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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. TO THE TOLLING OF THE BELLS[1]: for the Statute of Limitations to be tolled in a health care liability claim pursuant to Chapter 74, both the statutorily required notice and statutorily required authorization form must be provided.

In *Carreras v. Marroquin*, **2011 Tex. LEXIS 248 (Tex. 2011)**, parents brought wrongful death claims against a physician who allegedly caused their adult child's death. The parents attempted to toll the statute of limitations by sending pre-suit notice to the physician prior to the running of the statute of limitations, but failed to send the authorization form for the release of medical information required by Chapter 74 of the Texas Civil Practice and Remedies Code.[2] (Authorization Form Requirements set forth in TEX. CIV. PRAC. & REM. §74.052). The physician moved for summary judgment claiming the parents' claims were barred by the applicable statute of limitations. The parents argued that notice was provided and the suit was filed within the statute of limitations as tolled by Chapter 74. The trial court held (by letter ruling) that the requirement for notice and authorization form under sections 74.051 and 74.052 were separate and denied the physician's motion. Dr. Carreras appealed. The issue presented was whether notice provided without the statutorily-required medical authorization form was effective to toll the statute of limitations.

The Texas Supreme Court reviewed TEX. CIV. PRAC. & REM. § 74.051(a), (c) and §74.052(a). Both sections 74.051(a) and 74.052(a) specify that the notice "must be accompanied by" an authorization form. The Texas Supreme Court reasoned that "must accompany" was a directive that created a mandatory condition precedent. The Texas Supreme Court concluded that for the statute of limitations to be tolled in a health care liability claim pursuant to Chapter 74, a plaintiff must provide both the statutorily required notice and the statutorily required authorization form. The judgment of the Court of Appeals was reversed and

[1] From *The Bells*, by Edgar Allan Poe (1809-1849).

[2] The parents (The Marroquins) did not send an authorization form to the physician (Dr. Carreras) when they provided their Notice Letter on December 17, 2003, two days before the two-year statute of limitations would have expired. Suit was filed February 26, 2004. The trial court granted Dr. Carreras' plea in abatement on June 2, 2004. Two weeks later, the Marroquins provided Dr. Carreras with another notice including a list of providers and an authorization form that complied with the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), but not with the requirements of Chapter 74.

judgment rendered that the parents take nothing.

B. JUDGMENT IS NOT UPON ALL OCCASION REQUIRED, BUT DISCRETION ALWAYS IS[3]: Is the 30-day extension for the claimant to cure a timely served but deficient expert report truly issuable upon the trial courts "discretion," or is "discretion" now mandatory?

In *Samlowski v. Wooten*, 332 S.W.3d 404 (Tex. 2011), the patient presented to the hospital with a complaint of severe abdominal pain. Laparoscopic gall bladder surgery was subsequently performed but provided no relief for the patient's severe abdominal pain. An exploratory laparotomy was performed and revealed complete bowel obstruction with perforations in the pelvic region. The patient was transferred to a facility for higher care with diagnosis including, but not limited to: sepsis syndrome, acute respiratory distress syndrome, renal insufficiency/failure, anemia, and respiratory failure. Four additional surgical procedures were performed over the course of sixty (60) days.

The patient sued the surgeon for medical negligence and served an expert report one-hundred and five (105) days later. The surgeon challenged the expert report stating it was "wholly deficient in providing any expert opinions regarding specifically how the care [he] rendered . . . proximately caused the injury, harm, or damages claimed." A Motion to Dismiss was filed after the statutory deadline for serving expert reports had passed. The patient responded to both motions stating the expert report was sufficient but asked for, in the alternative, a thirty-day (30) extension to cure the report. The trial court found the report deficient and granted the Motion to Dismiss without giving the patient the benefit of the 30-day cure period.

A "divided [C]ourt of [A]ppeals" reversed and remanded with directions that the patient should receive the 30-day extension to cure the report. The surgeon argued that the court's concession that the expert report was not a "good faith effort" conflicts with its abuse of discretion holding.

The Texas Supreme Court held that because the statute is silent on the principles and procedures that should control the trial court's discretion to grant the 30-day extension to cure a timely filed but deficient expert report, and because the statute was designed to eliminate frivolous claims, a trial court should grant an extension when a deficient expert report could be readily cured and deny the extension when it could not be. The Court stated that the expert's report at issue was thorough, well-detailed, and sufficiently specific with the exception of one small and easily curable deficiency and that the trial court should have granted the patient an extension of time within which to cure the defect. The Texas Supreme Court remanded to allow the parties to present evidence responsive to the new guidelines the Texas Supreme Court established (the claimant must be prepared

[3] Quotation by Philip Stanhope.

to cure a deficient expert report whether or not the trial court grants the claimant's motion and make a record to the trial court showing that the defect could have been cured).

The Court of Appeals' judgment was modified to reflect a remand to the trial court for further proceedings, and the court's judgment, as modified, was affirmed.

C. NO WAIVER REQUIRED: Under § 101.106(f) of the Texas Tort Claims Act (the "Act") suit can be brought against the government regardless of whether the Act waives immunity from suit.

In *Franka v. Velasquez*, 2011 Tex. LEXIS 70 (Tex. Jan. 21, 2011), Dr. John Christopher Franka and Dr. Nagakrishna Reddy, both worked at a University Hospital, owned and operated by the Bexar County Hospital District, doing business as the University Health System. *Franka v. Velasquez*, 2011 Tex. LEXIS 70 (Tex. Jan. 21, 2011). Plaintiffs, Velasquez and Alaniz, individually and on behalf of S.M.A., sued Franka and Reddy but not the Center (or the District or Hospital)[4]. Franka moved to dismiss the action under section 101.106(f) of the Texas Tort Claims Act[5]. Plaintiffs stated that in order to invoke section 101.106(f), Franka had the burden of proving that suit could have been brought under the Act, and to discharge that burden, he had to offer evidence that the Center's immunity was waived by the Act via a condition or use of tangible personal property under section 101.021 of the Act.

Plaintiffs stated that nothing in the record implicated the use or misuse of tangible personal property in causing the injuries made the subject of the case. The trial court ultimately denied defendants' motions and they appealed. The Court of Appeals affirmed, holding that a government employee is not entitled to dismissal under section 101.106(f) until he has established that his employer's immunity from suit has been waived by the Act.

The Texas Supreme Court granted review, and stated that the construction of section 101.106(f) does foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment. The Court further stated that under Texas law, a suit against a government employee in his official capacity is a suit against the government employer with one exception, an action alleging that the employee acted *ultra vires;* and with that exception, an employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer. The Court ultimately held that under section 101.106(f), the suit "could have been brought" under the Act against the government regardless of whether the Act waives immunity from suit and reversed the judgment of the Court of

[4] The lawsuit involved an attempt at a vaginal delivery that was being facilitated by a vacuum extractor and where Franka and Reddy tried to free the baby's shoulder with their hands; the baby's left clavicle was fractured, and the baby suffered injury to his brachial plexus, requiring surgery several months later. *Franka v. Velasquez*, 2011 Tex. LEXIS 70 (Tex. Jan. 21, 2011). The Plaintiffs brought suit against Franka and Reddy but not the Center, the District, or the Hospital. *Id*.

[5] If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. TEX. CIV. PRAC. & REM. CODE § 101.106(f). On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed. *Id.*

Appeals and remanded the case to the trial court for further proceedings.

D. BECAUSE NO WAIVER REQUIRED, STATUTE OF LIMITATIONS DEFENSE IS WAIVED: Because under § 101.106(f) of the Texas Tort Claims Act (the "Act") suit can be brought against the government regardless of whether the Act waives immunity from suit, the true party in interest is the governmental unit, and not the employee; accordingly, the governmental unit cannot then assert statute of limitations defense once substituted.

In *Tex. Health Sci. Ctr. v. Bailey*, 2011 Tex. LEXIS 67 (Tex. Jan. 21, 2011), the physician, Dr. Sanders, a clinical assistant professor at the University of Texas Health Science Center at San Antonio (hereafter the "Center"), operated on Bailey (replacement of spinal fixation hardware). One of the pedicle screws he inserted broke, injuring the dural sac and impinging the nerves, resulting in a neurologic deficit. Sanders notified the Center that "an untoward event" had occurred.

Bailey and her husband sued Sanders individually on a health care liability claim (and other defendants) but not the Center, a governmental unit as defined by TEX. CIV. PRAC. & REM. §101.001(3). Sanders took the position that the suit was against him in his official capacity and moved to order the Baileys to substitute the Center for him or else suffer dismissal of the action. The trial court ordered the substitution and the Baileys complied. The Center answered and subsequently argued that the claim against it was barred by the Statute of Limitations and that the Relation-back Doctrine did not apply. The trial court granted the Center's motion and the Court of Appeals reversed.

The Texas Supreme Court looked at §101.106(f) of the Texas Tort Claims Act and determined that it does allow a plaintiff who has sued a government employee in what is considered to be his official capacity to avoid dismissal of the action by substituting the governmental employer as a defendant and that such action against the substituted defendant is not barred after limitations has run. *Tex. Health Sci. Ctr. v. Bailey*, 2011 Tex. LEXIS 67 (Tex. Jan. 21, 2011) (*following Franka v. Velasquez*, and holding that although Plaintiffs may have intended to sue Sanders in his individual capacity, §101.106(f) did not allow them that choice; when the Center was substituted as the defendant in Sanders' place, there was no change in the real party in interest and the Center could not prevail on its defense of limitations).

E. STATUTE OF LIMITATIONS IS AN ABSOLUTE TWO (2) YEARS: TEX. CIV. PRAC. & REM. CODE §74.251(a) does conflict with and does control TEX. CIV. PRAC. & REM. CODE §33.004(e).

In *Molinet v. Kimbrell*, 2011 Tex. LEXIS 68 (Tex. 2011), Molinet injured his Achilles tendon and underwent surgical repair. (Dr. Horan performed the first repair surgery). Molinet subsequently injured his Achilles tendon and Dr. Allen performed a second operation later that year. Kimbrell, a wound treatment specialist, treated Molinet.

Molinet filed suit against several parties seeking damages related to his injury and medical treatment. He sued Allen but not

Horan or Kimbrell. More than two-and-a-half years after Horan and Kimbrell last treated Molinet, Allen moved to designate them as responsible third parties. The trial court granted Allen's motions. Molinet then amended his pleadings to join Horan and Kimbrell as defendants. The doctors moved for summary judgment based on the fact that the claims against them were barred by the two-year statute of limitations in TEX. CIV. PRAC. & REM. §74.251(a). The trial court denied the motion and authorized an interlocutory appeal. The Court of Appeals reversed the trial court's order and rendered judgment dismissing Moline's claims against Horan and Kimbrell.

Molinet argued in front of the Texas Supreme Court that §74.251(a) and §33.004(e) do not truly conflict and both can be given effect. Alternatively, he argued that even if the sections do conflict, §33.004(e) controls and provides an exception to the two-year limitations period in §74.251(a).

The Texas Supreme Court reviewed both statutory provisions, the weight of legislative history, and whether an exception to §74.251(a) is appropriate. The Texas Supreme Court reasoned that although §33.004(e) provided that if a defendant designates a responsible third party that the claimant can, within sixty (60) days, join the designated party even though such joinder would otherwise be barred by the statute of limitations. However, §74.251(a) provides a two-year limitations period for health care liability claims and it is applied notwithstanding any other law. TEX. CIV. PRAC. & REM. CODE ANN. §74.002(a) provides that Chapter 74 of the Texas Civil Practice and Remedies Code controls in the event there is a conflict of law. Accordingly, the Texas Supreme Court held that the Court of Appeals correctly concluded that §74.251(a) bars Molinet's suit against Horan and Kimbrell. The decision by the Court of Appeals was affirmed.

F. *ANOTHER* CHAPTER 74 EXPERT CASE: Make sure the right issue gets appealed.

In *Rosemond v. Al-Lahiq*, 331 S.W.3d 764 (Tex. 2011)[6], a physician filed three Motions to Dismiss, each alleging the Plaintiff's failure to comply with the expert report requirements of TEX. CIV. PRAC. AND REM. CODE §74.351. Two motions were premised on timeliness objections and the other on the adequacy of the report. The trial court dismissed the plaintiff's claims based on *adequacy*. The Court of Appeals affirmed, impliedly finding that the report was not *timely* served as required under §74.351(a).

The Texas Supreme Court held that because the record demonstrated that the trial court did not implicitly rule in favor of Dr. Al-Lahiq on the timeliness issue, the remaining issue, which the trial court resolved in favor of Dr. Al-Lahiq and which the Court of Appeals did not reach, was the adequacy of the expert report. As a result, the case was remanded to the Court of Appeals for consideration of whether the trial court

[6] In this matter, Rosemond sued Memorial Hermann Hospital System, Dr. Maha Khalifa Al-Lahiq, other entities, alleging that their failure to provide physical therapy while he was immobilized and subject to prolonged bed rest caused him to develop severe contractures.

abused its discretion in concluding the expert report was inadequate.

G. NO IMMUNITY FOR CREDENTIALING ACTIVITIES: Hospital was not entitled to immunity for its credentialing activities related to a physician assistant and Plaintiffs were not required to allege and produce evidence that the physician assistant was credentialed with malicious intent to avoid summary judgment on their negligent credentialing allegations.

In *Moreno v. Quintana*, 324 S.W.3d 124 (Tex. App. El Paso 2010)[7], Alfredo and Frances Moreno, as representatives of the estate of Bernadette Moreno, filed a medical malpractice suit against Dr. Quintana and El Paso Healthcare System, Ltd. d/b/a Del Sol Medical Center on April 25, 2005. Both Dr. Quintana and Del Sol answered the suit and filed independent hybrid motions for summary judgment. The Morenos timely filed their responses to both motions and produced summary judgment evidence on the challenged elements of breach and proximate cause. Dr. Quintana filed numerous objections to the Morenos' summary judgment evidence, including objections to the affidavit evidence and deposition testimony of the Morenos' medical expert witness, Dr. David Ostrander, and objections to his own deposition testimony.

By written order dated March 23, 2006, the trial court sustained Dr. Quintana's objections and excluded Dr. Ostrander's affidavit and deposition from consideration. The court also sustained Dr. Quintana's objection to the Morenos' supplement to their summary judgment response and struck documentary evidence of Dr. Quintana's orders for Ms. Moreno's treatment on February 12th. On the same day, the trial court granted summary judgment for Dr. Quintana specifically on no-evidence grounds and entered a take-nothing judgment against the Morenos. The court also granted Del Sol's motion for summary judgment, although without specifying on what basis, and entered another take-nothing judgment against the Morenos. The Morenos appealed.

The Appellate Court found that the cardiologist's (Quintana's) alleged breach of the standard of care pended on the information that he was or was not given by the nurse. Accordingly, one must look at the credibility of the nurse's recollection. The Appellate Court determined that the evidence could have lead reasonable minds to differing conclusions regarding the alleged breach of the cardiologist. The Appellate Court held that summary judgment was not proper on the issue. The Appellate Court also looked at the cause of action of negligent credentialing and found that there was no indication from the statutory language that the legislature intended TEX. OCC. CODE ANN. §160.010(b) to apply to credentialing decisions regarding

[7] *Subsequent History*: Released for publication November 17, 2010. Rehearing denied by *Moreno v. Quintana*, 2010 Tex. App. LEXIS 9280 (Tex. App. El Paso, Apr. 7, 2010); Rehearing denied by *Moreno v. Quintana*, 2010 Tex. App. LEXIS 9276 (Tex. App. El Paso, Apr. 14, 2010); Petition for review denied *by El Paso Healthcare Sys. v. Moreno*, 2010 Tex. LEXIS 735 (Tex., Oct. 1, 2010).

a physician assistant. In arguably the most important part of the holding, the Appellate Court found that the hospital was not entitled to immunity for its credentialing activities related to a physician assistant and the parents were not required to allege and produce evidence that the physician assistant was credentialed with malicious intent to avoid summary judgment on their negligent credentialing allegations.

This leaves us with a question: how does *Moreno* coincide with the Texas Supreme Court decisions in *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503 (Tex. 1997) and *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005)? In *Agbor*, the Petitioner moved for summary judgment asserting that the Texas Medical Practice Act (the Texas Act), TEX. REV. CIV. STAT. ANN. ART. 4495b §§ 1.01-6.13 provided immunity for credentialing decisions by health care entities absent a showing of malice. The Texas Supreme Court held that the Texas Act's immunity provisions prescribe a threshold standard of malice to state a cause of action against a hospital for its credentialing activities.

In *Romero*, the court explained, "[i]n Texas, by statute, a hospital is not liable for improperly credentialing a physician through its peer review process unless the hospital acts with malice . . . ." *Romero*, 166 S.W.3d at 214.

In *Moreno*, the Appellate Court determined that whether or not malice is a requirement is one of statutory construction. *Moreno* 324 S.W.3d at 135. Arguably, it is not the end result of the credentialing, but the process by which credentialing takes place that is privileged (absent a showing of malice). In this humble writer's opinion, the Appellate Court did not take this ideology into account when reaching its holding in *Moreno*.

H. TIS BUT THY NAME THAT IS MY ENEMY[8]: That which we call a health care claim by any other name would smell as sweet.

In ***Marks v. St. Luke's Episcopal Hosp.***, 319 S.W.3d 658 (Tex. 2010)[9], Marks underwent back surgery at St. Luke's Episcopal Hospital. Seven (7) days later, while still recuperating from his surgery, Marks fell in his hospital room. He alleged that this fall was caused by the footboard on his hospital bed which collapsed as he attempted to use it to push himself from the bed to a standing position.

Marks sued the hospital, alleging that its negligence contributed to the cause of his fall. He complained that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly, (2) failing to provide him with the assistance he required for daily living activities, (3) failing to provide him with a safe environment in which to recover, and (4) providing a hospital bed that had been negligently assembled and maintained by the hospital's employees.

The trial court concluded that Marks' petition asserted health care liability claims as defined under the Medical Liability and

[8] From *Romeo and Juliet*, Act II, Scene 2, by William Shakespeare.

[9] This opinion is technically not a "Spring" decision and was released for publication October 8, 2010. However, given its important holding, it was decided to include it in this newsletter with this explanation.

Insurance Improvement Act ("MLIIA"). See TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim). Under the MLIIA, a health care liability claim must be substantiated by a timely filed expert report. *Id*. § 13.01(d). Because Marks failed to file a timely expert report, the trial court granted the hospital's Motion to Dismiss.

The Court of Appeals initially reversed, concluding that Marks' allegations concerned "an unsafe condition created by an item of furniture" and thus related to "premises liability, not health care liability[.]" The hospital appealed, filing its petition for review a few days before the Texas Supreme Court opinion in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005), (another case involving the scope of a health care liability claim under the MLIIA). After full briefing, the Texas Supreme Court granted the hospital's petition without reference to the merits and remanded the case to the Court of Appeals for its reconsideration in light of *Diversicare*.

Following the remand, a divided Court of Appeals affirmed the trial court's judgment of dismissal for want of a timely filed expert report, concluding that Marks had asserted only health care liability claims. Review was granted to consider the issue.

The Texas Supreme Court, following *Diversicare*, reasoned that if a health care provider furnishes unsafe materials or creates an unsafe condition as an integral and inseparable part of a patient's health care or treatment, the health care provider's acts or omissions would already fall within the category of claims based on departures from accepted standards of health care and there would be no need for the Act to include the word "safety." The Texas Supreme Court held that Marks' suit should be dismissed in its entirety holding that the entire suit, including allegations concerning the hospital bed, fell within MLIIA and is barred for three reasons: (1) the suit is substantively a health care liability claim and part of it cannot be recast into a non-health care claim; (2) the claims are for departures from accepted standards of health care; and (3) the claims are for departures from accepted standards of safety.