IN THE SUPREME COURT OF TEXAS

NO. 06-0369

IN RE JACK JORDEN, M.D. ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 26, 2007

JUSTICE O'NEILL, concurring.

The Court concludes that, until an expert report is filed, discovery concerning a potential health care liability claim against a provider is limited to that prescribed in section 74.351(s) of the Civil Practice and Remedies Code, which does not include Rule 202 presuit depositions. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(s). I agree, and fully join the Court's opinion. I write separately, though, to emphasize that while the Legislature's purpose in enacting Chapter 74 was to decrease costs associated with meritless claims, it sought to do so "in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis." Act of June 1, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(3), 2003 Tex. Gen. Law 847, 884. Accordingly, if the discovery methods that section 74.351(s) allows are fully and effectively utilized but fail to yield information necessary to assess the merits of the potential claim, *e.g.*, the medical records are lost or indecipherable and responses to written questions are unenlightening or evasive, I would leave some discretion in the trial court to allow discovery under Rule 202 if "a failure . . . of justice in [the] anticipated suit"

would otherwise result. TEX. R. CIV. P. 202. Because, in this case, the potential claimant has not availed himself of the discovery tools that the rules concerning health care liability claims allow, I agree with the Court that the presuit depositions he seeks are prohibited.

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Harriet O'Neill
Justice

OPINION DELIVERED: March 28, 2008