

## Special Thanks to Contributing Editors

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*"We combine our  
extensive legal  
experience with practical  
advice and counsel on a  
wide range of issues."*

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## NEW DEVELOPMENTS IN THE LAW

### *Medical Malpractice Plaintiffs May Get a Second Bite at the Apple After Undergoing a Lengthy Appeal*

*Leland v. Brandal*, 257 S.W.3d 204 (Tex. 2007).

In a case that significantly impacts tort reform, the Texas Supreme Court decided that plaintiffs are allowed the 30-day extension of time provided in Chapter 74 at the appellate level. Under the ruling in *Leland*, plaintiffs whose expert reports are found lacking for the first time on appeal may receive a 30-day extension of time to cure defects. In essence, *Leland* permits a medical malpractice plaintiff another chance or "second bite at the apple" after undergoing a lengthy appeal.

Turning to the facts of *Leland*, in preparation for an oral surgery, Dr. John Leland advised Mr. George Brandal to stop taking his anticoagulant medication. Brandal suffered a stroke shortly after the procedure and was paralyzed. He and his wife sued Dr. Leland and alleged that the stroke was caused by following his dentist's order to stop taking his medicine.

Chapter 74.351(a) of the Texas Civil Practice and Remedies Code requires plaintiffs to file an expert report that meets a list of requirements within 120 days of filing suit. If a report is insufficient, the trial court has discretion to grant one 30-day extension to file a sufficient report. The Brandals served Dr. Leland with expert reports within 120 days of filing suit in accordance with §74.351(a). Dr. Leland objected to the reports, but the trial court determined that the reports were timely and sufficient.

Subsequently, Dr. Leland filed an interlocutory appeal to challenge the sufficiency of the reports. The appellate court held that one of the expert reports did not meet all of the statutory requirements. The court of

appeals remanded the case to the trial court so that it could grant the Brandals 30-days to cure the reports.

Dr. Leland appealed to the Texas Supreme Court and argued that the reports, now supplemented well over 120 days from the date the Brandals filed suit, were not timely and that the statute did not authorize a 30-day extension to cure the reports when an appellate court found them deficient. Dr. Leland argues that if the report had been found deficient by the trial court, the trial court would have clearly had discretion to grant the Brandals one 30-day extension to supplement the report. But, Dr. Leland argued, the Brandals should not be entitled to a 30-day extension of time to cure the reports because the appellate court, as opposed to the trial, found the reports deficient. The Supreme Court disagreed and held that if an appellate court determines that the expert report is deficient and remands the case to the trial court, the trial court still has discretion to grant the plaintiff one 30-day extension to cure the report.

Justice Brister, who authored the dissent, argued that the effect of majority opinion will impermissibly extend the time that health care cases could exist in the court system in contradiction to statute's legislative intent. Nevertheless, under *Leland*, the trial court may grant a 30-day extension to a plaintiff to allow him to cure his expert report after an appellate court determines that the report is deficient. Consequently, a plaintiff may have more than one chance to comply with the statute even after losing on appeal.

*When are “Bad Result” Jury Instructions Required to be given in a Health Care Liability Claim?*

*Austin Periodontal Associates, Inc. v. Husak*, No. 03-07-00125-CV, 2008 Tex. App. LEXIS 562 (Tex. App.—Austin, Jan. 25, 2008, no pet ).



*“We believe that our clients are best served by the combined resources of the entire firm.”*

As a result of recent changes in tort law, there are two different categories of medical malpractice cases. If a case was filed before September 1, 2003, it must conform to the confines of article 4590i of the Medical Liability and Insurance Improvement Act (“MLIIA”). If a lawsuit was filed after September 1, 2003, it is subject to the confines of Chapter 74 of the Texas Civil Practice and Remedy Code.

In *Husak*, a recent dental malpractice case, Husak filed the lawsuit before September 1, 2003, and consequently, the MLIIA applied. Husak sued her dentist, Dr. Dolce, and the Austin Periodontal Associates, Inc. for injuries she received that were allegedly caused by Dr. Dolce’s negligence. Dr. Dolce caused harm to her lingual nerve while performing surgery to remove her wisdom teeth. Additionally, during the surgery, a piece of an instrument broke off in Husak’s mouth, and Dr. Dolce did not inform her that he was unable to recover the missing piece. Husak alleged that Dr. Dolce caused her harm, and she underwent subsequent surgeries to attempt to repair the damage.

A jury found for Husak and awarded her damages. Austin Periodontal Associates, Inc. appealed the verdict and argued that the trial court erred by denying its request for a jury instruction. Specifically, it asked for a “bad result” instruction. The MLIIA provided that,

“In a jury trial involving a health care liability claim against a *physician or hospital* for injury to or death of a patient in which the

court determines that the following instruction is reasonably applicable to the facts, the court shall provide the following instruction in the court’s charge to the jury:

A finding of negligence may not be based solely on evidence of bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judge of the weight, if any, to be given such evidence.”

Under the MLIIA, the requested jury instruction is only available in a “health care liability claim against a physician or hospital.” Dr. Dolce did not present evidence at trial that he was a “physician” as defined by the applicable statute. Austin Periodontal Associates, Inc. also failed to present evidence that it was a “hospital,” and consequently, it was not entitled to the “bad result” instruction. After reviewing the evidence, the appellate court affirmed the trial court’s decision in favor of Husak.

Would there have been a different outcome in a case filed after September 1, 2003? Section 74.303(e) of the Texas Civil Practice and Remedies Code now requires the trial judge to give a “bad result” instruction in “any action on a health care liability claim that is tried by a jury.” This language is broader than the language of the MLIIA, which only required the instruction in cases against a “physician” or “hospital.” Accordingly, the “bad result” instruction will likely be included in more jury charges in the future.





Aimal Wardak researches a client's legal issues.

*A Leap-Year Decision Reaffirms Lamar Homes.*

*Grimes Constr. Inc. v. Great Am. Lloyds Ins. Co.*, 248 S.W.3d 171 (Tex. 2008).

The Fall 2007 edition of The RMJE Quarterly discussed the case *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 1007). In *Lamar Homes*, the Texas Supreme Court addressed a situation where an insurance company had issued a CGL policy to a homebuilder. The individuals for whom the builder constructed a home alleged that the insured builder's defective workmanship caused physical damage to the home.

In *Grimes*, a recent opinion with similar issues, the trial court found that the CGL policy did not provide coverage for the homebuilder when the property damage claims were caused by its own work. The court of appeals affirmed the trial court's decision. The appellate court reasoned that defective work was outside the scope of the CGL policy and was a contract claim.

The Texas Supreme Court, however, remanded the case to the trial court. Relying on *Lamar Homes*, the Texas Supreme Court reasoned that courts should look at the language of the CGL policy when determining the duty to defend and not focus on whether the parties categorized their claims as tort or contract actions. The Court held that "allegations of unintended construction defects might constitute an 'accident' or 'occurrence' under the CGL policy, and allegations of damage to or loss of use of the home itself might also constitute 'property damage'" so that the duty to defend would arise. The trial court will now consider the case again in light of *Lamar Homes*.

If you would like to review the *Lamar Homes* decision, please visit our website at [www.rmjelaw.com](http://www.rmjelaw.com). A brief discussion of the case is included in the Fall 2007 edition of the RMJE Newsletter.

Please visit our website at:

[www.rmjelaw.com](http://www.rmjelaw.com)



Leap Year Facts:

A leap year occurs when a year contains an extra day. February usually has only 28 days, however, every four years the calendar will have a 29th day. The purpose of having a Leap Year is to keep the calendar coordinated with the astronomical year. Because there are few Leap Years, *Grimes Construction Inc.* is one of the few Texas Supreme Court decisions released on February 29th and is unique.

Information from [http://en.wikipedia.org/w/index.php?title=Leap\\_year&oldid=213103261](http://en.wikipedia.org/w/index.php?title=Leap_year&oldid=213103261) (last visited November 3, 2008).

*Insurers May Employ Their Staff Counsel to Represent their Insureds under Limited Circumstances*

*Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24 (Tex. 2008).

The Texas Supreme Court recently held that in limited situations, insurers may employ their staff attorneys to represent their insureds. Generally, an insurer may only use its staff attorneys to represent its own interests. If an insurer uses its staff attorneys to represent an interest other than its own, it may engage in the unauthorized practice of law. To avoid engaging in the unauthorized practice of law, many insurers employ outside attorneys to defend their insureds against claims. After this recent decision, however, an insurer that does not have conflicting interests with an insured may utilize its staff attorneys to defend claims against that insured.

When an insurer decides to use a staff attorney to represent its insured, the insurer must make sure that it does not have interests that are in conflict with the interest of its insured. The Supreme Court discussed three factors that should be used to determine whether an insurer is impermissibly engaging in the practice of law when it employs a staff attorney to represent its insured. The first factor is “whether the company’s interest being served by the rendition of legal services is existing or only prospective.” The second factor is “whether the company has a direct, substantial financial interest in the matter for which it provides legal services.” The third factor is “whether the company’s interest is aligned with that of the person to whom the company is providing legal services.” The

Texas Supreme Court stated that the last factor is the most important.

In its opinion, the Texas Supreme Court discussed common issues that will often provide a conflict between an insurer and its insured. For example, a dispute regarding policy limits and coverage would likely be a conflict. Additionally, a conflict of interest could arise if a staff attorney learned confidential information from the insured that would reveal that coverage did not exist, or that the insurer should cancel the policy. Also, the attorney’s professional judgment could be compromised because he is an employee of the insurance company. Accordingly, if an insurer decides that using a staff attorney is appropriate, the attorney must make sure that the insured is aware of potential conflicts and verify that the insured knows that the attorney is employed by the insurance company.

If an insurance company decides to use staff attorneys to represent its insured instead of an outside law firm, they may unintentionally engage in the unauthorized practice of law. Insurers must carefully decide whether they have a conflict of interest with their insured and require that the staff attorney inform the insured that he is an employee of the insurance company. While this decision may be complicated, there are many situations where a staff attorney can defend an insured without engaging in the unauthorized practice of law.



Hope you had a happy Halloween!



RMJE celebrates Halloween.



## Attorney Spotlight: Jack Jackson

*In this section of the newsletter, we would like you to get to know the attorneys who are working hard for you every day.*

In this edition, we would like you to get to know Jack Jackson, one of the named partners at RMJE. Jack was born and raised in Houston, Texas. In fact, Jack is a fourth generation Houstonian. After completing grade school locally, he left Houston to attend the University of Texas in Austin. In 1991, he graduated from the University of Texas with a Bachelor's Degree in Business Administration.

Shortly after graduating from college, Jack returned to Houston to pursue his law degree. He graduated from South Texas College of Law in 1994 as a member of the Order of the Lytae. Since joining RMJE, he has been an integral member of the firm.

Not only is Jack a talented attorney, he is also a dedicated family man. He and his wife, Leslie, enjoy spending time with their two children, Kate and Thomas. Jack will be coaching Thomas' basketball team this season. Leslie also spends time volunteering in the community through the Junior League.



One of the Jackson family's favorite activities is watching baseball games together. Jack is also an avid Texas Longhorns football fan.



Michelle Price has been Jack's legal assistant since 1998.

## Office Updates

This past summer, RMJE welcomed several new law clerks. Summer clerkships provide law students an invaluable chance to roll up their sleeves and get "hands-on" experience. Our law clerks are able to apply the knowledge they gain during the school year to real legal situations.

Daniel J. Werlinger was an RMJE law clerk during the first half of the summer. He currently attends South Texas College of Law in Houston. Prior to attending law school, Daniel graduated

from Texas A & M University with a Bachelor of Science degree in Political Science.

RMJE also welcomed Barrett R. Salmon. Barrett was a law clerk at RMJE during the second half of the summer. He currently attends the University of Houston Law Center. Barrett graduated from the University of Texas and received a Bachelor of Arts in History. We wish both law clerks the best during this next school year. If you would like more information on our summer program feel free to contact us.

### New Website

See us at:

[www.rmjelaw.com](http://www.rmjelaw.com)



## RMJE's DISCO INFERNO

RMJE celebrated the summer with a 70's themed party. During the day, the attorneys, the staff and their family members enjoyed playing in the pool and bouncing on the moonwalk. As night fell everyone grooved to the music, played casino games and enjoyed fondue and other treats.

At the end of the night, employees and their family members who participated in the casino games won great prizes. We enjoyed the summer and are looking forward to the holiday season.



Child Compton is RMJE's newest employee.



Mike plays casino games and hopes to win big.



Stephen, Eugene, Aimal and Josh share laughs at the Summer Party.

## RMJE's Newest Editions

In this edition of the RMJE Quarterly, we are proud to announce the firm's newest member, and to announce ones that will be joining us soon!

On June 17, 2008, Leah Clemons, assistant to Clint Echols, gave birth to a handsome baby boy named Jackson Christopher Clemons. This is the first child for Leah and Doug Clemons and they anticipate he will be the next "Hunter Pence." The newborn weighed 6 lbs 12 oz. and was 21½ inches long. Jackson amazes his parents with his adorable smile and the fun noises he makes when he is excited. Most impressive, however, is that Jackson began to sleep through the entire night at the young age of six weeks.

Debra Mayfield and her husband, Eric, are looking forward to a new family member. Debra, an RMJE shareholder, is expecting a baby boy in March. The couple's two-year old daughter, Catherine, is excited to become a big sister.

Aimal Wardak and his wife, Maheen, are excited to announce that they are expecting their first child next May. Aimal has been with RMJE since 2006, and Maheen is currently a resident anesthesiologist.

RMJE congratulates all of the proud parents and parents-to-be.

*If you have any questions or comments about the issues discussed in this newsletter please feel free to contact us at 713-626-1550.*