TADC HEALTH CARE LIABILITY LAW NEWSLETTER

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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. "IT'S ENOUGH TO DRIVE YOU CRAZY, TRYING TO DEPICT THE WEATHER, THE ATMOSPHERE, THE AMBIENCE–CLAUDE MONET": TMLA cannot be circumvented by artful pleading.

In *PM Management-Trinity NC v. Kumets, 2013 Tex. LEXIS 514, 56 Tex. Sup. Ct. J. 816 (Tex. 2013)* the Supreme Court once again killed the artistic pleading. It has held that the Texas Medical Liability Act (TMLA) does not allow for parties to circumvent its procedural requirements by claim-splitting or by any form of artful pleading. In this case, the trial court refused to dismiss a claim that a nursing home unlawfully discharged a resident in retaliation for complaints made by the resident's family. The trial court concluded that this was not a health care liability claim (HCLC) for which TMLA requires a supporting expert report. The court of appeals affirmed, with one justice dissenting in part. The Supreme Court reversed the judgment of the court of appeals in part and affirmed in part. The matter was remanded to the trial court for dismissal and determination of attorney's fees and costs of court pursuant to §74.351(b) of the TMLA.

A resident was admitted to Trinity Care Center (a nursing home) to recover from a stroke. The resident's family alleged inadequate care caused the resident to suffer a second stroke. The family also plead retaliatory discharge when the resident was discharged. The retaliation claim was asserted under the Texas Health & Safety Code.

The Plaintiffs filed an expert report, which was challenged by Trinity. The trial court held the report deficient and granted the thirty (30) day extension to cure. The amended expert report was also found to be deficient and the trial court dismissed all claims except for the retaliation claim. Trinity appealed, arguing that the retaliation claim should also be dismissed. The Plaintiffs cross-appealed (for their fraudulent billing claim).

The Supreme Court, using reasoning from *Yamada v. Friend*, 335 S.W.3d 192, 196-97 (Tex. 2010)(claims based on the same facts could not alternatively be maintained as health care liability claims and ordinary negligence claims), found that the retaliation claim is based on the same factual allegations as the HCLCs.

The Supreme Court specifically stated that they are not deciding in this case that a claim for retaliation or discrimination under the Health & Safety Code is always an HCLC or that the Plaintiff's claim for breach of fiduciary duty was an HCLC (because Plaintiff's did not appeal the trial court's determination that the breach of fiduciary duty claim was an HCLC).

B. "CASE UPDATE: CHCA WOMAN'S HOSP., L.P. V. LIDJI"

Recall this case analyzing the tolling of the 120 days to serve an expert report if the matter is nonsuited in a health care liability claim.

CHCA Woman's Hosp., L.P. v. Lidji, 403 S.W.3d 228, (Tex. 2013): the Supreme Court delivered its opinion June 21, 2013. In our last newsletter, we discussed the split of authority over whether a claimant who has missed the 120-day deadline for serving an expert report may gain a new opportunity to comply by nonsuiting the action and re-filing it. If the claimant nonsuits before the 120-day period has expired, re-filing the action does not give rise to a new 120-day period measured from the date of re-filing; instead, the nonsuit suspends the running of the period, which begins to run again on the date the action is re-filed.

In *CHCA Woman's Hosp., L.P. v. Lidji*, the hospital argued that the trial court erroneously denied its motion to dismiss because the parent's nonsuit did not toll the 120-day time period, and thus, the expert report served more than two years after the parents first filed an original petition against it, was untimely. It was held that the nonsuit did toll the 120-days and here, where there was a nonsuit at 116 days, and subsequent re-filing of the claim, the claimants had the remaining time from the previous 120-day period. On November 16, 2012, the Texas Supreme Court released that the petition for review was granted.[1]

The Supreme Court framed the issue as follows: "In sum, we hold that the First Court of Appeals in the underlying case and the Third Court of Appeal in *Estate of Allen*[2] held differently on a question of law material to a decision of the case: whether a plaintiff's nonsuit of a health care liability claim tolls the expert-report deadline." *CHCA*, 403 S.W.3d at 231.

The Court stated that the TMLA neither expressly allows nor expressly prohibits tolling of the expert-report period in the event of a claimant's nonsuit. Because tolling the expert-report period both protects a claimant's absolute right to nonsuit and is consistent with the statute's overall structure, the Court agreed with the Lidjis that the various provisions of the TMLA's expert report requirement, construed together, demonstrate legislative intent that the expert report be provided within the context of a pending litigation. Accordingly, the Court held that when a claimant nonsuits a claim governed by the TMLA before the expiration of the statutory deadline to serve an expert report and subsequently refiles the claim against the same defendant, the expert-report period is tolled between the date nonsuit was taken and the date the new lawsuit is filed. Because the Lidjis nonsuited their claims against CHCA in the first suit four days before the deadline expired and served their expert report on CHCA the same day they filed their original petition in the second

[1] The Supreme Court was scheduled to hear oral argument on this matter February 5th. The matter was argued on behalf of Petitioners by Kirsten M. Castaneda and on behalf of Respondents by Gaines West and Jennifer D. Jasper. This case was discussed at the TADC Spring meeting by the Honorable Jeffrey Boyd, Supreme Court of Texas, and noted to be a decision to watch for.

[2] *Estate of Allen v. Scott & White Clinic*, No. 03-08-00576-CV, 2011 WL2993259 (Tex. App.—Austin July 22, 2011, no pet.)(mem. op.)

suit, the Lidjis complied with § 74.351. *Id*. at 234.

C. SO WHEN DOES THE PARTY START? **Whether a plaintiff can comply with Chapter 74's expert report requirements by serving a report on a non-served party.**

Michael A. Zanchi v. Reginald Keith Lane, et al, Respondents, 2013 Tex. LEXIS 688; *56* Tex. Sup. J. 1152 (Tex. 2013). The issue in this case was whether a claimant asserting a health care liability claim (HCLC) complies with *§ 74.351(a)*'s mandate to serve an expert report on a party by serving the report on a defendant who has not yet been served with process. The Texas Supreme Court construed the term "party" in § 74.351(a) to mean one named in a lawsuit, and thus the service of the expert report prior to the proper service of the citation complied with the statute. The Court further held that "service" of an expert report on such a defendant need not comport with the service requirements in *Rule 106 of the Texas Rules of Civil Procedure* that apply specifically to service of citation.

It was undisputed by the parties that Zanchi was not served with process until September 16, 2010. Lane attributed this delay to Zanchi's conduct, arguing that Zanchi actively evaded service. Lane mailed the expert report and curriculum vitae of Jeffrey Wagner, M.D., to Zanchi at five different locations (including the Hospital) by certified mail on August 19, 2010, which was the statutory deadline for serving the report. Four of the mailings were returned unclaimed, but a Chuey Potter signed for the mailing sent to the Hospital. The record does not reflect Zanchi's relationship to Potter, and Zanchi has neither admitted nor denied receiving Wagner's report.

Zanchi filed a motion to dismiss the suit for failure to timely serve an expert report as required by *§ 74.351(a) of the Texas Civil Practice and Remedies Code*. If the claimant does not serve an expert report by the statutory deadline and the parties have not agreed to extend the deadline, the statute requires, with one exception not relevant here, dismissal of the claim with prejudice "on the motion of the affected physician or health care provider." *TEX. CIV. PRAC. & REM. CODE ß 74.351(b)*.

At the hearing on the motion to dismiss, Zanchi specifically argued that he was not a "party" to Lane's suit until he was served with process, so any transmittal of Wagner's report to him before the date on which he was served could not satisfy *§ 74.351(a)*. The Court rejected the argument that Zanchi was not a party until he was served with process.

The Court concluded that, under *§ 74.351(a)* of the TMLA, a physician or health care provider against whom an HCLC is asserted is a "party" who may be served with an expert report regardless of whether he has been served with process. It further hold that an expert report need not be "served" in compliance with the formal requirements of *Rule 106* that apply specifically to service of citation.

D. BUT IT DOESN'T WALK LIKE A DUCK OR QUACK LIKE A DUCK??? **More confusion in the world of "what is a HCLA claim."**

Psychiatric Solutions, Inc. v. Palit, 2013 Tex. LEXIS *598*, *56* Tex. Sup. J. 946, 2013 WL 4493118 (Tex. 2013).

Kenneth Palit was employed as a psychiatric nurse at Mission Vista Behavioral Health Center, operated by Psychiatric Solutions, Inc., and Mission Vista Behavioral Health Services, Inc. (collectively "Mission Vista"). On April 2, 2008, he was injured at work while physically restraining a psychiatric patient during a

behavioral emergency. Palit subsequently filed suit asserting a cause of action for negligence against Mission Vista, seeking damages for personal injuries. Over 120 days later, Mission Vista moved to dismiss Palit's suit, claiming the suit alleged an HCLC and must be dismissed because Palit failed to serve an expert report as required by § 74.351 of the TMLA. The trial court denied the motion to dismiss, and the court of appeals affirmed under the impression that it was not a health care liability claim.

The Texas Supreme Court explained in *West Oaks* that a health care liability claim (HCLC) has three basic elements:(1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant. *Texas West Oaks Hospital, LP v. Williams*, 371 S.W.3d 171, 179-80 (Tex. 2012).

The parties only disputed the second element here. Palit's claim alleges he was injured "as a result of improper security of a dangerous psychiatric patient" because Mission Vista "failed to provide a safe working environment and failed to make sufficient precautions for [his] safety." As in *West Oaks*, these allegations fall under both the safety and health care components of an HCLC, indicating both an alleged departure from the accepted standards of safety, and that Palit's health care provider employer violated the standard of health care owed to its psychiatric patients.

The Court noted that the mental health statutes and regulations require that inpatient mental health facilities "'provide adequate medical and psychiatric care and treatment to every patient in accordance with the highest standards accepted in medical practice,'" TEX. HEALTH & SAFETY CODE § 576.022(a), and that "[i]t would blink reality to conclude that no professional mental health judgment is required to decide what those [standards] should be, and whether they were in place at the time of [the] injury." *Id*. at 182. The Court held "that if expert medical or health care testimony is necessary to prove or refute the merits of a claim against a physician or health care provider, the claim is a health care liability claim." *Id*. Thus, because Palit's allegations implicate a standard of care that requires expert testimony to prove or refute it, his claim is an HCLC.

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