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

LEGISLATIVE & CASE LAW UPDATE

April 25, 2011

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TO: **TADC Membership**

FROM: **Keith B. O'Connell, President**

Dear Members:

Some of you have reported receiving false and misleading information via email or telephone call about TADC's activities on three bills currently under consideration by the legislature: HB 274, HB 2661, and HB 2031. Specifically, it is being falsely reported that on your behalf, I testified in favor of HB 2031 and in favor of the original HB 274. Obviously, I cannot control what has been described as "amateur email rants from misinformed fringe elements" (see excerpts from the Austin Bar Legislative Update). I suppose this comes with the territory. It is important to me that you are kept informed and accurately advised, however, so I offer the following iteration of TADC's position and work on these three bills.

As you know from our weekly legislative updates, these bills have been extensively reviewed and amended by the House Judiciary and Civil

Jurisprudence Committee, working primarily through a subcommittee consisting of Rep. Jerry Madden (R-Plano), Rep. Tryon Lewis (R-Odessa), and Rep. Sarah Davis (R-Houston). At the request of Chairman Jim Jackson (R-Dallas) and other members of the committee, as President, and on behalf of the TADC, I and others worked closely with the subcommittee to craft reasonable substitute language for each of these bills that could pass muster with the full committee. The result of this work exceeded our expectations going into the session and has been positive

--HB 274. The loser pays provision of the original filed version of HB 274, which TADC publicly opposed, was removed from the bill and replaced by a reformed offer of settlement procedure (see summary of HB 2661 below). The remainder of HB 274 includes an interlocutory appeal provision for controlling questions of law, a provision barring courts from implying causes of action from a statute unless explicitly created, and a provision allowing a prevailing party to recover attorney's fees for breach of an oral or written contract (current law allows a "person" to recover attorney's fees on a "claim" for an oral or written contract). The bill also requires the SCOT to adopt rules regarding: (1) a motion to dismiss similar to FRCP 12(b)(6); and (2) expedited discovery and trial procedures for claims between $10,000 and $100,000. I testified in favor of the substitute bill but expressed concern, among others, that the substitute bill interfers with the right of private parties to contract. The TADC committed to continuing to work on this legislation to resolve our remaining concerns.

---HB 2661. On the day Representative Kleinschmidt's HB 2661 came up for hearing before the Committee, I testified instead for Representative Sheets' competing offer of settlement bill HB 2437. The gesture did not go unnoticed, prompting discussions with the Chair and other members of the Committee as to why the TADC views the original HB 2661 as unfair. As a result of these discussions and the efforts of others, the identical language of the offer of settlement provision in the Committee Substitute for HB 274 has now replaced the one-sided offer of settlement mechanism advanced in the original version of HB 2661, and is going forward as a stand-alone offer of settlement bill. Under the revised offer of settlement procedure, once a defendant triggers the offer of settlement process by tendering an offer, any party may respond to the offer. If the case ultimately goes to trial and produces a judgment, the current 80-120% thresholds continue to apply, reasonable

deposition costs are included in recoverable litigation costs, and litigation costs run from the earliest offer that entitles a party to the award of litigation costs.

---HB 2031. I testified against the filed version of HB 2031 in open committee. Contrary to the misinformation being circulated, my testimony against HB 2031 is public record and available on video at the Texas Legislature Online (www.capitol.state.tx.us) In response to concerns raised by TADC and others, the subcommittee adopted a substitute bill that allows one or more potentially liable parties to create a voluntary compensation fund, provides that the creation of a plan does not constitute an admission of liability, and bars the use of a plan creator's efforts to create a plan for the purpose of proving liability. All provisions regarding abatement of trial, duties of claimant's counsel to promote the fund, 5% cap on claimant's attorneys fees, cost and unilateral fee shifting contained in the original bill have been removed from HB 2031. No further testimony was allowed following the offer of the substitute. The version of the bill that remains provides no more than what parties are free to do now if they so desire. Accordingly, the TADC has taken no public position on the bill, other than against the bill as originally filed.

The primary author of the misinformation currently being broadcast repeatedly threatens that my actions and the actions of the TADC leadership will put us all out of work. Evidently, he seems to believe the most effective way to address legislation of concern to us, given the Governor's aggressive tort reform package, a Republican super-majority in the House and the atttempted influence by self-proclaimed civil justice reformers, is to refuse to work with the House Committee and testify against all legislation with impunity. There is a time to publicly oppose a bill and/or testify in opposition, and we have, as we did with HB 274 and HB 2031. There is a time to refuse to work on a bill that, by its terms, represents such bad public policy it cannot be fixed. To refuse indiscriminately however, the invitation of our legislators to work on bills in an effort to eliminate our concerns is tantamount to sticking our heads in the sand and letting others dictate what the law is going to be.

Perhaps most troubling is the suggestion that this is pocketbook issue for lawyers. Obviously At some point we have to realize the cause - what we are willing to fight for - is bigger than ourselves and our own selfish economic

interests. Make no mistake: TADC is not a trade organization. Our mission is not to line our pocketbooks. For that matter, our purpose is not to advocate for our clients, whose interests are indeed diverse and oftentimes competing. Our interest in the 82nd and any other legislative sessions is to work to preserve our civil jury system, to make it fair, accessible and balanced and to protect the Constitutionally protected right to trial by jury. That's it. Turning this into a pocketbook issue broadcast publicly on the internet is irresponsible, and causes substantial harm in the way the public views lawyers. It certainly misstates what I am all about.

Keith B. O'Connell
TADC President

CASE LAW UPDATE

Case summaries prepared by Don W. Kent, Kent, Good, Anderson & Bush, P.C, Tyler

TORTS

City of San Antonio v. Ash, 2011 Tex. App. LEXIS 901

What happens when a jury verdict is returned in an amount greater than the trial court's jurisdiction?

The Plaintiff, David Ash, sustained injuries when his car collided with a City of San Antonio street sweeper operated by a City employee. Suit was filed in the Count Court at Law No. 2 of Bexar County, Texas, a statutory county court with concurrent jurisdiction with the district court in civil cases where the matter in controversy exceeds $500, but does not exceed $100,000 excluding interest, statutory or punitive damages and penalties, and attorneys fees and costs, as alleged on the face of the petition. In his Original Petition, Ash sought damages "in an amount within the jurisdictional limits" of the Court. Ash's Second Amended Petition, which was the operative pleading at the time of trial, sought damages "in an amount to be determined by a jury of Plaintiff's peers, but in no event to exceed $50,000. The jury returned a verdict totaling $200,575.00. Of that amount, $89,000 was for past physical pain, mental anguish, physical impairment, and medical care expenses. Ash was awarded $111,000 for future damages (physical pain, mental anguish, physical impairment and medical care expenses). The balance of $575 was for property damage to Ash's vehicle. Ash filed a Motion for Leave to Amend Petition and Thereafter to Enter Final Judgment, which the trial court granted. In the post verdict Third

Amended Petition, Ash sought damages "in an amount to be determined by a jury of Plaintiff's peers, but in no event to exceed $200,575 exclusive of interest and costs." The City appealed asserting that the Plaintiff's Third Amended Petition divested the trial court of its jurisdiction because it alleged damages in an amount that exceeded the trial court's jurisdiction.

The Court of Appeals overruled that point. Citing an earlier Texas Supreme Court case, the Court of Appeals noted that where jurisdiction is once lawfully and properly acquired, no subsequent fact or event serves to defeat jurisdiction. This rule also applies where the original suit is within the jurisdictional limits of the court and the subsequent amendments seek only additional damages that are accruing because of the passage of time. This is especially so where there is no allegation of bad faith or fraud in invoking the jurisdiction of the Court. Since Ash's damages accrued because of the passage of time (which does not need to be expressly stated in the pleading) from the date of his Original Petition, the allegations of damages contained in the post verdict Third Amended Petition in excess of the trial court's jurisdictional limits did not deprive the court of jurisdiction. San Antonio Court of Appeals, No. 04-09-00732-CV, 02-09-2011 **READ THE OPINION**

Hanson Aggregates West, Inc. v. Ford, et al, 2011 Tex. App. LEXIS 1018

After a jury fails to find that a business' activities are creating a nuisance, can the trial judge under its equitable jurisdiction, grant a permanent injunction?

A group of homeowners sued a company which owned and operated a rock quarry, claiming that its business activities created a nuisance. In dispute in this appeal are the substantive and procedural standards that govern claims for permanent injunctive relief against a private nuisance. The homeowners filed suit alleging that the nearby rock quarry had created a nuisance and sought both monetary damages and a permanent injunction limiting quarry operations. A jury failed to find either that the quarry owner had intentionally created a nuisance, that the owner had negligently created a nuisance, or that the owner's conduct was abnormal and out of place in its surroundings such as to create a nuisance. Based on the jury's verdict, the district court rendered judgment that the homeowners take nothing on their claim for money damages. However, the trial court issued a permanent injunction based on the court's own determination that the quarry operations can and do create a nuisance and in balance of the equities, a permanent injunction should issue. The quarry owner appealed claiming the trial court abused its discretion in entering the permanent injunction in light of the jury's verdict. In three separate questions, the jury failed to find that the quarry owner intentionally created a nuisance, negligently created a nuisance, and that its conduct was abnormal and out of place in its surroundings such as to create a nuisance. These questions track the elements of what Texas courts have described as "actionable nuisance." The quarry owner took the position that the district court misapplied the law by granting a permanent injunction in the absence of either jury findings or conclusive evidence establishing an underlying cause of action for nuisance. The homeowners maintained the position that a permanent injunction is an equitable remedy whose issuance is ultimately left to the trial court's discretion and, therefore, the trial court's ruling granting a permanent injunction should be upheld.

The Court of Appeals, following previous Texas Supreme Court precedent, held that the trial court lacks discretion to issue a permanent injunction unless supported by at least one valid underlying cause of action that is established either by conclusive evidence or fact finding. In this case, there was legally sufficient evidence that the quarry operations did not result in an actual nuisance to the homeowners. A jury could reasonably have found that the quarry owner did not act intentionally or negligently to cause any nuisance to the homeowners. Further, a jury could reasonably find that the quarry owner's conduct was not abnormal and out of place in its surroundings. Given the jury's findings of no actionable nuisance by the quarry owner and the homeowners' failure to prove an actual nuisance as a matter of law, the district court lacked discretion to issue the permanent injunction. The trial court's judgment issuing a permanent injunction was reversed. Austin Court of Appeals, No. 03-09-00397-CV, 02-09-2011 **READ THE OPINION**

Neely v. Wilson, et al, 331 S.W.3d 900; 2011 Tex. App. LEXIS 1017

In a defamation case wherein a news agency reports on allegations being made by someone against someone else, must the underlying allegations themselves be true for the news agency to avoid liability, or is it sufficient that the news agency accurately reported that the allegations were being made and were under investigation?

An Austin area physician sued a local television station, its reporter and its owner for libel after the television station's broadcast of an investigative news report that negatively portrayed his work as a physician. The broadcast, as a whole, was consistent with its origins, plainly calculated to raise questions regarding how effectively the Texas Board of Medical Examiners and the medical peer review process ensured patient safety by taking action against doctors who endanger patients. To that end, the broadcast featured a negative portrayal of the physician and his medical practice. It discussed his background, his malpractice lawsuits, and a board disciplinary proceeding and order against him. The doctor sued for libel. The defendants moved for summary judgment, which was granted by the trial court. The doctor appealed. At the heart of appeal was whether Texas has adopted the "Third Party Allegation Rule." In short, when, as in this case, a report is merely that allegations were made and that they were under investigation, can the news agency defend itself by only showing that the allegations were in fact made and, in fact, were under investigation, so that the report was "substantially true," or must the media prove that the underlying allegations being reported about were themselves substantially true?

The Court of Appeals held that a media defendant's reporting that a third-party has made allegations is "substantially true" (and not defamatory) if, in fact, those allegations have been made and their content is accurately reported. Therefore, even if the underlying allegations themselves are false, there is no defamation. Austin Court of Appeals, No. 03-08-00495-CV, 02-09-2011 **READ THE OPINION**

The Court of Appeals reversed the trial court judgment.

Carreras v. Marroquin, 2011 Tex. LEXIS 248; 54 Tex. Sup. J. 788

In a healthcare liability claim governed by Chapter 74 of the Texas Civil Practice & Remedies Code, must a notice letter timely submitted to a defendant healthcare provider prior to the running of the two year statute of limitations be accompanied by the required statutory authorization in order to toll the statute of limitations for the 75 days set forth in the statutes?

In this case, the parents of their adult daughter brought wrongful death claims against a physician who allegedly caused their daughter's death. The parents attempted to toll the statute of limitations by sending pre-suit notice of their healthcare liability claims to the physician shortly before the statute of limitations ran, but failed to accompany it with an authorization form for the release of their daughter's medical information as required by Chapter 74 of the Texas Civil Practice & Remedies Code. The defendant doctor moved for summary judgment, arguing that the notice alone did not toll the statute of limitations and that the suit was therefore untimely. The trial court denied the motion and entered an agreed order permitting appeal.

The court of appeals affirmed the denial. There was inconsistency with respect to the rulings of various courts of appeal on this issue. There were two courts of appeal's opinions that conflicted with two other appellate courts' opinions in interpreting the effect of Sections 74.051 and 74.052 of the Civil Practice & Remedies Code on tolling of the statute of limitations when a medical authorization form was not provided as set forth in the statute. The Texas Supreme Court held that Chapter 74 requires that an authorization form accompany the provision of notice for the statute of limitations to be tolled and therefore, they reversed and rendered.

Healthcare liability claims have a two year statute of limitations period. There was no dispute in this case that the Plaintiffs filed suit more than two years after their causes of action against the doctor accrued. However, the Civil Practice & Remedies Code provides for tolling of the statute of limitations for a healthcare liability claim if notice of a claim is "given as provided" in Chapter 74 to the healthcare provider. Section 74.051(a) requires that "notice must be accompanied by an authorization form for release of protected health information as required under Section 74.052." The Texas Supreme Court posed the question before them as whether notice provided without an authorization form is considered to be given "as provided" in Chapter 74 and therefore, effective to toll the statute of limitations for 75 days, or whether notice given without an authorization form is insufficient to toll limitations. Section 74.051(a) provides "any person or his authorized agent asserting a healthcare liability claim shall be given written notice of such claim by certified mail, return receipt requested, to each physician or healthcare provider against whom such claim is being made at least sixty days before the filing of a suit in any court of this State based on a healthcare liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052. Notice given as provided in this Chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

Section 74.052(a) provides "notice of a healthcare liability claim under Section 74.051 must be accompanied by medical authorization in the form specified by this section. Failure to provide

this authorization along with notice of healthcare liability claim shall abate all further proceedings against the physician or healthcare provider receiving the notice until sixty days following receipt by the physician or healthcare provider of the required authorization.

The Supreme Court noted that "must accompany" is a directive that creates a mandatory condition precedent. Therefore, if the authorization does not accompany the notice, then the benefit of the notice tolling may not be utilized. The Court believed that the statutory history of the two sections at issue bolstered their interpretation. Accordingly, considering the text, history, and purpose of the statute at issue, the Court concluded that for the statute of limitations to be tolled in a healthcare liability claim pursuant to Section 74, a plaintiff must provide both a statutorily required notice and statutorily required authorization form. Texas Supreme Court, No. 09-0857¸04-01-2011 **READ THE OPINION**

TDIndustries, Inc. v. Citicorp North America, Inc., 2011 Tex. App. LEXIS 2643

Under what circumstances is a certificate of merit necessary to maintain a claim for damages arising out of the provision of professional services by a licensed or registered professional?

Citicorp filed suit against numerous parties, including TDI on February 26, 2009. Citicorp's suit sought damages against all defendants related to the installation and retrofit of complex machinery and equipment. Among other things, recovery was sought for damages caused by a fire involving a generator, retrofitted with a selective catalytic reduction ("SCR") exhaust scrubber for emissions reduction purposes, which TDI allegedly installed. Citicorp claimed that the SCR produced more back pressure than anticipated causing the fire. Specifically, the Citicorp Petition alleged that TDI owed a duty to exercise reasonably prudent and ordinary care in the installation of the SCR and alleged five other acts of negligence with respect to failing to adequately and properly inspect, test and verify the proper functioning of the system. Citicorp filed its First Amended Petition on April 1, 2009. This Petition included a certificate of merit concerning the alleged professional engineering negligence of another defendant regarding the installation and retrofit of the SCR, but Citicorp did not file a certificate of merit regarding its claims against TDI. Citicorp again amended its Petition on July 29, 2009 without including a certificate of merit concerning its claims against TDI. Believing that Citicorp was required to file a certificate of merit pertaining to its claims against it, TDI filed a Motion to Dismiss. In the Motion, TDI claimed that Citicorp was complaining of acts or omissions by TDI that implicate engineering services and the applicable standard of care for rendering engineering services, thus a certificate of merit was required. Citicorp maintained that the testing and verification of back pressure conditions did not involve the provision of professional services by a licensed professional engineer and noted that TDI, in discovery responses, denied having engineering or design obligations or back pressure testing responsibilities. Both parties filed affidavits in support of their positions. The affidavits were filed by Citicorp's expert and TDI's Senior Vice President responsible for engineering. The TDI employee averred that in his professional opinion, the allegations against TDI would necessarily invoke the use of engineering skill and duties, while the expert for Citicorp set out that, in his opinion, the allegations against TDI do not

necessarily involve the provision of professional services by a licensed professional engineer. The trial court denied TDI's Motion to Dismiss and this appeal followed.

TDI complained that the trial court abused its discretion by denying its Motion to Dismiss. The applicable version of Section 150.002(a) at the time this case was filed required a certificate of merit in actions for damages arising out of the provision of professional services by a licensed or registered professional. By its plain language, the certificate of merit statute is compulsory, not discretionary. In determining what "the provision of professional engineering services" means, the court was guided by the Texas Occupations Code's definition of the practice of engineering - the performance of any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work. The practice of engineering includes, among other things, design of engineering work for systems; engineering for construction of real property; engineering for preparation of operating or maintenance manual; and any other professional service necessary for the planning, progress, or completion of an engineering service. The court noted that Citicorp's negligence claims asserted in this case implicated TDI's engineering, education, training, and experience because it was premised on TDI's knowledge of the installation and testing of complex machinery and equipment - the retrofitted SCR exhaust scrubber installed and tested for omission reduction purposes. Thus, it was TDI's engineering expertise that underlay its alleged liability for having failed to exercise reasonably prudent and ordinary care in the installation of the SCR and for failing to adequately and properly inspect, verify, and take reasonable and necessary precautions so as to prevent harm to and to perform back pressure testing of the SCR. Therefore, the Court concluded that Citicorp's negligence claims as set forth were claims for damages arising out of the provision of professional services by a licensed or professional engineer within the meaning of the statute. The trial court's order was reversed and the case was remanded with instructions for the trial court to dismiss Citicorp's claims against TDI. Fort Worth Court of Appeals, No. 02-10-00030-CV, 04-07-201 **READ THE OPINION**

HEALTH LAW

Lovett v. Felton, 2011 Tex. App. LEXIS 596

In a medical malpractice case for lack of informed consent, what inherent risks must the doctor disclose to the patient (in a non listed procedure)?

Plaintiff Felton, a 29 year old carpet layer, experienced neck pain and headaches radiating into his eye after heavy lifting at work, and he consulted chiropractor Lovett. In the first two sessions, Lovett performed a manipulation of Felton's neck without providing relief. In the third session, Lovett performed a more forceful manipulation, resulting in a release of the joint, but Felton immediately experienced blurred vision, nausea, dizziness, and a headache. Felton was transported to a hospital. He suffered a stroke as a result of a dissection of a vertebral artery. He remained in the hospital for ten days and did not work for two years. He still suffers from headaches and double vision. He sued Lovett under three theories of negligence, but the jury found only one, that Lovett failed to inform Felton of the risk and dangers of chiropractic treatment. The jury failed to find for the Plaintiff on claims that Lovett was negligent by being too forceful in the third manipulation, thereby causing the artery dissection, which caused a stroke and that Lovett failed to recognize that Felton had an arterial dissection before beginning his treatment. Lovett appealed the one jury finding against him.

Causes of action for lack of informed consent are medical malpractice claims governed by Article 74 of the Civil Practice & Remedies Code. A chiropractor is a healthcare provider under the statute. The question in this case is whether the chiropractor failed to disclose that which he had a duty to disclose. The Texas Medical Disclosure Panel is charged with developing a list of risks and hazards which must be disclosed to patients. However, the list is not all encompassing. There may be instances of medical and surgical procedures that are not addressed by the panel. These are referred to as non listed procedures. In such cases, the physician is not free to remain silent. He still must comply with the duties to disclose imposed upon him by common law, that which a reasonably prudent physician would disclose. One such duty is to inform the patient of risks "inherent" in the medical procedure to be performed. To be inherent, the risk must be one that exists in and is inseparable from the procedure itself. The procedure itself must present the risk - it is not enough if some additional factor, independent of the procedure exists or occurs for the risk to arise.

The procedure at bar involved a manipulation of the surgical spine while the risk consisted of a ruptured or dissected vertebral artery as a result of the manipulation. It is undisputed that Lovett did not inform Felton of this risk. It was established, uncontradicted, in the testimony that current medical knowledge and literature indicates that it is highly unlikely, if not impossible, for a cervical spine manipulation to injure a healthy vertebral artery. For the manipulation to have caused the dissection, then the vertebral artery would have had to have been unhealthy, or the manipulation would have had to been applied improperly. The jury failed to find that he manipulation was applied improperly. From this, we see that the potential for a dissection of the vertebral artery arose only when some other factor or condition was present. The injury suffered by Felton was not an inherent risk, therefore, the injury suffered by Felton was not an inherent risk of which the chiropractor had a duty to disclose. Amarillo court of Appeals, No. 07-10-0197-CV, 1-27-2011 **READ THE OPINION**

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Hotel deadline – June 14, 2011

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