

CAUSE NO. CL-123878-D

Rafael Deleon And Vanessa Deleon, Individually	§	IN THE COUNTY COURT
And As Parents And Next Of Friend Of	§	
E.D., A Minor Child	§	
	§	
vs.	§	AT LAW NO.4
	§	
Jennier J. Garza, M.D.,	§	
Jennifer J. Garza, M.D., P.A.	§	HIDALGO COUNTY, TEXAS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jennifer J. Garza, M.D., and Jennifer Garza, M.D., P.A., Defendants, and after discovery is completed, files this their Motion for Summary Judgment and respectfully show the Court as follows:

**1.
Executive Summary**

This case involves a medical negligence claim governed by Chapter 74 of the Texas Civil Practices and Remedies Code. Plaintiffs claim Dr. Jennifer Garza committed medical malpractice. This case has been on file for over four years and is set for trial on May 8, 2017. Plaintiffs' deadline to designate expert witnesses was January 13, 2017. Plaintiffs' designated Dr. James Mouldsdale as their expert. Dr. Mouldsdale surrendered his medical license on July 28, 2016 and is not allowed to practice medicine. Plaintiffs do not have another designated expert on standard of care or causation. The requirements of Ch. 74 TXCPRC require dismissal of this case.

**2.
Judicial Notice Under TRE 201, 202**

Defendant's request that the Court to take Judicial Notice of the following matters:

- A. Dr. Mouldsdale CV filed with Court by Plaintiffs on January 8, 2017.

B. James Mouldsdale's July 25, 2016 letter resigning from the practice of medicine
<http://mbp.state.md.us/bpqapp/Orders/D1362907.286.PDF>.

3.

Bases for Summary Judgment

A. Plaintiffs' Expert

On January 8, 2017, Plaintiffs filed Plaintiffs' Disclosure of Expert Witness in which they designated James Mouldsdale, M.D., as their sole retained testifying expert and produced his CV and expert report. Plaintiffs deadline to designate experts and produce written reports from retained experts on or before January 13, 2017. Trial is set May 8, 2017.

B. Plaintiffs' Expert Does Not Practice Medicine

Plaintiffs' expert Dr. Mouldsdale's curriculum vitae filed with the Court in their expert designation shows on page 2 that he maintained a medical license only in the State of Maryland. Disciplinary action was initiated against Dr. Mouldsdale by the Maryland State Board of Physicians for unprofessional conduct in the practice of medicine and failure to meet appropriate standards for the delivery of quality medical care. Dr. Mouldsdale voluntarily surrendered his license in lieu of further prosecution. Dr. Mouldsdale admitted that he performed inappropriate pelvic and rectal examinations on multiple female patients in a manner that compromised the patient's dignity and made them feel uncomfortable. He did not have adequate clinical rationale, explanation or consent for these patients and he performed pelvic and rectal examinations of female patients who presented with kidney stones and other urologic symptoms or conditions that are outside of his specialty practice.

James Mouldsdale, surrendered his license to practice medicine in the State of Maryland on July 28, 2016. See letter dated July 25, 2016, from James E. Mouldsdale, M.D.

<http://mbp.state.md.us/bpqapp/Orders/D1362907.286.PDF> which is available in public records and susceptible to judicial notice under TRE 201 and 202.

C. Missing Evidence

Defendants are entitled to summary judgment against Plaintiffs as a matter of law because there is no credible medical evidence on the following elements of their medical negligence claims:

(i) Applicable standard of medical care or Defendant's violation of that standard.

There is no credible medical evidence that an inappropriate amount of foreskin was removed, whether electrocautery, metal clamps or other devices were appropriately used and appropriate measures required to address complications and control bleeding. There is no credible medical evidence that Defendants breached the standards of care, and how and in what manner did Defendants breach these standards of care.

(ii) How or in what manner any of Defendants' alleged breaches of the standard of care proximately caused injuries.

There is no medical evidence that claims of improper removal of foreskin, cauterizing, development of fistulas, crushing, the need for future surgeries, risk of urethral strictures and causing pain and physical impairment were caused by alleged breaches of the standards of care and these causes were the "but for" cause of any of the alleged injuries, and that based on a reasonable degree of medical probability without which the alleged injuries would not have occurred. There is no credible medical evidence establishing that the foregoing alleged injuries were reasonably foreseeable in connection with any of the alleged improper acts or omissions by Defendants.

Plaintiffs have had over 4 years to prepare their case. The time for obtaining expert medical testimony upon which to found their case has passed and Plaintiffs have not designated a testifying expert. Dr. Mouldale is not a physician within the meaning of chapter 74 and is not a qualified expert. His opinions are not reliable as a matter of law as he no longer holds a medical license as required by TEX. CIV. PRAC. & REM. CODE ANN. § 74.401(a), (g)(1). Consequently, there is no competent, credible medical evidence on the foregoing vital elements of Plaintiffs' claims for medical negligence and causation against Defendants. Defendants are entitled to judgment against Plaintiffs on all claims as a matter of law.

4. Plaintiffs' Legal Requirements

A. Medical Malpractice Claims

The essential elements of a medical negligence claim are: (1) the physician or health care provider had a duty to act according to a certain standard of medical care; (2) the physician or health care provider breached the applicable standard of care; (3) there was injury or harm to the plaintiff; and (4) there was a causal connection between the breach of the applicable standard of care and the injury or harm. *Sage v. Howard*, 465 S.W.3d 398, 403 (Tex. App.—El Paso 2015, no pet.); *Moreno v. Quintana*, 324 S.W.3d 124, 129 (Tex. App.—El Paso 2010, pet. denied); *Brandt v. Suber*, 194 S.W.3d 108, 115 (Tex. App.—Corpus Christi 2006, pet. denied). Proximate cause has two components: (1) cause-in-fact and (2) foreseeability. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013); *Columbia Medical Center of Las Colinas v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008). Cause-in-fact requires a showing that the negligent act or omission was a substantial factor in bringing about the harm, and absent the act or omission the harm would not have occurred. *Park Place Hosp.*, 909 S.W.2d at 511.

Expert testimony is required when an issue involves matters beyond jurors' common understanding. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006) (citations omitted). A plaintiff is required to present legally sufficient evidence to establish that in a reasonable degree of medical probability the physician's negligence caused the injuries complained of. *Jelinek v. Casas*, 328 S.W.3d 526, 533 (Tex. 2010). Furthermore, to establish causation in a medical negligence case, the plaintiff must prove by a reasonable medical probability or reasonable probability that the injuries were proximately caused by the defendant's negligence. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 699, 709 (Tex. 1995).

Meeting the evidentiary standard of a reasonable medical probability in a medical negligence case requires expert medical testimony. Expert medical testimony is required to prove negligence in medical negligence cases unless the form or mode of treatment at issue is a matter of common knowledge or experience of laypeople. *See Guevera v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007); *see also Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977)(holding expert medical testimony required in medical negligence case on issue of negligence).

Nothing about the form or mode of treatment involved in this case is a matter within the common knowledge or experience of laypeople. A plaintiff must prove by expert medical testimony from a doctor of the same school of practice as the defendant that the diagnosis or treatment involved was negligence and that negligence was a proximate cause of the plaintiff's injuries. *Williams v. Bennett*, 610 S.W.2d 144, 146 (Tex. 1980); *see also Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779, 782 (1949)(It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or recognized treatment, unless he proves by a doctor of the same school of practice as the defendant that the diagnosis or treatment complained of was such as to constitute negligence and it was a proximate cause of the patient's

injuries. Expert testimony is required to establish the governing standard of care and whether that standard was breached. *Ocomen v. Rubio*, 24 S.W.3d 461, 466 (Tex. App.—Houston [1st Dist.] no pet.); *McCombs v. Children's Med. Ctr. Of Dallas*, 1 S.W.3d 256, 259 (Tex. App.—Texarkana 1999, pet. denied). Proximate cause must be based on expert medical testimony. *Jelinek*, 328 S.W.3d at 533-34; *see also Hart v. Van Zandt*, 339 S.W.2d 791, 792 (Tex. 1986)(In determining negligence in a case such as this, which concerns the highly specialized art of treating disease, the Court and jury must be dependent on expert testimony. There can be no other guide and where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury).

B. No-Evidence Summary Judgment

A no-evidence summary judgment motion operates as a pre-trial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). Texas Rule of Civil Procedure 166a(i) authorizes a party to file such a motion on any elements of a claim or defense on which the opponent bears the burden at trial, stating specifically the elements on which no evidence exists. TEX. R. CIV. P. 166a(i). A Court must grant the motion unless the non-movant produces competent summary judgment evidence raising a genuine issues of material fact on each challenged element. *Id.* Once a motion is filed, the burden shifts to the non-movant to raise a material fact on the challenged elements. A no-evidence summary judgment motion will be sustained when there is a complete lack of evidence of a vital fact, or the Court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, or the evidence offered to prove a vital fact is no more than a mere scintilla, or the evidence conclusively proves the opposite of the vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

TRCP 166a(i) authorizes a no-evidence summary judgment motion after adequate time for discovery. In determining whether adequate time for discovery has elapsed, courts consider factors such as: (a) the nature of the cause of action; (b) the nature of the evidence necessary to controvert the motion; (c) the length of time the case has been active; (d) the amount of time the motion has been on file; (e) whether the movant requested stricter discovery deadlines; (f) the amount of discovery that has already taken place; and (g) whether the discovery deadlines in place are specific or vague. *Neurodiagnostic Tex., L.L.C. v. Pierce*, 506 S.W.3d 153, (Tex. App.—Tyler Oct. 31, 2016, n.p.h.). Typically, the time allotted in a docket control order is a strong indication of an adequate amount of time. *TEX. R. CIV. P 166a(i) cmt.; McInnis v. Mallia*, 261 S.W.3d 197, 200 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

This case has been on file for over four years and the expert witness-disclosure deadline has already passed under the Level Three Scheduling Order. All the pertinent discovery deadlines in this case have passed. The case is set for trial on May 8, 2017. This case is ripe for determination, and this motion is timely.

5.

Professional Association Defendant

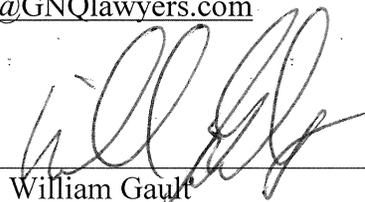
Plaintiffs have no evidence that Jennifer Garza, M.D. was acting by and through her legal entity Jennifer Garza, M.D., P.A. Her Professional Association was not involved in any way. Defendants move for Summary Judgment as to Defendant Jennifer Garza, M.D., P.A. In fact, this claim is specifically denied in pleadings.

WHEREFORE, Defendants Jennifer J. Garza, M.D., and Jennifer Garza, M.D., P.A., pray that, after a hearing on this motion, Defendants' Motion for Summary Judgment be granted in all things and that Defendants have a take nothing judgment against Plaintiffs and for such other and further relief at law or in equity to which they may show themselves justly entitled.

Respectfully submitted,

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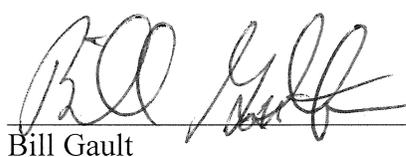
Attorney for Defendants Jennifer J. Garza, M.D.
and Jennifer J. Garza, M.D., P.A.

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing instrument has been forwarded to counsel as indicated below on this the 27th day of March, 2017.

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Bill Gault