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August 24, 1987

CERTIFIED MAIL - RRR

Ms. Daisy Wanda Garcia
1901 Exposition Blvd.
Austin, Texas 78703

Re: Evaluation of Possible Medical Malpractice Case
Daisy Wanda Garcia

Dear Ms. Garcia:

Based upon our evaluation of the information available to us, we have decided to decline your request for representation.

To prevail on a medical negligence claim, the injured party must prove each of the following points by a preponderance of the evidence:

1) that the medical care provider's care fell below a recognized standard of ordinary care;

2) that it should have been foreseeable to a reasonable medical care provider that the alleged negligent conduct could result in injury to the patient; and

3) that in the instance in question the patient sustained injuries and damages which, in reasonable medical probability, would not have been sustained, but for the negligence of the Defendant.

Being able to successfully and persuasively prove all the above points is virtually always an extremely difficult and expensive burden for a malpractice victim to sustain. As a practical matter, both the liability and damage evidence must be compelling for the lawsuit to be successful.

We have examined the information regarding your claim, applying the above analysis. Our evaluation leads us to believe that it would be extremely unlikely that we could sustain our burden relative to proving that the conduct in question was a proximate cause of the injuries. It is our opinion that, in light of these circumstances, it would be unlikely that we could obtain a mutually satisfactory result, particularly given the great time and expense that would be probably required to litigate the case.

You should not infer from our decision that you do not have a meritorious claim. We are making no representation in this regard. A letter is being sent to your attorney, notifying him of our decision. Please contact him regarding whatever actions you decide to take.

Whatever future course you choose to follow in this matter, we strongly urge you to promptly seek a second legal opinion. Please keep in mind that the MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT OF TEXAS, Art. 4590i, §10.01 (1977) as presently interpreted, requires that a suit for medical malpractice be filed within two (2) years of the date of the alleged malpractice or last date of treatment, or hospitalization for the alleged injury. The courts may, however, toll the limitations period under certain instances, such as when a notice letter is served on a medical care provider, pursuant to the above statute (75-day tolling period); or for a minor [until their eighteenth (18th) birthday] who has sustained damages; or for the amount of time it reasonably takes to discover that an act of malpractice has occurred (only available in a very few instances). The whole area of limitation periods and notice requirements relating to suits for medical malpractice is complex and is undergoing constant review and change. As a courtesy, are enclosing copies of several applicable statutes for your information.

We thank you for allowing us to review this matter for you. If we may be of any assistance to you in another matter in the future, please call us.

Best regards.

Very truly yours,

Frank L. Branson

FLB/ic

Enclosures

cc: David L. Perry, Esq.
2300 Texas Commerce Plaza
P.O. Drawer 1500
Corpus Christi, Texas 78403

ARTICLE 4590i

TEXAS REVISED CIVIL STATUTES

TEXAS MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT

SUBCHAPTER A. - GENERAL PROVISIONS

SECTION 1.03(a):

(3) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

SUBCHAPTER D. - NOTICE

SECTION 4.01:

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

(c) Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

SUBCHAPTER J. - STATUTE OF LIMITATIONS

SECTION 10.01:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

(Note: This statute has been held unconstitutional as it relates to the claims of minors, but not as to parents' claims for injuries to their minor children. Under common law the two year statute of limitations does not begin to run until the child's eighteenth (18th) birthday.)

ARTICLE 5538

TEXAS REVISED CIVIL STATUTES

In case of the death of any person against whom or in whose favor there may be a cause of action, the law limitations shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate, in which case the law of limitation shall only cease to run until such qualification.

(Note: This statute has recently been held to be applicable to a survival action arising from medical negligence. This statute does not, however, apply to a wrongful death case.)

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NOTICE PROVISIONS REGARDING CLAIMS AGAINST CITY, COUNTY AND/OR STATE-OWNED HOSPITALS, CLINICS AND THEIR EMPLOYEES AND OTHER HEALTH CARE PROVIDERS OWNED AND/OR OPERATED BY STATE, COUNTY, CITY OR OTHER NON-FEDERAL GOVERNMENT UNITS.

ARTICLE 6252-19

(Selected Provision)

Texas Tort Claims Act

SECTION 16

NOTICE OF DEATH OR INJURY: Except where there is actual notice on the part of the governmental unit that death has occurred or that the claimant has received some injury, any person making a claim hereunder shall give notice of the same to the governmental unit against which such claim is made, reasonably describing the damage or injury claimed and the time, manner and place of the incident from which it arose, within six months from the date of the incident. Provided, however, except where there is such actual notice, charter and ordinance provisions of cities requiring notice within a charter period permitted by law are hereby expressly ratified and approved.