TADC e-Update
The Texas Association of Defense Counsel, Inc.

# LEGISLATIVE & CASE LAW UPDATE

***April 4, 2011***

***CLICK HERE to be directed to Texas Legislature On-Line homepage where you may look up any bill before the legislature by bill number***

**TADC's Legislative Day on Wednesday, March 30th was a resounding success. TADC members visited with dozens of legislators and their staffs, including members of the House Judiciary and Civil Jurisprudence Committee and Senate State Affairs Committee, on bills of critical interest to the profession and the judicial system. The value of these visits to the TADC's legislative effort cannot be overstated, and we are appreciative of the time and commitment TADC members have generously given to this event.**

**TADC has focused its efforts on four bills: HB 2031 by Rep. Jerry Madden (R-Plano), HB 274 by Rep. Brandon Creighton (R-Conroe), HB 2661 by Rep. Tim Kleinschmidt (R-Lexington), and HB 2437 by Rep. Kenneth Sheets (R-Dallas). HB 2031 establishes a mechanism by which a defendant may create a compensation fund, abate trial for a specified period of time, and invoke a cost and fee shifting process under certain circumstances. HB 274 proposes a form of loser pays generally applicable in civil actions, allows interlocutory appeals for controlling questions of law, establishes an expedited trial process for claims of $100,000 or less, and clarifies that causes of action may not be implied from statutory provisions unless expressly stated. HB 2661 and HB 2437 propose amendments to Chapter 42, CPRC, the offer of settlement procedure. At least with regard to HB 2437, this represents an effort to make offer of settlement a more effective tool in resolving litigation.**

**Three of these bills--HB 2031, HB 2661, and HB 2437--have been heard in House committee and are currently under consideration by the committee. HB 274 has yet to be heard. It appears that the offer of settlement bills (and perhaps HB 274, although this is not clear) may be referred to a House subcommittee in order to devise an acceptable compromise that can clear committee and come to the House floor in the next two weeks or so. It is also likely that a proposed substitute for HB 2031 will be offered within the next few days that addresses some of the concerns raised at the committee hearing two weeks ago. The TADC leadership is actively involved in the ongoing discussions on these bills and will be at the table when amendments are considered. The Senate has yet to take up any of these issues.**

**Today, Monday, April 4, the Senate State Affairs Committee will hear SJR 45 and SB 1718 by Senator Robert Duncan (R-Lubbock), which calls for a modified election system for appellate and district court judges. Under the proposal, justices and judges would be initially elected on a partisan ballot as they are now, but subsequently would stand for re-election in non-partisan retention elections. If a vacancy in a judicial office is filled by gubernatorial appointment, the first election of the appointee would be a contested partisan election, followed by non-partisan retention for subsequent terms.**

***TADC makes the front page AGAIN, advocating the importance of a balanced and accessible civil justice system!***

***Read it HERE!***

# CASE LAW UPDATE

## POSSIBLE DUE DILIGENCE COMPONENT IN SERVICE OF EXPERTREPORT—

**Court impliesapplication of due-diligence exception to timely service of expert report underright set of circumstances.**

***Stockton vOffenbach*, No. 09-0446, 2011 Tex. LEXIS 128 (Tex. Feb. 25,2011).**

> **In this medical malpractice case, P attached an expertreport to her petition but was never able to locate D doctor, thereby missingthe 120-**

**day deadline for service of the report. She had searched for D by way of a private investigator prior to filingsuit, initiated a Rule 202 proceeding seeking information about D from thehospital where D had previously practiced, and contacted D's last knownliability carrier for help in locating D. P ultimately had D served by publication, long after the 120-day deadlinehad passed. Although D's whereaboutswere still unknown, his liability carrier provided a defense, and D's counselsought dismissal of the case for failure to timely serve an expert report. The trial court agreed with P that the120-day deadline should not apply under the circumstances, and the Dallas Courtof Appeals reversed, finding that there was no evidence that the expert-reportrequirement prevented P from pursuing her claim. Finding that the court of appealsappropriately reviewed the case*denovo*since it involved the legal questions of whether Chapter 74 permitsadditional time beyond the 120-day deadline and whether Chapter 74 isunconstitutional, the Supreme Court affirmed the court of appeals' decision,citing multiple instances in which P did*not*exercise due diligence. Importantly, the Supreme Court stronglyimplied that a due-diligence exception, under the right set of circumstances,could be applied to Chapter 74: "Theword 'served' is not defined in Chapter 74, but its meaning under common lawincludes the notions of due diligence and relation back. And if Chapter 74 incorporates these conceptsthrough its use of the word 'served,' no conflict, as prohibited by section74.002, would exist. . . . [I]fpresented with a choice between an impossible condition and a due diligenceexception we would, of course, choose the latter."READ THE OPINION HERE**

**STRICT CONSTRUCTION OF MED MAL STATUTE OFLIMITATIONS—**

**Theresponsible-third-party statute, which allows, under certain circumstances, thejoinder of a D post limitations, is trumped by the*Medical Liability Act*, which imposes anabsolute two-year bar to health care liability claims.**

***Molinet v.Kimbrell*, No. 09-0544, 2011 Tex. LEXIS 68 (Tex. Jan. 21,2011).**

**In this medical malpractice case, P filed suit againstmultiple Ds, not including H or K. Morethan two and a half years after H or K treated P, the trial court granted themotion of one of the Ds to join H and K at RTPs pursuant to section33.004(a). Soon thereafter, P amendedhis**

**pleadings to join H and K as Ds. TheSupreme Court held that dismissal of H and K was proper despite the languagecontained in section 33.004(a) to the contrary. ("If a person is designated under this sectionas a responsible third party, a claimant is not barred by limitations fromseeking to join that person, even though such joinder would otherwise be barredby limitations, if the claimant seeks to join that person not later than 60 daysafter that person is designated as a responsible third party.") Section 74.251 provides that"[n]otwithstanding any other law . . . , no health care liability claim may becommenced unless the action is filed within two years from the occurrence of thebreach or tort or from the date the medical or health care treatment that is thesubject of the claim or the hospitalization for which the claim is made iscompleted . . . ." By the expresslanguage of section 74.251, the legislature has resolved the"otherwise-conflicting provisions" of the two statutes, thereby barring P'sclaims against H and K.READ THE OPINION HERE**

**DEFINITION OF HEALTH CARE LIABILITY CLAIM—**

**Cause ofaction based on ventilator's failure to function is a health care liabilityclaim.**

***TurtleHealthcare Group v. Linan*, No.09-0613, 2011 Tex. LEXIS 131 (Tex. Feb. 25, 2011) (per curiam).**

**Patient died after ventilator supplied by D health careprovider failed. Patient's family suedunder common law negligence, claiming a defective ventilator and ventilatorbattery caused the patient's death. Thecourt found that Ps' claims should be dismissed because they were health careliability claims, and Ps had failed to serve an expert report within 120 days offiling suit. "[P]ermitting the sameunderlying facts to give rise to [a common law negligence claim] wouldeffectively negate the procedures and limitations of the [Texas MedicalLiability Act]."READ THE OPINION HERE**

**MEDICAL MALPRACTICE—**

**Summaryjudgment in favor of D doctor was proper because no doctor-patient relationshipexisted.**

***Ortiz v.Glusman*, No. 08-08-00345-CV, 2011 Tex. App. LEXIS 1094 (Tex.App.—El Paso Feb. 16, 2011, no pet. h.).**

**P was admitted to the hospital with fever, chills,sweats, and low back pain. The followingday, when P developed numbness and weakness in his lower extremities and urinaryincontinence, P's attending physician ordered a routine, non-emergencyneurological consult with D neurologist. The hospital staff contacted D's answering service. Although D was not on call that day, Dreturned the call shortly thereafter and spoke with a nurse. D informed the nurse that he was unavailableto see any patients that day, but that he was available the following day. Early the next day, P's condition worsened,developing into paralysis. By the time Darrived at the hospital, P had already been transferred to another hospitalafter having been seen by an infectious disease specialist. P sued D for medical negligence, allegingthat D knew or should have known that P's condition required a timely evaluationand that D failed to provide such an evaluation. Affirming the summary judgment granted by thetrial court in favor of D, the court of appeals held that no doctor-patientrelationship existed between P and D because D had taken no affirmative acts totreat P.READ THE OPINION HERE**

## TEXAS TORT CLAIMS ACT—

**An allegationof misuse of tangible property by improper reading and interpretation of EKGgraphs does not state a claim under the TTCA.**

***Redden v.Denton County*, No. 02-10-00111-CV, 2011 Tex. App. LEXIS 1195 (Tex.App.—Fort Worth Feb. 17, 2011, no pet. h.).**

**Deceased inmate's family sued D county jail under theTTCA, alleging that the misuse of D's EKG machine by misinterpreting EKG datacaused the inmate's death. The trialcourt granted D's plea to the jurisdiction based on sovereign immunity. The court of appeals, noting a split ofauthority among its sister courts (San Antonio, Corpus Christi, and Amarillo vs.Waco and El Paso), identified the single issue presented on appeal: "Is*Salcedo v. El Paso Hospital District*,659 S.W.2d 30, 32 (Tex. 1983), which held that an allegation of misuse oftangible property by improper reading and interpretation of EKG graphs stated aclaim under the TTCA, still good law regarding the 'use' of an EKG machine,**

**orhas it been implicitly overruled by*Dallas Area Rapid Transit v. Whitley*,104 S.W.3d 540 (Tex. 2003)?" Agreeingwith the San Antonio, Corpus Christi, and Amarillo Courts of Appeal*not*to continue to follow*Salcedo,* the Fort Worth Court of Appealsaffirmed the trial court's grant of D's plea to the jurisdiction, holding thatthe "'use' of tangible property must involve the use of a medical machine, notthe 'use' of information from the medical machine."READ THE OPINION HERE**

## SOLE PROXIMATE CAUSE—

**Summaryjudgment in favor of non-subscriber employer was proper because act of employeewas sole proximate cause of employee's injury.**

***Brown v.Holman,* No. 07-10-00013-CV, 2011 Tex. App. LEXIS 1464 (Tex.App.—Amarillo Feb. 28, 2011, no. pet. h.).**

**P employee sued his non-subscriber employer for aninjury incurred in the course and scope of P's employment. D had instructed P to clean out a storagebuilding but to park P's pickup truck outside the fence within which the storagebuilding was located. P chose totransport certain items from the storage building to his pickup truck byclimbing over the fence. During one suchtransfer, P injured himself while straddling the fence. D obtained a summary judgment dismissing P'sclaim on the basis that P's act was the sole proximate cause of his injury. The court of appeals affirmed, noting that Ddid not require P to climb the fence to transport the materials, that D had onlyrequired P to park P's pickup outside the fence, and that P was free to use thegate. The court further noted that P'sact was the*only*proximate cause ofhis injury because the "foreseeable consequences of [D's] instruction to [P] topark the pickup behind the fence were inconvenience and delay, not that [P's]chosen method of negotiating the fence would lead to his injury." READ THE OPINION HERE**