL YANOF: Well, this isn't a part of the record, but I will tell you most typically we're not retained until the lawsuit is filed. We're not retained for claims. We're retained for lawsuits.

JUSTICE NATHAN L. HECHT: But even then, the report would have been passed along.
ATTORNEY MICHAEL YANOF: It may very well have been passed along at some point. That does not constitute service on the party or the party's attorney in accordance with Rule 21a.

JUSTICE NATHAN L. HECHT: Why not? Why not if you get it? It's actual service, actual delivery.

ATTORNEY MICHAEL YANOF: Because it has to be served by the Petitioner, I mean by the plaintiff by one of the methods set forth in Rule 21a. Every court to address it has agreed with that with no exceptions and the fact that it gets into the.

JUSTICE NATHAN L. HECHT: I'm not aware of a situation where actual delivery is not good enough service.

ATTORNEY MICHAEL YANOF: Well, I think one that, it assumes from the record, it assumes something that's not in the record that that happened. It assumes the timing of it happening, that it would have happened after suit was filed even though the report was served on the insurance adjustor pre-suit, which would not be sufficient. So it assumes a lot of things that are simply not in the record.

JUSTICE EVA GUZMAN: When would the period for objections begin to run when the insurance adjustor received it or when he forwarded it on in terms of the objections to the [inaudible] court?

ATTORNEY MICHAEL YANOF: Well, I think that creates kind of the slippery slope of how you decide where the deadline is. Are we going to move the deadline? Is it going to be a moving target? Where would those objections fall? Would it be 21 days from when the counsel received it? What would it fall from? And any of those steps along that slippery slope makes it no longer a hard-and-fast deadline.

JUSTICE PAUL W. GREEN: What happens if a plaintiff sues a doctor, serves the doctor, that patient, and then simply disappears before he gets the report? What happens then?

ATTORNEY MICHAEL YANOF: If he's served with the lawsuit?

JUSTICE PAUL W. GREEN: The doctor's served with the lawsuit, doesn't retain a lawyer, disappears. 120 days runs and there's no way to find him to deliver a [inaudible]

ATTORNEY MICHAEL YANOF: Well under this Court's holding in Gardner, if the 120- day deadline has not run before the deadline for the answer has expired, then this Court has held that the 120-day deadline at that point gets tolled because at that point, the plaintiff can go to the court and get a default judgment and the whole purpose for the expert report requirement is moot at that point because everything has been judicially admitted other than damages.

JUSTICE DON R. WILLETT: What recourse does a plaintiff have if service is impossible within 120? I know you said those aren't your facts, but.

ATTORNEY MICHAEL YANOF: Right.

JUSTICE DON R. WILLETT: Assume that service is impossible within 120 and the trial court refuses to allow notice by publication within 120, what is a plaintiff to do?

ATTORNEY MICHAEL YANOF: Well I think that there can be no due diligence exception with the statute as written. I think there are good reasons to go to the legislature and trigger the 120-day deadline off of the doctor being served or the answer being filed, but that's a creature of the legislature. As written, there is no due diligence exception.

JUSTICE DALE WAINWRIGHT: Now that approach means that defendants can hide for 120 days and you would still say that the deadline rules.

ATTORNEY MICHAEL YANOF: Well, if we truly have a situation like Justice Willett's scenario that it is truly impossible to serve, then you have an open courts violation. Then you do have an open courts violation. If it is an impossible condition as applied to a particular situation, I will readily admit if this Court finds that it was truly judicially impossible to have served the Respondent within 120 days, then there's an open courts violation. I'll acknowledge that.

JUSTICE DALE WAINWRIGHT: Do you believe that defendants can hide for 120 days and intentionally dodge service under the language of this statute and that the courts have to enforce that?

ATTORNEY MICHAEL YANOF: Do I believe they do that or that's permissible?

JUSTICE DALE WAINWRIGHT: No, asking for a candid but maybe hard to answer.

ATTORNEY MICHAEL YANOF: Yeah, I think that's exactly what the Amarillo court of appeals was faced with in Packard v. Miller. I think there was evidence in that record unlike this record, there was evidence in that record that the doctor, in fact, evaded service and the Amarillo court of appeals honestly pointed out in the opinion from Justice Quinn that it was unfair. It was harsh, but the statute required dismissal in that case. The statute seems to contemplate particularly when read with Rule 21a that there are mechanisms to go to the Court and find a different way to serve the defendant if you can't do it by traditional means.

JUSTICE DALE WAINWRIGHT: Counsel, you said before that a motion for substituted service could have been filed after the lawsuit was filed, the petition was filed, substituted service could have been obtained within 120 days. Of course, that depends on the trial court acting timely and setting a hearing and those things. But don't you have to prove post filing due diligence before you can get substituted service? You have to prove you've been unable to serve by the normal means after filing before you can get substituted service? It's hard to do all that in 120 days isn't it?

ATTORNEY MICHAEL YANOF: Well.

JUSTICE DALE WAINWRIGHT: I mean because service of process is a lot different than service under 21a.

ATTORNEY MICHAEL YANOF: If all you're working off of is post-filing diligence and trying to serve, then the petitioners couldn't have gotten it in this case. The petitioners didn't make efforts to serve Respondent after the lawsuit was filed. They made lots of efforts pre-suit, so I disagree that you have to show everything you've done afterwards. If you've exhausted everything you can pre-suit.

JUSTICE DALE WAINWRIGHT: I didn't say that. I said after, and I was a trial judge for nearly four years as well and had lots of these matters come up. From the time a lawsuit is filed and you have service of process different from just getting certified mail, etc., in-- and after a lawsuit in which the parties have been served, but from the time a lawsuit is filed, service of process by personal service with an officer who certifies to all the things that are required, in order to avoid having to meet that requirement, you have to show that that requirement was not able to be met before you can get substituted service by publication. Can you show those things within 120 days in order to get alternative service? That's my question.

ATTORNEY MICHAEL YANOF: Yeah, I think the first motion for substituted service that petitioner filed within approximately 40 days after filing suit, if it had laid out the very things that the supplemental motion laid out, which were all known pre-suit, I don't know a trial judge that would have denied that motion.

JUSTICE DALE WAINWRIGHT: Because the difference between the efforts to serve pre-suit, which would be just mail under Chapter 74, service of process on the lawsuit from the time the lawsuit is filed is a different animal and in order to get alternative service of process, you have to serve, you have to show that service of process, not putting it in the mail under 21a, was not capable, reasonably capable of being obtained.

ATTORNEY MICHAEL YANOF: But in this case.

JUSTICE DALE WAINWRIGHT: So all the pre-suit conduct is not attempts to serve process for the lawsuit, right?

ATTORNEY MICHAEL YANOF: I do agree with that, but in this case where the last hit, the last even remote location of the defendant is years earlier, I think a processor server could have come to that conclusion in about a day. It's not a matter of the doctor who's trying to evade service and he's showing up here and he's hiding in the hospital and he won't accept it and he won't accept the certified mail. Here it is abundantly clear from day one that the whereabouts of this defendant are unknown and will be unknown and a processor server would not have had to do a bunch of work to figure that out. The work had been done pre-suit.

JUSTICE DALE WAINWRIGHT: But you have to attempt through the processor server.

ATTORNEY MICHAEL YANOF: I don't disagree with that, but I think it could have been done in a week. I'm guessing, but it would not have taken very many efforts because the efforts had already been laid out.

JUSTICE PHIL JOHNSON: In this case, you appeared for the doctor when they served by publication. What if a doctor is served by publication and no one appears, how do you serve the report then? Would it be counted as service if you served it with the citation? How do you do that where no one appears for a doctor?

ATTORNEY MICHAEL YANOF: I think there's two things. If the doctor doesn't appear and a default judgment is taken, then this Court's opinion in Gardner would preclude application of barring the claim under Chapter 74. So that's one scenario. The other scenario is Rule 21a has a catch-all that says any other method which the Court may direct. Now, I think clearly any other method which the Court may direct would dovetail in with Rule 109 in substituted service. Any other manner would have to include some type of method like that.

JUSTICE PHIL JOHNSON: Service of the report?

ATTORNEY MICHAEL YANOF: Yes. Yes. And I don't agree that the report was not served by publication. I think it probably was served by publication. I don't think it's abundantly clear in the record, but I don't know that I would disagree if a report was served that way on order of substitution. I think it impliedly was served that way. The statute is harsh, but it is a hard-and-fast deadline intended to be that. There may very well be good reasons for the legislature to consider changing it, but that's up to the legislature. Chief Justice, I've just run out of time. Can I finish briefly?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may.

ATTORNEY MICHAEL YANOF: Thank you. But that is up to the legislature. As Justice Guzman noted in the Makkala opinion, it is a hard-and-fast deadline and it is intended to be that. Any due diligence exception read into this statute will undercut the expressed language of 74.351a. It will write out of the statute Section 74.002a that says notwithstanding any other law and it will undercut this Court's opinion in Badiga and it will reverse every single court of appeals that has addressed this opinion. The statute is constitutional under open courts as every court has held that has addressed it and even under a due diligence exception, which I do not believe applies, even under a due diligence exception, there are three-month delays between filing and getting a proper motion for substituted service on file and there's also a three-month delay between the order of substitution being signed and the citation being issued, which the Petitioner can simply go to the court, could have gone to the courthouse and do. There's nine months of delay total between filing suit and service. That is lack of diligence as a matter of law if the due diligence applies. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

JUSTICE DAVID M. MEDINA: Mr. Talaska, how is this different from the Makkala decision and I'd like for you to address this nine-month delay that's alleged here?

REBUTTAL ARGUMENT OF ROBERT J. TALASKA ON BEHALF OF PETITIONER

ATTORNEY ROBERT TALASKA: If we're talking about the Makkala decision. I'm trying to recall the exact facts of that with how the service was, was that perhaps to an insurance adjustor prior to the lawsuit being filed? I'm drawing a blank.

JUSTICE DAVID M. MEDINA: That's all right. Well talk about the nine-month delay then because from what I read, it looks like there's due diligence and that's going to be contested and [inaudible].

ATTORNEY ROBERT TALASKA: I apologize. The 120 days was even when you ask Counsel what he would have done, looking at the timeline that we have here. The lawsuit is filed. We asked for service. And you are absolutely correct at the trial court level, they're not going to allow service by publication unless you make some diligent effort to serve the defendant.

JUSTICE NATHAN L. HECHT: Which you did in 13 days?

ATTORNEY ROBERT TALASKA: Yes, within the court's record is the return declaration of not found due in diligence search which isn't notarized until July 16. We got that back and we realized that they were not able to serve the defendant so within a week we filed our motion for substituted service at the end of July and playing out any possible scenario that we would like to have here with the judge not ruling on it--whether we had mandamused her at that point? Whether we did a motion? A bigger motion--

JUSTICE HARRIET O'NEILL: Well the argument's been made that it wasn't ruled on because it wasn't a sufficient motion.

ATTORNEY ROBERT TALASKA: I disagree with that. That has never been suggested by the court. They asked for more to it. The motion completely follows the rules for substituted--

JUSTICE HARRIET O'NEILL: But you have to show due diligence. Apparently, the trial court didn't think that had been specified enough in the motion, but let me ask you this. If there were a due diligence requirement, if we were to find a due diligence requirement, is that a question of fact for the jury?

ATTORNEY ROBERT TALASKA: That could be a question of fact.

JUSTICE HARRIET O'NEILL: And wouldn't that subvert the purposes of the Health Care Liability Act in general if every time somebody claims due diligence, we have to try it as a fact matter?

ATTORNEY ROBERT TALASKA: Well, ultimately, the due diligence is a equitable aspect to this whole concept of deadlines that the court can say things can be impossible and in playing out the timeline in this case, from the time that the court did have record that due diligence was attempted in trying to serve it by this Texas licensed process server, it comes back to the court. We immediately filed a motion for substituted service at the end of July and the court says they don't want to rule it so let's assume within three or four weeks--

JUSTICE HARRIET O'NEILL: No, I understand your claiming due diligence, but would we find that as a matter of law there was due diligence here or would that be a question to be submitted to the jury in the case?

ATTORNEY ROBERT TALASKA: I don't want to give you the wrong answer.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why don't you answer in a post submission letter to the Court?

JUSTICE NATHAN L. HECHT: Let me ask you another question.

ATTORNEY ROBERT TALASKA: Yes, sir.

JUSTICE NATHAN L. HECHT: Would it be important if Counsel were retained as soon as the suit was filed and got a copy of the report from the adjustor?

ATTORNEY ROBERT TALASKA: I think that's a really important point you bring up, Your Honor, and that's something. We can't do discovery. In fact, they [inaudible] answer and immediately filed their motion to dismiss. We could not do discovery into this case. We know the insurance adjustor had the report for a year and a half before the case.

JUSTICE NATHAN L. HECHT: Why couldn't you ask them when they got the report? What's? I don't understand why that's not a proper question?

ATTORNEY ROBERT TALASKA: Because with the timing of sending discovery, they filed their answer and their motion to dismiss right away with that.

JUSTICE NATHAN L. HECHT: Tell the judge, I need to know if they got the report. We can't dismiss it if they got the report within 120 days.

ATTORNEY ROBERT TALASKA: Well, being in their file, I don't know if that would be attorney work product [inaudible].
JUSTICE NATHAN L. HECHT: Well not when you were served with the other side's report. I wouldn't think.

ATTORNEY ROBERT TALASKA: Okay. I think that shouldn't because they may have had it the whole time because they did as they pointed out in their thing prior to the filing of this lawsuit in the Rule 202, they filed, I'm not saying that they were representing Dr. Offenbach, but filed a vacation letter prior to when we even filed this. So they were aware of this case and they were aware of it so whether or not they had it--

JUSTICE NATHAN L. HECHT: Why should we worry about constitutional violation and engrafting a due diligence exception or whatever you call it to the statute if they were served all along and we just don't know it?

ATTORNEY ROBERT TALASKA: Because there's no official showing. They're not the attorney of record until they are, until the defendant is served and they make an appearance.

JUSTICE NATHAN L. HECHT: It doesn't say attorney of record. It says "the attorney."

ATTORNEY ROBERT TALASKA: And see that, we thought of that. What if we served the report on the defense lawyer and then they come to court with an answer and say well I'm not his lawyer, it's Joe Miller who's going to be representing him. You didn't serve it on his lawyer. I thought: should we serve it on every defense lawyer in Dallas County? There's impossibility. But the point ultimately is which I think Judge Wainwright pointed out is when you do use due diligence to try to serve a defendant, come back to the Court and ask for motion for substituted service and if there's any delay at all by the court in either not signing the motion or if we have to mandamus them, then we get them in playing out this timeline, end of July, figure we get by September 1 a motion for substituted service granted. That then still takes 42 days of publication before the answer is due. It's well beyond the 120 days. So even taking every step to get the motion for substituted service in place, the citation in place, to get it published and to get an answer so we could receive the report, it was impossible under any way you slice this up, with any steps we could have taken and that's why it's an open courts provision violation. This child cannot get his day in court and what's egregious, of course, from the public policy aspect of it is I am concerned that doctors can avoid service, can avoid the entire repercussions of the lawsuit by avoiding service and that's what potentially an opinion authorizing or approving of this and the fact that this is a doctor who's lost his license for drug abuse, has a long 20-year history. It's all in the records. We could not find him and I understand and appreciate the question why didn't we wait to file the case, but the trial was cold. We needed to invoke the power of the court to get him into the lawsuit by serving him by publication and because we weren't able to do that, this boy, we could not look under every bridge and every abandoned house to find him. We wanted to serve him by publication, get him the report and go on with the lawsuit.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Justice Willett.

JUSTICE DON R. WILLETT: Has he showed up at all? Did the doctor reappear?

ATTORNEY ROBERT TALASKA: I have no knowledge that he has appeared.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further question? Justice Wainwright?

JUSTICE DALE WAINWRIGHT: Thank you, Chief. Did you ever think years ago that with the simple language that claimant shall file the expert report not later than 120 days that there would be all these issues and questions and uncertainty in what seems to be pretty clear language in the statute?

ATTORNEY ROBERT TALASKA: But as you know, sometimes statutes can be unconstitutional when applied to an individual situation as applied and they can also not take into consideration all of the power that the court has to make it equitable and yes, I'm very aware. All I do is medical negligence cases [inaudible] try to be diligent [inaudible] can within the rules and I think we did in this case and it was impossible to get this report into the defendant's hands or his attorney of record within the 120 days [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Talaska. The cause is submitted and the Court will take another brief recess.

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