CAUSE NO. 331.088-401

THE ESTATE OF JEREMY RATCLIFFE, WENDY RATCLIFFE, Individually, and HAROLD RATCLIFFE, Individually	§	IN THE COUNTY PROBATE
vs.	§	COURT NUMBER ONE
MERCY HOSPITAL SYSTEMS, INC., D/B/A MERCY CITY HOSPITAL	§	OF LARAMIE COUNTY, TEXAS

PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS AND FOR ATTORNEY'S FEES AND COST FILED BY DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW THE ESTATE OF JEREMY RATCLIFFE, WENDY RATCLIFFE, Individually, and HAROLD RATCLIFFE, Individually, Plaintiffs herein (collectively "Plaintiffs"), who make and file this, their Response to the Motion to Dismiss and for Attorney's Fees and Cost ("Motion") filed by MERCY HOSPITAL SYSTEMS, INC., D/B/A MERCY CITY HOSPITAL ("Defendant"), and in support whereof would respectfully show unto the Honorable Court as follows:

I.
Procedural Background and Statement of Facts

The instant suit arises out of Defendant's treatment of Jeremy Ratcliffe ("Mr. Ratcliffe") for an illness. Mr. Ratcliffe was admitted to Defendant facility on April 1, 2000. He was treated for pneumonia and kept in the intensive care unit until April 3, 2000 when he was transferred to the skilled nursing unit. The hospital personnel caring for Ratcliffe in the skilled nursing unit failed to follow the attending physician's orders

for nebulizer treatments and suction and failed to timely and adequately care for Ratcliffe hastening and contributing to his death on April 4, 2000.

Plaintiffs filed this medical malpractice lawsuit against Defendant on June 4, 2002. Because this suit is governed by the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann., art. 4590i ("MLIIA"), Plaintiffs provided Defendant with an expert report ("Report") dated June 3, 2002 prepared by Carla M. Webb, RN, MN, CNOR, CNS ("Webb"), along with the resume of Webb. True and correct copies of the Report prepared by Webb and Webb's resume are attached hereto as Exhibits "A" and "B" respectively, and are incorporated herein by reference as if set forth at length.

Defendant filed the instant Motion, asking the Honorable Court to dismiss Plaintiffs' suit against it on the grounds that the Report fails to provide sufficient causation testimony and therefore does not meet the requirements of the MLIIA. Defendant seeks dismissal of Plaintiffs' claims with prejudice and an order requiring Plaintiffs to pay the reasonable attorney's fees and costs of Defendant. Plaintiffs hereby respond to the Motion.

II.
Arguments and Authorities

The central issue presented is whether the Report prepared by Web constitutes a good faith attempt to comply with the expert report provisions of the MLIIA. If Webb's Report constitutes a good faith effort to comply with the terms of the MLIIA, and contains all of the elements such a report requires, it is inappropriate for the Honorable

Court to dismiss Plaintiffs' claims against the Defendant. As will be set forth in detail below, Webb was qualified to offer testimony regarding medical causation and Webb's Report was a good faith attempt to comply with the MLIIA. Therefore dismissal of Plaintiffs' claims against the Defendant is not warranted.

A. Sufficiency of the Report Generally

The MLIIA requires a plaintiff asserting a health care liability claim to file either a bond or an expert report regarding each health care provider that has been sued. MLIIA, § 13.01(a). These reports must then be furnished to the counsel for each defendant, along with the curriculum vitae of the expert making the report, within 180 days of the plaintiff's suit being filed, or else that defendant must be nonsuited. MLIIA, § 13.01(d). After an expert report has been filed, the defendant may still challenge the "adequacy" of the report, and if the defendant convinces the trial court that the report does not constitute a "good faith effort to comply with the definition of an expert report" found in the MLIIA, the plaintiff's suit is subject to dismissal. MLIIA, § 13.01(l). It is pursuant to this provision of the MLIIA that the Defendant ask the Honorable Court to dismiss Plaintiffs' claims.

As the Supreme Court has recently stated, an expert's report is sufficient under the MLIIA if it represents:

> "a good-faith effort to provide a fair summary of the expert's opinions. A report need not marshal all of the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute. In setting out the expert's opinions on each of these elements, the report must provide

> enough information to fulfill two purposes if it is to constitute a good-faith effort. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit."

American Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 878-79 (Tex. 2001); *see also Whitworth v. Blumenthal*, 59 S.W.3d 393, 396 (Tex. App.—Dallas 2001, pet. dism'd) (en banc); *Wood v. Tice*, 988 S.W.2d 829, 831 (Tex. App.—San Antonio 1999, pet. denied).

As set forth in *Palacios*, an expert's report is a good faith effort to comply with the MLIIA if it addressed the three things an expert's report is required to address: (1) the applicable standard of care; (2) the manner in which the care provided failed to meet this standard; and (3) the causal relationship between the failure and the injury. MLIIA, § 13.01(r)(6); *Strom v. Memorial Hermann Hosp. System*, 2003 WL 21233555 at *3 (Tex. App.—Houston [1st Dist.] May 29, 2003, n.p.h.). However, the MLIIA does not require the expert's report to present the same measure of evidence as if it were actually litigating on the merits. *Palacios*, 46 S.W.3d at 879; *Strom*, 2003 WL 21233555 at *3. Instead, in determining whether a given report represents a good faith effort to comply with the MLIIA, the question is whether the report is a "fair summary" of the plaintiff's claim. MLIIA, § 13.01(r)(6); *Palacios*, 46 S.W.3d at 878-79.

In this respect, it is important to remember that the overarching purpose of the MLIIA is to protect health care providers in Texas from frivolous claims, *Hanzi v. Bailey*,

48 S.W.3d 259, 263 (Tex. App.—San Antonio 2001, pet. denied); *Hart v. Wright*, 16 S.W.3d 872, 876 (Tex. App.—Fort Worth 2000, pet. denied), not to prevent an injured plaintiff with a meritorious claim from asserting it. Because Webb's Report meets the standard of sufficiency announced in *Palacios*, the Honorable Court should refuse to dismiss Plaintiffs' claims against the Defendant. In addition, when considering Defendant's Motion, Plaintiffs also request this Honorable Court to take judicial notice that the MLIIA was repealed on June 11, 2003, effective September 1, 2003. Tex. H.B. 4 § 10.09, 78th Leg., R.S. (2003). This Honorable Court should hesitate to dismiss Plaintiffs' claims pursuant to a statute that has been repealed and within six weeks will no longer be effective.

In attacking the sufficiency of the Report in this case, the Defendant argues both that Webb is not qualified to give her opinion regarding medical causation, and that even if she is qualified, the Report merely gives conclusory testimony regarding causation and, therefore, does not contain the elements required by the MLIIA. Because the question of Webb's qualification is potentially a dispositive issue, Plaintiffs will address this issue first.

B. Webb is Qualified to Express her Opinions

The Defendant's argument with respect to Webb's alleged lack of qualifications is that Webb is not a physician, lacks any specialized training, and is unable to offer any testimony regarding medical causation. Motion at p. 4. The MLIIA does not require

expert opinion testimony by a physician unless the expert is giving opinion testimony regarding whether a *physician* departed from accepted standards of medical care. MLIIA, § 13.01(r)(5); *Fischer v. Tenet Hospitals, Ltd.*, 2002 WL 59349 (Tex. App.—Dallas Jan. 17, 2002), *reversed on other grounds*, 2003 WL 21406133 (Tex. June 19, 2003). Here, Defendant is a nonphysician health care provider. MLIIA, § 1.03(a)(3) & (8). "[A]n expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim" may give opinion testimony about a nonphysician health care provider. MLIIA, § 13.01(4)(5)(B).

Specifically, a nurse, through specialized experience or training, can be qualified to give testimony about medical causation. *Lesser v. St. Elizabeth Hosp.*, 807 S.W.2d 657, 659 (Tex. App.—Beaumont 1991, writ denied). *See, e.g.*, *Fischer*, 2002 WL 59349 at *4 (allowing registered nurse to testify against a nursing home and hospital); *University of Texas Medical Branch at Galveston v. Danesi*, No. 01-96-01107-CV (Tex. App.—Houston [1st Dist.] March 25, 1999, no pet.) (not designated for publication), 1999 WL 164444 at *5 (allowing testimony of registered nurse). Defendant cites *Pace v. Sadler*, 966 S.W.2d 685, 690 (Tex. App.—San Antonio 1998, no pet.) in support of its argument that a nurse expert is not qualified to offer testimony as to causation. However, *Pace* did not hold that a nurse expert is never qualified to offer testimony as to causation. In fact, the court cited *Lesser*, 807 S.W.2d at 659 and specifically recognized that a nurse can testify about causation if it is within her specialized experience or training. *Pace*, 966

S.W.2d at 690. The court in *Pace*, however, found that the nurse expert in that case was not qualified to medically diagnose heart conditions and therefore could not interpret the plaintiff's symptoms as indications of a heart problem. *Id.*

In this case, Webb has specialized knowledge and training and is therefore qualified to offer opinion testimony on medical causation against Defendant in this case. *See also* Tex. R. Evid. 702. Webb is a Registered Nurse in the State of Texas with 20 years of practice experience in clinical, education, management, quality outcomes management, and clinical research. She is a Clinical Nurse Specialist in adult health and holds a Master of Nursing degree. Exhibits A-B. Webb has knowledge of the standards of care for patients with respiratory insufficiency and patients requiring inhalation therapy and respiratory suction at issue in this case. She has provided care to patients who developed changes in their respiratory status, and has been involved in planning care for patients in a multidisciplinary approach. Exhibit A. With respect to the proper way to care for respiratory insufficiency, there is no question that Webb is not only qualified, but well qualified to give her opinion in a MLIIA report.

The Honorable Court should reject the Defendant's argument and find that Webb is qualified to offer her expert opinion with respect to the Defendant's care and treatment of Mr. Ratcliffe and medical causation in this case.

C. Webb's Report Contains Ample Evidence of Causation

Defendant's main argument is that Webb is not qualified to give causation testimony. However, in a footnote, Defendant argues that even if Webb is qualified to testify regarding causation, her Report is conclusory and insufficient. Motion at p. 4. As set forth above and below, Webb's Report is sufficient under the MLIIA, and does not support the Defendant's requested dismissal.

The MLIIA requires an expert report to address the issue of causation. MLIIA, § 13.01(r)(6). Broadly speaking, "the ultimate standard of proof on the causation issue 'is whether, by preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.'" *Cruz v. Paso Del Norte Health Found.*, 44 S.W.3d 622, 629 (Tex. App.—El Paso 2001, pet. denied) (*citing and quoting Park Place Hosp. v. Milo*, 909 S.W.2d 508 (Tex. 1995)). This standard does not require Plaintiffs to establish causation in terms of medical certainty (especially in the MLIIA report, the purpose of which is merely to allow the Honorable Court to cull out frivolous claims), but rather merely requires a reasonable inference drawn from the evidence. *Cruz*, 44 S.W.3d at 630; *Bradley v. Rogers*, 879 S.W.2d 947, 954 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

In tort-based claims such as the medical liability claims Plaintiffs brought against the Defendant herein, causation has two elements: cause in fact and foreseeability. *Cruz*, 44 S.W.3d at 630 (health care liability claims); *Cowart v. Kmart Corp.*, 20 S.W.3d 779,

783 (Tex. App.—Dallas 2000, pet. denied) (torts generally). Cause in fact is shown where the act or omission is both a but-for cause of the injury and a substantial factor in bringing about the injury, *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 779-83 (Tex. 1995) (Cornyn, J. concurring); *Boyattia v. Hinojosa*, 18 S.W.3d 729, 735 (Tex. App.—Dallas 2000, pet. denied). Foreseeability turns on the question of whether a person of ordinary intelligence could foresee that the act or omission complained of would cause an injury similar to the one which occurred. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

In cases involving claims of medical negligence, causation is proven when a medical expert testifies that the injuries suffered by the plaintiff are the result of some act or omission by the defendant, *Harris Co. Hosp. Dist. v. Estrada*, 872 S.W.2d 759, 763-64 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (testimony that patient died because she ingested sulfa drugs prescribed by district supported finding that district was liable, because sulfa drug caused patient's death), or where the act or omission complained of was a "substantial factor" in causing the injury complained of, without which the injury would not have occurred. *Park Place Hosp.*, 909 S.W.2d at 511; *Kramer v. Lewisville Mem. Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993); *Sisters of St. Joseph of Tex., Inc. v. Cheek*, 61 S.W.3d 32, 35 (Tex. App.—Amarillo 2001, pet. denied); *Sloan v. Molandes*, 32 S.W.3d 745, 749 (Tex. App.—Beaumont 2000, no pet.).

Based on these requirements, Webb's report identifies the causal relationship between Defendant's acts and omissions and the death of Mr. Ratcliffe. In her report, Webb specifically sets out how Defendant failed to meet the standard of care in its treatment of Mr. Ratcliffe by failure to: (1) follow the physician's orders for nebulizer Albuterol (suction) every 4 hours; (2) timely provide respiratory care, with a 12 hour treatment delay; (3) timely address the malfunction of suction equipment; and (4) accurately document information related to respiratory treatment results. Exhibit A. As to medical causation, Webb states that delays in treatment and failure to follow physician's orders resulted in sputum build-up which effected Mr. Ratcliffe's respiratory function and hastened and contributed to Mr. Ratcliffe's death. Additionally, Webb states that inaccurate and contradictory information in Mr. Ratcliffe's medical chart regarding respiratory treatment results was significant immediately prior to Mr. Ratcliffe's coding. Exhibit A. Accordingly, Webb's report is sufficient to establish that the breaches in the standard of care set forth above hastened and contributed to Mr. Ratcliffe's death. *See, e.g. Moore v. Sutherland*, 2003 WL 21197261 at *3 (Tex. App.—Texarkana May 22, 2003, n.p.h.) (finding the following positive statement of fact a sufficient statement of causation: "Had the diagnosis of bile peritonitis been made before discharge from the hospital, treatment would have prevented the patient's death."); *Morrill v. Third Coast Emergency Physicians, P.A.*, 32 S.W.3d 324, 328 (Tex. App.—San Antonio 2000, pet.

denied) (statement of causation sufficient where it specifically stated that delay in care of patient caused by acts and omissions resulted in patient's injury).

Here, the Defendant's acts and omission are a cause in fact causation of Mr. Ratcliffe's death, because the failure to follow physician's orders and timely provide respiratory care resulted in sputum build-up which effected Mr. Ratcliffe's respiratory function which hastened or contributed to his death, and it was foreseeable that the act or omission might result in injury or death. As set forth in *Palacios*, the twofold purpose of an expert's report is to inform Defendant of the specific conduct complained of by Plaintiffs, and to provide the trial court with some basis to conclude that the claims have merit. Webb's report fulfills this purpose, clearly telling Defendant what they did wrong, and showing the Honorable Court that a nurse, qualified by training and experience, finds that these acts were negligent. Because Webb's report contains all of the elements required by the MLIIA, it represents a good faith effort to comply with the statute. Because Webb's report is a good faith attempt to comply with the MLIIA, dismissal of Plaintiffs' claims against Defendant should be denied.

D. Good Faith Attempt

Strictly in the alternative, any deficiencies present in Webb's Report are minor and do not support the conclusion that the Report is not a "good faith effort" to comply with the provisions of the MLIIA. Webb's report contains all of the elements required of an expert report by the MLIIA, and contains a fair summary of her opinions. The Honorable

Court should find that it is a good faith attempt to comply with the terms of the statute, and therefore the Honorable Court should deny the Defendant's request that the claims against it be dismissed.

E. Attorney's Fees

As set forth above, Webb's Report complies with the MLIIA or, in the alternative, was a good faith attempt to comply. Therefore, Defendant's request for attorney's fees and costs should be denied. MLIIA § 13.01(e).

F. Grace Period

Finally, and strictly in the alternative, Plaintiffs ask the Honorable Court to grant them a 30-day period to correct any deficiency the Honorable Court finds to exist in Webb's Report pursuant to MLIIA, § 13.01(g). This section of the MLIIA permits the grant of an extra 30 days of time to comply with the MLIIA's expert report requirements, if the plaintiff can show that the failure to comply with these requirements was an accident or mistake. A request for 30 days grace pursuant to MLIIA § 13.01(g) is neither explicitly nor implicitly limited to the 30 days immediately following the 180-day deadline for filing expert reports found in MLIIA, § 13.01(d), *Knie v. Piskun*, 23 S.W.3d 455, 462 (Tex. App.—Amarillo 2000, pet. denied); *McClure v. Landis*, 959 S.W.2d 679, 682 (Tex. App.—Austin 1997, pet. denied) (grace allowed even though reports not filed until 249 days after suit was filed), and must be granted if a mistake is shown. MLIIA, § 13.01(g) (. . . the court *shall grant* a grace period of 30 days . . .) (emphasis added).

Plaintiffs' request for 30 days of grace is timely, because it is being made before the hearing on the Defendant's Motion. MLIIA, § 13.01(g); *Hightower v. Saxton*, 54 S.W.3d 380, 385 (Tex. App.—Waco 2001, no pet.). This 30 days is intended to prevent the forfeiture of a party's claims where the party has failed to comply with the terms of MLIIA, § 13.01(d) in the first instance. *Broom v. MacMaster*, 992 S.W.2d 659, 663 (Tex. App.—Dallas 1999, no pet.). Once a court grants grace to amend an expert's report pursuant to MLIIA, § 13.01(g), the 30-day grace period runs from the date the court grants the request. If the court finds that the grace period should be granted, it must grant the claimant the entire 30 days called for by MLIIA, § 13.01(g). *Hanzi v. Hanzi*, 48 S.W.3d 259, 264 (Tex. App.—San Antonio 2001, pet. denied).

In deciding whether a plaintiff is entitled to an extension pursuant to MLIIA § 13.01(g), the Honorable Court must consider evidence regarding whether the deficiencies in the Report in question were either intentional or the result of conscious indifference, or whether they were the result of an accident or mistake. MLIIA, § 13.01(g). In making this determination, the Honorable Court should apply a standard similar to those used to determine whether a default judgment should be set aside. *Roberts v. Medical City Dallas Hosp., Inc.*, 988 S.W.2d 398, 403 (Tex. App.—Texarkana 1999, pet denied). "Some excuse . . . is sufficient to warrant an extension of time to file the expert report, so long as the act or omission causing the failure to file the report was, in fact, accidental.

Moore, 2003 WL 21197261 at *5 *citing Horsley-Layman v. Angeles*, 968 S.W.2d 533, 536 (Tex. App.—Texarkana 1998, no pet.).

Here, any omission from the Report with respect to the claims against the Defendant or causation was the result of accident or mistake, and was not intentional or the result of conscious indifference, because counsel for Plaintiffs believed that the Report prepared by Webb satisfied the requirements of the MLIIA in this case. Plaintiffs' counsel believed that a well-qualified and trained registered nurse is qualified to give expert opinions regarding the treatment of Mr. Ratcliffe by a nonphysician medical provider, and that Webb's report was sufficiently specific and detailed with respect to the deficiencies in the treatment rendered to Mr. Ratcliffe by the Defendant and medical causation. *See* Affidavit of Mark Lowe, attached hereto as Exhibit "C" and incorporated herein by reference as if set forth at length.

Some mistakes of law may negate a finding of intentional conduct or conscious indifference entitling the plaintiff to a grace period. *Walker v. Gutierrez*, 2002 WL 32116846 at *6-7 (Tex. June 19, 2003) (holding that a claimant who files a report *omitting* one or more required elements but believing the report complies with the statute does not negate a finding of intentional or conscious indifference), *emphasis added*. In this case, Webb's Report does not omit any of the required elements of the statute. For the foregoing reasons, should this Honorable Court find that Webb's Report is

insufficient, Plaintiffs request an additional 30 days to file a MLIIA-compliant report because of Plaintiffs' counsel's mistake of law regarding the sufficiency of the Report.

III.
Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Honorable Court find that the Defendant's Motion be in all respects DENIED for the reasons set forth herein, or, strictly in the alternative, that the Honorable Court grant him 30 days of grace pursuant to MLIIA, § 13.01(g), to allow Webb to amend the Report or otherwise file a MLIIA-compliant report.

Plaintiffs pray for such other and further relief, general or special, in law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

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By:_____
Mark J. Lowe
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ATTORNEY FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response to the Motion to Dismiss and for Attorney's Fees and Cost has been sent to the following counsel of record in accordance with the Texas Rules of Civil Procedure on this, the _____ day of July, 2003:

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_____
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