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NOTE: This newsletter is intended to summarize significant cases and issues impacting the Texas Health Care Liability practice area in the past six (6) months. It is not a comprehensive digest of every case involving Texas Health Care Liability litigation issues during that time period or a recitation of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.

A. "I DON'T BELIEVE YOU HAVE TO BA A COW TO KNOW WHAT MILK IS[1]": But you do have to be telepathic these days to figure out if your case is a "slip and fall" or healthcare liability claim. In this case, a fall over milk crates was held to be a garden variety "slip and fall."

In *Gonzalez v. Diversicare Leasing Corp., 2014 Tex. App. LEXIS 10576* Iris Gonzalez was employed at a nursing home known as Afton Oaks. Shortly after arriving at work, she exited the building to move her car. A co-worker had stacked empty milk crates in the dimly lit path used by employees to enter and exit the building. Gonzalez stumbled over the milk crates and fell, sustaining injuries. She sued her employer alleging that it was a non-subscriber under the Texas Worker's Compensation law, and that it was liable for failing to provide a safe place to work, enforce and establish safety rules and regulations, and other related acts and omissions. Afton Oaks argued that Gonzalez's claim was a health care liability claim because she had sued a nursing home and alleged departures from accepted standards of safety. Gonzalez failed to serve an expert report within the 120-day deadline. Afton Oaks sought dismissal.

In its analysis, the court held that there was no dispute that Gonzalez was claiming that she was injured as a result of the nursing home's negligent acts. Therefore, focus was on the second element, i.e. whether the claim or claims at issue must concern treatment, lack of treatment, or departure from accepted standards of medical care, or health care, or safety or professional or administration services directly related to healthcare.

Here, Gonzalez alleged that Afton Oaks was negligent for failing to take specific actions to establish, provide, and maintain a safe work environment for its employees. To the extent that the gravamen of her claims invokes her employer's liability for a co-worker's placement of empty milk crates in a dimly lit path on the premises of a nursing home, this case is indistinguishable from *Texas West Oaks Hospital L.P. v. Williams*, 371 S.W.3d 171 (Tex. 2012), insofar as her claim may be characterized as a "garden-variety" personal injury claim "that is completely untethered from the provision of healthcare." *Id*. As such, it does not qualify for the "safety" category of healthcare liability claims, and the trial court erred by dismissing her claims with prejudice.

[1] Quote by Ann Landers.

B. 'STERILE' URINE MAY BE A MYTH (ACCORDING TO WEB MD)[2]:

Worker slip and fall on "fluid" in hospital room and back pain while lifting patient was indeed a HCLC.

In *Barnes v. Navarro Hosp., L.P., 2014 Tex. App. LEXIS 9706,* Barnes was injured while working as an employee of Navarro, a non-subscriber under the Texas Worker's Compensation Act. In her original petition, Barnes alleged that she "injured her back shortly after starting her shift, when she was forced to care for a patient who had been unattended for several hours." According to the original petition, for several hours, the patient had made repeated phone calls to patient technicians seeking assistance that went unnoticed. When Barnes entered the patient's room she found debris and "other liquids" scattered across the floor, which created an unsafe working environment. She attempted to assist with the patient, who was obese, by cleaning and repositioning her. She was not provided proper equipment to move the patient and sustained a back injury. The debris and liquid caused Barnes to slip and fall causing further injury to her back.

Navarro moved to dismiss Barnes' suit asserting that the claim raised herein is a health care liability claim and that Barnes failed to timely file an expert medical report. Barnes filed two amended petitions, the latter of which omitted certain factual allegations (i.e. it did not state that she was walking in a room when she fell, state where the accident occurred, or that she was caring for a patient at the time). The second petition stressed that Navarro was negligent in failing to clean the floors and appropriately remedy a slippery and unstable condition to the floor.

Barnes argues that the appellate court should disregard her original petition and instead review the trial court's ruling in light of her second amended petition which she alleged only that she was walking in a room in the hospital when she fell due to a "slippery substance and dangerous debris" on the floor. Navarro stated that the original petition must be considered as a health care liability claim cannot be recast as another cause of action (quoting *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 at 851(Tex. 2005)).

The appellate court agreed that Barnes' second amended petition was merely an effort to "recast" the claims made in her original petition. Superseded pleadings may be introduced as probative evidence. *See Drake Ins. Co*. 606 S.W.2d at 817. The court therefore concluded that the factual allegations made by Barnes in her original petition were properly considered in the analysis of whether the claim was a HCLC and found that the claim alleges a departure from the accepted standards of healthcare.

Judgment was affirmed of the granting of Navarro's motion to dismiss.

NOTE: The Tenth Court of Appeals previously dismissed an appeal arising from the same trial court proceedings. *Barnes v. Navarro Hospl., LP*, No 10-12-00380-CV, 2013 Tex. App. LEXIS 927, 2013 WL 387880 at *1 (Tex. App.—Waco Jan 31, 2013, no pet)(mem. op) (dismissing appeal for want of jurisdiction because attorney's fees issue remained outstanding and judgment was therefore not final, but stating that dismissal was "without prejudice to the filing of a timely notice of

[2] http://www.webmd.com/news/20140519/sterile-urine-may-be-a-myth. While reading this case I just kept thinking, at least it is sterile???? So I looked it up and found this article. As a mom to a potty-training boy and a one-year-old girl this article really bummed me out. C. Marcin.

appeal when the trial court has signed a final judgment"). The trial court subsequently rendered an agreed order dismissing Navarro's attorney's fees claim and explicitly disposing of all claims and parties.

C. REBUTTABLE PRESUMPTION: The essence or underlying nature of a claim must be examined in determining whether it is a healthcare liability claim.

In *Bueno v. Hernandez*, 2014 Tex. App. LEXIS 9738 (Tex. App. San Antonio Aug. 29, 2014), the Appellee Melissa Hernandez filed suit alleging that while receiving care in the emergency room, she was sexually assaulted by an attending nurse, Appellant Andres Bueno. After Hernandez failed to meet the mandatory 120-day expert report deadline, prescribed by *Section 74.351(a) of the Texas Civil Practices and Remedies Code*, the trial court granted Bueno's motion to dismiss.

On March 25, 2011, Hernandez presented to the CHRISTUS Spohn Hospital Kleberg emergency room. She was attended to by Bueno, an employee of the hospital and a registered nurse. Hernandez alleges that after she was medicated, Bueno sexually assaulted her by touching and fondling her breasts and stomach.

On March 25, 2013, Hernandez sued Bueno for assault-infliction of bodily injury, assault-offensive physical contact, assault-threat of bodily injury, intentional infliction of emotional distress, and gross negligence. Specifically, Hernandez alleged Bueno "touched and fondled her breasts and stomach without her consent and removed her undergarments and inappropriately touched and gazed at her naked body." In his answer, Bueno contended that he never touched Hernandez in an inappropriate or unprofessional manner and that he performed his duties as a registered nurse in the emergency room in accordance with standards of practice.

Bueno's amended answer asserted Hernandez's claim was a health care liability claim under Chapter 74 of the Texas Civil Practices and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. ch. 74 (West Supp. 2014). Although Hernandez eventually served Bueno with a statutory expert report, the report failed to meet the 120-day deadline prescribed by *section 74.351(a)*. *Id. § 74.351(a)*. Bueno objected to Hernandez's expert report and moved to dismiss her claims for failure to timely file the expert report. *Id. § 74.351(b)*.

On November 4, 2013, the trial court concluded Hernandez's claims against Bueno were health care liability claims and Hernandez's failure to file the expert report within the mandatory 120-day deadline required dismissal of her claims against Bueno. The trial court dismissed with prejudice all of Hernandez's claims against Bueno and awarded him attorney's fees.

The Court of Appeals, when arriving at their conclusion, reasoned that they must examine the essence or underlying nature of Hernandez's claims against Bueno, and noted that all her claims stem from her allegations that he sexually assaulted her while she was a patient at CHRISTUS Spohn Hospital Kleberg. As this court previously determined, "[i]t would defy logic to suggest that a sexual assault 'is an inseparable part of the rendition of medical care' or a departure from accepted standards of health care." *Holguin v. Laredo Reg'l Med. Ctr., L.P., 256 S.W.3d 349, 353 (Tex. App.—San Antonio 2008, no pet.)* (quoting *Diversicare, 185 S.W.3d at 848*).

They further went on to state that the breadth of the statute's [Chapter 74] text essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patients care, treatment, or confinement. But the presumption is necessarily rebuttable. In some instances the only possible relationship between the conduct underlying a claim and the rendition of medical services or healthcare will be the healthcare setting (i.e., the physical location of the conduct in a health care facility), the defendant's status as a doctor or health care provider, or both. *Loaisiga v. Cerda, 379 S.W.3d 248, 255 (Tex. 2012)*

Being mindful of the *Loaisiga* presumption that a claim is a health care liability claim when it involves a physician or health care provider and is based on facts evolved during the course of the patient's care, the Court felt the record clearly supported that Bueno was a health care provider and the assault about which Hernandez complains occurred while she was receiving treatment at the emergency room under Bueno's care. Accordingly, there was a presumption that the claim is a health care liability claim.

Next, the Court determined whether Hernandez successfully rebutted the presumption. The gravamen of Hernandez's complaint was that she was inappropriately touched by Bueno while a patient at the emergency room. Hernandez presented at the emergency room complaining of severe stomach pain. Hernandez had to conclusively show that the allegation did not contain a:

> (1) . . . complaint about any act of [Bueno's] related to medical or health care services other than the alleged offensive contact,
>
> (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and

(3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place. *Id. at 257*; *compare id. at 255* (conducting "an examination for the purpose of diagnosing or treating a patient's condition, [wherein] a medical or health care provider almost always will touch the patient intentionally.") *with Buck v. Blum, 130 S.W.3d 285, 289-90 (Tex. App.—Houston [14th Dist.] 2004, no pet.)* (concluding neurologist's placement of his penis in patient's hand during neurological examination was not a HCLC).

Looking at the record as a whole, the Court could not conclude that Hernandez *conclusively* rebutted "the presumptive application of the [Texas Medical Liability Act's] expert report requirements." Because Hernandez failed to conclusively rebut the presumption that her claim was a health care liability claim requiring an expert report pursuant to *section 74.351(a)*, the Court of Appeals reversed the trial court's March 25, 2014 order, render judgment dismissing, with prejudice, Hernandez's claims against Bueno, and remand the cause to the trial court for a determination of court costs and attorney's fees to be awarded to Bueno pursuant to *section 74.351(b)(1)*. *See Tex. Civ. Prac. & Rem. Code Ann. § 74.351*.

D. HERE'S A HINT: IT IS PROBABLY A HEALTH CARE LIABILITY CLAIM

Alleged Illegal Acts Held to Be Inseparable from Health Care

Brazil v. Hillman,[3] decided by the Texas Supreme Court on September 25, 2014, determined that a physician alleged to have defrauded his patient, and conspired with non-health care providers to defraud his patient, by using the dementia and deteriorating memory of the patient for personal gain is a healthcare liability claim because such acts would be inseparable from the medical care rendered.

Brazil was brought on behalf of Jennie Stokes, an incapacitated woman, by her daughter and guardian of Estate, Mayrita Hillman. Ms. Hillman alleged that several persons, including Ms. Stokes' personal physician Dr. Brazil, had conspired to rob Ms. Stokes of her property and business during a period of time in which she had "memory issues, dementia, and was deteriorating" [mentally]. The story goes, that Ms. Stokes had hired an attorney named Michael Payne to help her collect a delinquent loan she had made to her daughter (Ms. Hillman). Instead, Attorney Payne "orchestrated the dissolution" of Ms. Stokes' living trust, helped Richard Bowen to obtain power of attorney over Ms. Stokes, and then assisted Richard and Brenda Bowen in obtaining over $1.5M in property and loans from Ms. Stokes. Dr. Brazil found himself a defendant in this lawsuit stemming from his eleven years of treating Ms. Stokes (1998 to 2009), during which period it is

[3] 2014 Tex. App. LEXIS 10725 (mem. opinion)

alleged that he knew of her incapacity but encouraged her to see Attorney Payne and then also supported Payne's and the Bowens' misdeeds. Ms. Hillman alleged claims against Dr. Brazil for breach of fiduciary duty, undue influence and duress, aiding and abetting, civil conspiracy, and money had and received.

Ms. Hillman failed to serve any expert report at the 120-day mark, and Dr. Brazil then filed the motion to dismiss at issue arguing that these claims were health care liability claims because they "center upon her allegation that Stokes did not have the mental capacity to understand the complained-of transactions that she conducted with the defendants… contrary to Dr. Brazil's treatment opinion that she was mentally competent to operate her businesses." Ms. Hillman's position was that the suit did not allege a violation of the standard of care but rather that Dr. Brazil was complicit in a scheme to defraud, i.e., that he did not negligently fail to properly diagnose but rather, after properly diagnosing Mom, he participated in a scheme to use her medical condition to defraud her.

There are several findings in this case applicable to health care liability claims generally. First, the Court held that there is a rebuttable presumption that if the claims are based on the defendant physician's conduct during patient care, treatment, or confinement that those claims **are** health care liability claims and, therefore, the onus lies on the plaintiff to rebut that presumption. The Court considered (1) determination of the type of claim requires an examination of the underlying nature (the gravamen) of the claim, not the pleadings; (2) departure from the standard of care is alleged if the act or omission complained of is an inseparable part of the rendition of medical services; and (3) if expert medical or health care testimony is necessary to prove the merits of the claim against the defendant, it is a health care liability claim. [*citing Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex.2005), *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex.2010), *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171 (Tex.2012)]. Finally, claims presented on facts that could support claims against a health care provider for departures from the standard of care **are** health care liability claims regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards.

Specific to the facts at issue, the Court found that "medical care means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed … for, to, or on behalf of a patient during the patient's care, treatment, or confinement" and, further based on the daughter's testimony that Dr. Brazil, as a responsible physician, should have contacted her or other family when he determined that her mother had increased signs of dementia and reduced mental facilities," the Court held that the cause of action, therefore, was a health care liability claim that required the service of an expert report establishing the standard of care for Dr. Brazil after he determined his patient's mental faculties were deteriorating. The Court stated, "[t]he essence of Hillman's claim against Dr. Brazil is that he assisted the other defendants in their fraud scheme by encouraging Stokes, whom he knew lacked mental capacity to make business decisions, to go see [Attorney] Payne…. Dr. Brazil, however, confirmed that he had no relationship with Stokes outside of his medical care for her. Consequently, he could not have known about Stokes's alleged lack of mental capacity – and then referred her to Payne to be taken advantage of – in the absence of performing medical care for her. In other words, Dr. Brazil's rendition of medical care to Stokes and his referral to Payne of a known incompetent are unquestionably inseparable [from medical care] and not mutually exclusive."

The Court also gave a friendly nod to *Saleh v. Hollinger*, 335 S.W.3d 368 (Tex.App.—Dallas 2011, pet. denied). In *Saleh*, the patient alleged that after an in vitro fertilization procedure performed within the standard the care, the physician Defendant then stole her fertilized eggs and illegally sold them. Ms. Saleh argued that "no accepted standard of medical or health care includes theft," but the Dallas appeals court ultimately concluded the subsequent theft was an inseparable part of the rendition of medical

services by the physician Defendant. The Supreme Court found the *Saleh* decision "persuasive" because both plaintiffs were attempting to separate an alleged improper "extracurricular act" by a physician from the healthcare provided by the physician. However, the Supreme Court held that because the alleged extracurricular actions could not have occurred were it not for the opportunity presented by rendering medical care, therefore, the alleged wrongdoing(s) were thus inseparable from medical care, thus requiring 74.351 report(s).

E. THERE'S NO SURVIVING DISTRACTED DRIVING: A bicyclist's negligence claim against a distracted doctor driver who caused a vehicular collision is not a "health care liability claim" subject to Texas Medical Liability Act.

In *Reddy v. Veedell*, 2014 Tex. App. LEXIS 10504(Tex. App. Houston 1st Dist. Sept. 18, 2014), Dianna and Maury Veedell sued Dr. Malladi Reddy for negligence and negligence per se arising from a collision between Reddy's car and Dianna's bicycle. The Veedells alleged that while looking at his mobile phone, Reddy backed his car into a road and collided with Dianna's oncoming bicycle, propelling her into the air and shattering the rear window of Reddy's car.

Relying on the construction of the "safety" prong of the statutory definition of "health care liability claim" announced by the Supreme Court of Texas in *Texas West Oaks Hospital, L.P. v. Williams, 371 S.W.3d 171 (Tex. 2012)*, the Fourteenth Court held that an "allegation pertaining to safety, standing alone and broadly defined," was sufficient to invoke the statute, and that no actual connection to health care was required.

Likewise, Dr. Reddy argued that his case involves health care liability claims because (1) he, the defendant, is a physician, (2) the Veedells' claims pertained to "safety," and (3) the Veedells alleged that they were damaged by his act or omission. Considering that some other courts of appeals, unlike the Fourteenth Court, have required that a claim be at least indirectly related to health care to qualify as a safety claim under the statute, Reddy also argued that the Veedells' claims met the indirect-relation standard because the phone call that distracted him "was from a hospital Dr. Reddy worked at." The evidentiary support for this argument was limited to Reddy's own deposition testimony that the caller "was the hospital, I believe." Accordingly, Reddy argued that the Veedells were required to file an expert report, and because they did not do so, he moved for dismissal of their claims with prejudice.

In response, the Veedells argued that whether a plaintiff's claim is a health care liability claim is a question of law that a court determines based on the underlying nature of the cause of action. Calling Reddy's arguments "patently absurd" and reasoning that the accident was completely unrelated to health care, the Veedells argued that theirs were not health care liability claims.

There was no dispute that Reddy is a physician or that the Veedells claim to have been injured as a result of his negligent acts. *See Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13), (23)(A).* The only determination left to be made was of whether the claims at issue implicate a claimed "departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care." *See id. § 74.001(a)(13).*

However, Reddy argued that the claims allege personal injury proximately caused by a departure from standards of safety, and as such they are controlled by the Supreme Court's holding in *West Oaks*, which stated that a "safety claim" need not be directly related to health care in order to qualify as a health care liability claim under the TMLA. *Tex. W. Oaks Hosp., 371 S.W.3d at 186.*

The First Court of Appeals held that a physician driver who caused a vehicular collision was not a "health care liability claim" under the Texas Medical Liability Act, *Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13)* (Supp. 2014); the doctor produced no evidence that he was attending to health-care issues when he stopped his car in the street; and the bicyclist's allegations that the doctor failed to keep a proper lookout and backed unsafely in violation of *Tex. Transp. Code Ann. § 545.415(a)* (2011) did not qualify for the "safety" category of health care liability claims. The trial court correctly denied the doctor's motion to dismiss the claim for failure to provide an expert witness report, because the personal injury case was completely unrelated to the provision of health care. Whether a claim is a health care liability claim depends on the underlying nature of the claim being made.

Judge Michael Massengale, in his concurring opinion, sums up the overarching problem that continues to exist in these types of cases. "Regardless of how the Supreme Court ultimately resolves this challenge of statutory interpretation, there is a possibility of a better path forward. Even though the Legislature does not write statutes for the courts' approval, it still could clarify the TMLA in response to manifest interpretive difficulties. Not only could this relieve the courts and litigants from the continuing burdens of litigation over the procedural standards, it could also better ensure that the standards applied are those actually approved by the Legislature, as opposed to a standard reflecting the courts' best good-faith effort to implement an opaque statute. Legislatures have the right to expect courts to faithfully implement laws as enacted. When the words fail, the Legislature has a corresponding responsibility to provide clarity where it is wanting."

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