TADC HEALTH CARE LIABILITY LAW NEWSLETTER

SPRING 2016 EDITION

EDITOR: CASEY MARCIN

COOKSEY & MARCIN, PLLC

***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. EVERYTHING *AND* THE KITCHEN SINK: Jury charge issues, comparative negligence, indemnity, *Haygood* Analysis, Remittitur, and more.

In *Gunn v. McCoy, 2016 Tex. App. LEXIS 3036 (Tex. App. Houston 14th Dist. Mar. 24, 2016),* McCoy (37 weeks pregnant) presented at the hospital with severe abdominal pain. Her fetus had died due to placental abruption, and McCoy was suffering from disseminated intravascular coagulation (DIC)-a blood clotting disorder. She received blood products, delivered the stillborn baby, and was transferred to ICU. She underwent a hysterectomy. Prior to the surgery, she went into cardiac arrest. She suffered brain damage and seizures. She was transferred to a neurological ICU, and underwent therapy. She is a quadriplegic.

A jury returned a verdict in favor of McCoy through her husband and guardian against Debra Gunn, MD, and Gynecological Associates, O.A. and Obstetrical and Gynecological Associates, PLLC (OGA).

The trial court signed a judgment in conformity with the jury's verdict. Gunn and OGA assail the judgment in multiple issues on appeal, challenging: (1) the trial court's granting of McCoy's no-evidence summary judgment on comparative negligence; (2) the legal sufficiency of the evidence to establish that asserted instances of negligent medical treatment proximately caused Shannon's brain injuries; (3) the legal sufficiency of the evidence of Shannon McCoy's past medical expenses; (4) the legal sufficiency of the evidence of Shannon McCoy's future medical expenses, along with the trial court's refusal to allow evidence from Gunn's and OGA's life care expert; and (5) the trial court's refusal to submit various instructions in the jury charge. Gunn also argues that OGA's indemnity claim is not ripe.

The Appellate Court found that the evidence was legally insufficient to support the full amount awarded for Shannon McCoy's future medical expenses. Accordingly, the Appellate Court suggested a remittitur of $159,854.00. The trial court's judgment was modified as to the amount of future medical expenses.

Before suit, two co-defendants settled their claims and were dismissed. The jury returned a verdict of 11-1 in favor of the plaintiff for $10,626,368.98. The award included past medical care expenses of $703,985.98 and future medical care expenses of $7,242,403.00. Pursuant to OGA's election of a dollar-for-dollar settlement credit, which Gunn joined, the

trial court applied an offset of $1,206,773.50 in its final judgment. The trial court also determined that OGA was vicariously liable for Gunn's negligence and that OGA was entitled to indemnity from Gunn.

Upon a detailed analysis, the Appellate Court determined that the summary judgment for McCoy was properly granted because, taking all of the evidence and making inferences in their favor, Gunn and OGA did not meet their burden to raise a fact issue connecting the treating labor and delivery nurses' negligent conduct with Shannon McCoy's brain injury to a reasonable medical probability.

Gunn and OGA also argued that McCoy failed to put forth legally sufficient evidence of Shannon's past medical expenses, for which the jury awarded $703,985.98. Gunn and OGA argued that because McCoy did not offer expert testimony or affidavits in compliance with Section 18.001 of the Texas Civil Practice and Remedies Code, there is no evidence that Shannon McCoy's past medical expenses were reasonable and necessary. They further argue that McCoy presented no evidence of a causal link between Shannon's expenses and Gunn's actions. Gunn and OGA challenged the lack of segregation within the past expenses.

The amount of damages to which a plaintiff is entitled is generally a fact question. *Citing Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 6 (Tex. App.—Tyler 2009), *aff'd*. The Appellate Court went through the analysis and holding in *Haygood* (which was issued during the midst of this litigation). The Appellate Court stated that after *Haygood*, plaintiffs like Shannon McCoy with medical insurance coverage could no longer rely on evidence of medical expenses that included any amounts beyond the levels health care providers had agreed to or otherwise had the right to actually be reimbursed by the insurers. Moreover, plaintiffs like Shannon McCoy with medical insurance coverage needed to submit evidence of recoverable amounts but without informing the jury that such amounts had been adjusted or had been or would be pain by their insurers.

Gunn and OGA asserted Shannon McCoy later received treatment for a pulmonary embolism and a stroke unrelated to Gunn's negligence. However, McCoy's life care expert, Dr. Willingham, testified there was no functional difference in the fulltime medical care Shannon required before and after she suffered these complications. Therefore, the jury could have determined any additional care that could be segregated out was not worth subtracting from her total medical expenses. Accordingly, the Appellate Court concluded that the evidence is legally sufficient to support the jury's award of $703,985.98 for Shannon's past medical expenses.

As for future medical, counsel for Shannon MCoy directed the jury to the numbers found in "Exhibit 14" (their life care plan). The jury provided the figure $7,242,403.00 which corresponds to the number provided in the totals on Exhibit 14. However, that figure included *both* present-day costs for permissible probable expenses and for impermissible possible expenses ($159,854.00). Therefore, the Appellate Court exercised power to suggest a

voluntary remittitur of $159,854.00. (Tex. R. App. P. 46.3; *Matbon, Inc. v. Gries*, 288 S.W.3d 471,585-86 (Tex. App.—Eastland 2009, no pet.). McCoy timely remitted this amount.

Gunn and OGA also had several jury charge issues. They requested instruction for the jury not to consider the nurses' conduct in considering the negligence of Gunn. The Appellate Court stated that since there was no agency issue or borrowed servant issue, the trial court did not abuse its discretion in refusing the instruction.

Gunn and OGA then contend the trial court erred by refusing to submit an instruction that an occurrence may be an unavoidable accident, that is, an event not proximately caused by the negligence of any party to the occurrence. There was no authority concluding that it was error to refuse to submit an unavoidable accident instruction. The Appellate stated "under these circumstances," the trial court did not abuse its discretion by refusing such instruction.

Gunn and OGA further argue that the amount of Propofol used to sedate McCoy prior to her hysterectomy and her later pulmonary embolus and stroke, warranted an instruction on new and independent cause. The court stated that the new and intervening causes of pulmonary embolism and stroke occurred over a year after Gunn's negligence and the original brain injury. She was already suffering severe brain deficiencies requiring fulltime care. The court concluded that these later intervening conditions rise to the level of superseding causes. Therefore, the trial court did not abuse its discretion in refusing to submit the instruction with regard to Shannon's later medical complications.

Finally, Gunn argues that "OGA's claim for common-law indemnity will not be ripe until there is a final judgment payable on appeal." Essentially, Gunn asserted that OGA is not permitted to pursue inconsistent positions—that Gunn was not negligent but OGA is entitled to indemnity from her. The Court found no authority indicating that an indemnity claim only ripens when any related liability appeal is completed. Accordingly, the Appellate Court concluded that OGA's common-law indemnity claim was ripe for determination when the trial court rendered its judgment against Gunn.

B. IT'S COOL, I'M LUTHERAN: Child Placement Agency was not licensed to provide treatment services and so no Chapter 74 expert report was required.

Lutheran Soc. Serv. Of the South, Inc. v. Blount, 2016 Tex. App. LEXIS 2625 (Tex. App. Dallas Mar. 14, 2016) is an interlocutory appeal from the 192nd Judicial District Court, Dallas County, Texas. Appellant, Lutheran Social Services of the South, Inc. ("LSSS") challenged the trial court's denial of its motion to dismiss the claims asserted against it by the Blounts due to their failure to satisfy the expert report requirement of the Texas Medical Liability Act ("TMLA").

PB is the biological child of the Blounts and was born with a congenital disorder known as Apert Syndrome. He received an endotracheal tube early in his life due to breathing difficulties resulting from the

disorder. Prior to PB leaving the hospital, the Texas Department of Family and Protective Services determined he needed to be placed in foster care and contracted with LSSS respecting the placement of PB in an appropriate foster home. LSSS selected the Burks as foster parents. Epic Health Services was hired to provide nursing staff for PB while he was with the Burks. He was on a pulse alarm and it sounded. Epic nurses were on duty and, upon hearing the alarm, ran to PB's room and found him struggling to breathe. They contacted the Burks and called 9-1-1. Two days later, PB again became distressed. 9-1-1- was called. A nurse was able to stabilize PB by inserting a "back-up" trach tube. PB was taken to the hospital and returned to the Burks' home. A third incident occurred a week later. PB again became distressed when PB's trach tube again became dislodged. 9-1-1- was again called and he was transported to a nearby hospital. Although PB survived, he allegedly suffered permanent brain damage as a result of being "deprived of adequate oxygen flow."

The Blounts sued Epic and the individual nurses (for medical negligence), LSSS, and the Burks (for negligence). Notice pursuant to §74.001 et seq. of the Texas Civil Practice and Remedies Code was sent. Suit was filed and expert reports were served to LSSS, Epic, and the individual nurses. LSSS filed timely objections to the sufficiency of those reports. The trial court sustained those objections, in part. The Blounts were given opportunity to cure the deficiencies. Additional expert reports were timely filed by the Blounts and LSSS filed objections to the additional expert reports. Those objections were sustained by the trial court. The Blounts filed a Motion for Reconsideration and Motion for New Trial as to the Order Relating to LSSS. The Motion in part argued that LSSS is not a health care provider or institution to which any of the requirements of Chapter 74 applied, including the expert report requirement.

LSSS argued that it is a health care provider "because it assesses the medical needs of children in conjunction with physicians to ensure that children placed in foster homes receive the required care and treatment to meet their unique medical needs." The trial court granted the Blounts' motion for reconsideration and new trial as to LSSS and denied LSSS's motion to dismiss (filed after the ruling on the supplemented expert reports). The interlocutory appeal timely followed.

The Appellate Court analyzed the meaning of "health care provider," defined in the TMLA, and also the definition of a "child-placing agency" under Tex. Hum. Res. Code Ann. § 42.002(12)(West 2013)"(a person, including an organization, other than the natural parents or guardian of a child who plans for the placement of or places a child in a child-care facility, agency foster home, agency foster group home, or adoptive home.") The Appellate Court determined that the "assessment services" LSSS is licensed to provide are described in § 749.61(3)(B) as "services to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facility service planning. The language,

on its face, does not pertain to health care. Further, the record contained no evidence respecting LSSS's employment of, or affiliation with, any licensed physician, nurse practitioner, physician's assistant, or other medical provider.

The Appellate Court concluded that LSSS had not met its burden to demonstrate that it was "licensed, certified, registered, or chartered by the State of Texas to provide health care." Tex. Civ. Prac. & Rem. Code Ann. §74.001(a)(12)(A). Therefore, LSSS was not found to be a health care provider for purposes of the TMLA.

C. IT APPLIES, RIGHT?:

The Open Courts Clause does not prevent the running of limitations against otherwise untimely filed survival and wrongful-death claims against health care providers.

Durham v. Children's Med. Ctr. of Dallas, 2016 Tex. App. LEXIS 4302 (Tex. App. Dallas Apr. 25, 2016), is an appeal from the County Court at Law No. 4, Dallas County, Texas. The issue in this matter was one of first impression: If a 12-year-old person receives medical treatment and dies more than two years after that treatment ends, does the Texas Constitution's Open Courts Clause prevent the running of limitations against otherwise untimely filed survival and wrongful-death claims against her health-care providers? The Appellate Court concluded that the answer is "no" because the Open Courts Clause does not apply to these statutorily created claims. The Court of Appeals concluded that it does not apply and that the appellants failed to raise a genuine fact issue regarding fraudulent concealment.

Jessica Durham was born on November 16, 1993. In July 2006, she was seriously injured in a car accident in Hawaii. Her injuries included a broken leg and a ruptured spleen. The Hawaii doctors also diagnosed her to have dilatation of the ascending aorta that did not appear to be trauma related and for which they recommended follow-up with a pediatric cardiologist in Texas. She was transferred to Children's Medical Center of Dallas. Her general pediatrician, Dr. Hieber, helped arrange transfer. Dr. Hieber did not see Jessica after her transfer to Children's, nor did he see her again before she died in 2008.

Dr. Rupp and Nurse Practitioner Thornton treated her when she arrived at Children's. Dr. Copley evaluated her and operated on her left leg. She was transferred subsequently to Texas Scottish Rite Hospital. Appellants concede that August 31, 2006, was the "date of Jessica's last treatment by the Appellees."

On December 25, 2008, Jessica suddenly became ill and died because her aorta ruptured. Jessica was 15 years old when she died. Notice letters were not sent until December 6, 2010. On February 17, 2011, 73 days after sending the notice letters, appellants sued appellees asserting survival and wrongful-death claims related to Jessica's death, claiming that appellees failed to act on the information they had about Jessica's enlarged aorta and failed to treat or obtain treatment for that condition.

After unsuccessfully challenging the Chapter 74 expert reports, the appellees filed motions for summary judgment based on limitations. The trial court granted the motions.

If a survival claim is also a health-care liability claim, it is governed by §74.251. *Citing Gross v. Kahanek*, 3 S.W.3d 518, 521 (Tex. 1999)(per curiam). The Open Courts Clause does not apply to statutory claims, and both survival and wrongful-death claims are statutory claims. "Wrongful-death and survival claims cannot establish an open-courts violation because the 'have no common law right to bring either.'" *Citing Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000).

Next, the Appellate Court looked to whether or not tolling of § 74.251(a) applied and determined it did not. Because Jessica was 12 years old when appellees treated her, § 74.251(a)'s tolling provision for minors under 12 does not apply. Accordingly, the survival action was time-barred as the Appellate Court also determined the minority age tolling did not apply. The wrongful death claim was also time barred.

The Appellate Court also looked at whether there was a genuine issue of material fact regarding whether fraudulent concealment tolled limitations. The elements of fraudulent concealment are: (1) the defendant actually knew that a wrong occurred, (2) the defendant had a fixed purpose to conceal the wrong, and (3) the defendant concealed the wrong from the plaintiff. *Citing Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2011). Thus, fraudulent concealment requires more than evidence that the physician was negligent; it also requires evidence "that the defendant actually knew the plaintiff was in fact wronged and concealed the fact to deceive the plaintiff." *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999). The tolling ends when the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence. The Appellate Court determined that here, there is no evidence that appellees actually knew that a wrong occurred or that they had a fixed purpose to conceal it.

The trial court's judgment was affirmed.

D. MOO COWS!:

Chapter 74 did not apply where a truck hit some cows allegedly owned by a physician.

Archer v. Tunnell, 2016 Tex. App. LEXIS 1334 (Tex. App. Dallas Feb. 9, 2016), is another Dallas Appeal (*no offense to Dallas--but figured it was going to be from my home town of Canyon/Amarillo when I first picked the case*). In this case, Tunnell sued appellants (a physician and his professional association) for negligence and negligence per se, stating that he was a passenger in a pickup and was traveling on a road when cattle strayed onto the roadway causing the truck to strike the cattle and roll eight times. Appellants filed a motion to dismiss the suit asserting the suit alleged a health care claim under Chapter 74 because "the suit alleged the violation of safety standards and Richard K. Archer, MD was a physician and his professional association was a healthcare provider." Appellants requested the trial court dismiss the suit with prejudice and award them their attorney's fees because Tunnell did not file an expert report, required by Chapter 74. Appellants also

filed a motion for summary judgment asserting the trial court lacked jurisdiction to hear any claims involving the retirement plans because ERISA preempts state laws on all issues involving retirement plans. Appellants also asserted Tunnell lacked standing to bring the claims because he had no evidence appellants knowingly allowed the cattle to enter the roadway, and that Tunnell and the driver of the truck were contributory negligent.

Appellants also filed a motion to dismiss or abate requesting that the trial court "abate this suit or dismiss all references to Richard K. Archer's ERISA retirement plans for the reason this court lacks jurisdiction to hear ERISA matters or matters affecting an ERISA plan."

On April 10, 2015, after a hearing, the trial court signed a written order denying appellants' motion to dismiss due to the lack of an expert report. The trial court stated at the hearing that it denied the motion for summary judgment with respect to the ERISA arguments, but the court did not orally rule on the remaining grounds for summary judgment. The appellate record does not contain a written order denying the motion for summary judgment, nor does the record indicate that the trial court considered or ruled on appellants' motion to dismiss or abate.

The Appellate Court first looked at whether or not it had jurisdiction to hear the interlocutory appeal. There is no written order denying appellants' motion for summary judgment or their motion to dismiss or abate. An interlocutory appeal may be perfected only from a written order, not from a ruling. *Citing State v. $982,110*, No. 08-11-00253-CV, 2011 Tex. App. EXIS 7490, 2011 WL 4068011 at *1 (Tex. App.—El Paso Sept. 14, 2011, no pet (mem. op.)

Since there was no written ruling denying either appellants' motion for summary judgment or their motion to dismiss or abate, the Appellate Court did not have jurisdiction to consider Appellants' issues related to those motions. The Appellate Court further stated even if there was an order, they could not consider the issues because no statute authorizes the interlocutory appeal of such an order. Tex. Civ. Prac. & Rem. Code Ann. § 51.014.

The Appellate Court dismissed the appeal and considered damages for frivolous appeal. The Court stated that after the Supreme Court Decision in *Ross v. St. Luke's Hospital* there was no legitimate reason for appellants to think the appeal worthy. Further "no reasonable counsel could believe the ERISA-preemption argument was a reasonable ground for reversal in this case when there was no written order." Accordingly, Tunnell's request for damages was awarded in the amount of $2,205. The Appellate Court also granted Tunnell leave to file within 10 days of the date of the opinion a request under rule 45 for just damages after the appeal became frivolous and egregious on May 1, 2015.

COOKSEY & MARCIN, PLLC

The editor of this issue's newsletter is **Casey Marcin.** CML is a law firm located in The Woodlands and San Antonio, Texas.

For more information, please contact us at:
25511 Budde Road #2202
The Woodlands, Texas 77380; or
202 E Locust Street
San Antonio, Texas 78212
281-719-5881;
Fax: 281-719-5847.