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.*

COMMENT FROM THE EDITOR: *This newsletter is a mixed bag of cases I found interesting. I have stayed away from expert report cases since I think most readers are most likely as tired of reading them as I am.*

A. VERY HAIRY: This case comes from the Thirteen District Court of Appeals and addresses whether or not laser hair removal falls under the purview of Tex. Civ. Prac. & Rem. Code Ann. Ch. 74.

In *Rio Grande Valley Vein Clinic, P.A. v. Guerrero,* 2012 Tex. App. LEXIS 7366, 2012 WL 3744791 *(*Tex. App. —Corpus Christi Aug. 30, 2012*)* the issue to be decided was whether or not laser hair removal is a health care liability claim under Chapter 74. The court noted their decision in *Tesoro v. Alvarez*, 281 S.W.3d 654, 659 (Tex. App.—Corpus Christi, 2009, no pet)(stating it was not). The appellate court acknowledged that currently there is a split in jurisdiction amongst the appellate courts regarding whether laser hair removal is a health care liability claim.[1]

Appellee Yvette Guerrero sought laser hair removal services from Appellant Rio Grande Valley Vein Clinic ("RGV Vein Clinic"). While undergoing the laser hair removal process by a licensed physician, Guerrero allegedly suffered severe burns and scarring to her face, chin, and neck. Suit was filed and RGV Vein Clinic asserted that the claim was a health care liability claim under Chapter 74 of the civil practices and remedies code. RGV accordingly filed a motion to dismiss based upon failure to provide an expert report. The trial court denied the motion and the interlocutory appeal followed. The appellate court affirmed.

The appellate court acknowledged that laser hair removal is regulated by the state but cited that the Legislature has deemed that an individual does not have to be a physician or health care provider to perform the procedure. However, it does require that all laser hair removal facilities have a written contract with a consulting physician to

[1] *See Bioderm Skin Care, LLC v. Sok*, 345 S.W.3d 189,192-93 (Tex. App.—Dallas 2011, pet filed)(concluding that laser hair removal is not health care treatment); *compared with Kanase v. Dodson*, 303 S.W.3d 846, 850 (Tex. App.—Amarillo 2009, no pet)(holding that laser hair removal is health care treatment for the purposes of Chapter 74). *See also Stanford v. Thomas*, No. 06-11-00011-CV, 2011 Tex. App. LEXIS 4754, at 27-28 (Tex. App.—Texarkana June 8, 2011, no pet.)(mem. op.)(same); *Sarwal v. Hill*, No. 14-01-01112-CV, 2002 Tex. App. LEXIS 8783, at 8-9 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet)(mem. op., not designated for publication)(same).

"establish proper protocols for the services provided at the facility" and to "audit the laser hair removal facility's protocols and operations." *See* Tex. Health & Safety Code Ann. § 401.519(a)(West 2010). This appellate court was not swayed and stated that the fact that a consulting physician must be available for emergency consultations or appointments relating to care does not persuade them. The appellate court was more persuaded that a non-health care professional may provide the cosmetic service and that the right to perform the service does not lead that same individual to be able to provide any form of medical diagnosis or treatment.

As cited in this opinion, because of the split of authority, the Supreme Court will have to weigh in on this decision (and apparently the Texas Supreme Court made such request in June of this year)[2]. This appellate court has refused to extend the scope of Chapter 74 beyond its stated bounds.

NOTE:

I personally am also persuaded by the fact that one does not have to be a licensed health care professional to provide laser hair removal and agree with this holding. I think the truly interesting issue would have been if they would have sued the physician for establishing improper protocols for the services since the statute does state that such must be done by a physician. In that circumstance, since licensure is demanded by the Legislature, I wonder if this Appellate Court would have held that to have been a healthcare liability claim. Here, it was the actual conducting of the procedure that was the basis of the claim.

B. DOCTOR PUNISHED FOR EXCELLENT CREDIT BY TRIAL COURT:

Trial court erred by not ordering periodic payments for some portion of the future medical expenses in the final judgment under Tex. Civ. Prac. & Rem. Code Ann. § 74.503(a) because he had an available line of credit of $2.5 million from the doctor's bank and such represented funds available to him to allow him to satisfy the $5 million judgment against him.

In *Prabhakar v Fritzgerald,* 2012 Tex. App. LEXIS 7154, 2012 WL 3667400 (Tex. App. —Dallas Aug. 24, 2012)), the appellate court held that the trial court erred by not ordering periodic payments for some portion of the future medical expenses in the final judgment under Tex. Civ. Prac. & Rem. Code Ann. § 74.503(a) because the available line of credit of $2.5 million from the doctor's bank represented funds available to him to allow him to satisfy the $5 million judgment against him.

This matter involved treatment provided in 2003 in which Dr. Holmes, a general surgeon, determined that the patient,

[2] The Supreme Court of Texas requested full briefing on the merits in a laser hair removal case, *Bioderm Skin Care, LLC v. Sok*, Case No. 11-0773 (Tex. June 22, 2012). Also granted petition for review in *Ghazali v. Brown*, Case No. 10-0232, 2011 Tex. LEXIS 119 (Tex. Feb. 8, 2011)(case was dismissed by agreement).

Fritzgerald, had a duodenal ulcer and needed surgery. The procedure was performed and then the patient, post-op day one, began to develop high fever and his blood pressure began to drop. The patient went into septic shock. The hospitalist consulted Prabhakar, an infectious disease doctor. Prabhakar thought that the patient had peritonitis (intra-abdominal infection). Broad-spectrum antibiotics were ordered and commenced the evening of September 1. However, the antibiotics ordered did not treat hospital-acquired Methicillin-resistant staphylococcus aureas (MRSA). Holmes performed exploratory surgery. The results of the surgery, coupled with the ordered tests, did not indicate that the abdomen was the source of the infection.

A nephrologist was consulted on the 4th who ordered Vancomycin, a broad-spectrum antibiotic that is effective against MRSA. On the 7th, a sputum culture had grown hospital-acquired MRSA pneumonia and the patient was treated with Vancomycin. The patient had developed gangrene in both arms and legs and underwent amputation of the arms below the elbow and both legs below the knee.

Many of the sued parties settled and only Holmes and Prabhakar went to trial on this matter. The jury found that Holmes' negligence did not proximately cause the patient's injuries. The jury found that Prabhakar was 100% liable for the patient's injuries. The jury awarded the patient $5 million for past and future physical pain and mental anguish; $144,350 for loss of earning capacity in the past; $300,300 for loss of earning capacity in the future; $3 million for past and future disfigurement; $3 million for past and future physical impairment; $1.28 million for medical expenses paid and incurred; and $5 million for future medical expenses. The trial court modified the damages to reflect the statutory damages cap, the credits from settling defendants, and the medical expenses actually paid. The court then rendered judgment in favor of the patient for $5,240,182.16.

For purposes of this newsletter, we will look primarily at the periodic payment issue. Section 74.503(a) of the Texas Civil Practice and Remedies Code states that upon request by a defendant physician a court shall order that payments for medical, health care, and custodial services awarded in the judgment be paid in whole or in part through periodic payments rather than one lump-sum payment. As a condition to authorizing period payments, "the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment." *Id.* § 74.505(a).

The question on appeal is whether Prabhakar provided evidence of financial responsibility in an amount adequate to assure full payment of the damages awarded by the judgment. Prabhakar contends he did and the patient contends he did not. This issue was one of first impression.

At the hearing, Prabhakar offered evidence of financial responsibility through the testimony of his wife, who is also his office administrator. The amount of his insurance policy was $200,000 and she identified an account that could be used to satisfy the

judgment in the amount of $638,035.19 and a line of credit for $2.5 million. She also identified an account for the physician's professional association with a balance of $2,577,118.21 that could be available.

The patient argued that there was no evidence of Prabhakar's liabilities or that the named accounts and lines of credit were reserved solely to satisfy the judgment.

The appellate court did not agree that the line of credit could not be considered evidence of financial responsibility. The appellate court stated that when the physician offered evidence that he could and would provide funds adequate to assure full payment of damages, and the evidence was not refuted, the condition to authorize the periodic payments was satisfied in accord with the statute. The trial court was found to have erred on this issue and this appellate point was resolved in favor of the physician.[3]

NOTE:

I just have to say, as a physician's wife, this case more than unsettles me. I agree with the appellate court's holding in this matter (and find it to be a huge relief) but I think this case really highlights the dangers of physicians being underinsured. Of course, one is a target if they have a healthy insurance policy, but certainly this case shows the flip side of what happens in an underinsured situation.

[3] This was the only true point addressed in the judgment.

C. "SCHIZOPHRENIA BEATS DINING ALONE"[4]: Employee's Safety/Training Claim against Mental Health Hospital Were Deemed to be Health Care Liability Claims under TMLA by the Supreme Court. Seriously.

In *Tex. West Oaks Hosp., LP v. Williams,* 371 S.W.3d 171, 2012 Tex. LEXIS 561, *55 Tex. Sup. J. 1033, 2012 WL 2476807 (Tex. 2012),* The appellate court for the Fourteenth District of Texas affirmed the trial court's order denying petitioner employer's motions to dismiss respondent employee's claims on the grounds that they constituted health care liability claims under the Texas Medical Liability Act ("TMLA"). The employer petitioned for review. The Supreme Court reversed and remanded the judgment to the trial court with instructions to dismiss the employee's claims against the employer and consider the employer's request for attorney's fees and costs.

In this case, Texas West Oaks Hospital, LP and Texas Hospital Holdings, LLC operate Texas West Oaks Hospital ("West Oaks"), a state-licensed, private mental health hospital located in Houston. Williams was a psychiatric technician and professional caregiver at West Oaks. He was supervising a patient, Vidaurre, who suffered from paranoid schizophrenia, including manic outbursts and violent behavior. While Williams was supervising him, Vidaurre became "agitated." Williams took Vidaurre to an outdoor enclosed smoking area in violation of the unit-restriction policy. The door to the enclosure locked and there were no cameras or other monitoring apparatus. A physicial altercation occurred which

[4] Quotation by Oscar Levant.

resulted in Vidaurre's death and injuries to Williams.

Vidaurre's estate sued West Oaks and later Williams, asserting Health Care Liability Claims. Williams later asserted cross claims of negligence against West Oaks pursuant to Section 406.033 of the Texas Labor Code, a statutory provision governing employee common law claims against employers not subscribed to worker's compensation.

Williams claimed that West Oaks failed to properly train him and warn him of the inherent dangers of working with patients such as Vidaurre. Williams also claimed improper protocol to avoid such situations, failing to provide employees with proper emergency notification devices, and failure to provide a safe workplace.

West Oaks filed a motion to dismiss on the grounds that Williams' claims constituted health care liability claims and that Williams did not serve an expert report on West Oaks. Williams responded that his claims sounded in ordinary negligence. The trial court denied West Oaks' motion and West Oaks filed an interlocutory appeal. The court of appeals affirmed the trial court's order. West Oaks filed peition for review.

The Supreme Court looked to Williams' status as a "Claimant" under the TMLA and determined that "Claimant" is broadly defined as a "person," including the estate of a person, bringing a heatlh care liability claim. Tex. Civ. Prac. & Rem. Code §74.001(a)(2). The term "Patient" is not included within the definition of "Claimant."

The Supreme Court next looked at the character of Williams' claims. The Court found that there are several types of health care liability claims set out in the Act and in addition to claims involving treatment and lack of treatment, the Act contemplates claims for alleged "departures from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care." *Id*. at §74.001(a)(13).

The Supreme Court was not persuaded on the bare basis that the claims of Williams' mirrored those of the patient and stemmed from the same fact pattern because Williams and the patient stand as separate claimants. They agreed with West Oaks that Williams' claims were indeed for departurees from accepted standards of safety and concluded that the safety component of health care liability claims need not be directly related to the provision of health care and that Williams' claims against West Oaks implicated this prong of a health care liability claim. The Court refused to create a common law exemption from the TMLA simply because he was an employee of a nonsubscriber health care provider.

The Court concluded that Williams must establish the medical negligence of West Oaks to recover under the TMLA.

NOTE:

The Dissent states that the law (TMLA) was designed to reduce the number of medical malpractice suits, and that by the Court holding that an employee's claims against his employer for providing an unsafe workplace and inadequate training are health care liability claims does the exact opposite. I agree with the Dissent that this is a "very strained reading of the statute." The Dissent also stated that "the Court's decision undermines the balance struck by the Legislature to encourage employers to become subscribers under the Workers Compensation Act." The Dissent was authored by Justice Debra H. Lehrmann and joined by Justices Medina and Willett.

D. "RATHER FAIL WITH HONOR THAN SUCCEED BY FRAUD"[5]: This case analyzed the prospect of fraudulent concealment in a health care liability claim.

In *Limon v. Yahagi,* 2012 Tex. App. LEXIS 6392, 2012 WL 3133804 (Tex. App. — Corpus Christi Aug. 2, 2012), the patient claimed that a stent placement should not have been performed on her by the physician. The physician sought summary judgment on the ground that the patient did not timely file her lawsuit. The trial court granted the physician summary judgment, and the court affirmed on appeal.

The original procedure was performed May 7, 2008. The patient claimed the procedure should not have been performed. On May 3, 2010, appellant sent a notice letter to appellee. Suit was actually filed on July 22, 2010, alleging that no procedure was indicated because the patient's abdominal aortic aneurysm was uncomplicated and measured only 2.2 centimeters in diameter. The patient contended that unless the aneurysm measured at least 4.5-5.0 centimeters in diameter, no surgery should have been performed.

The physician, appellee, moved for summary judgment on the basis that appellant filed suit one day outside the relevant limitations period. The patient, appellant, asserted fraudulent concealment to avoid appellee's limitations defense and attached evidence in support thereof.

Fraudulent concealment estops a defendant from relying on the statute of limitations as an affirmative defense to the claim. *Malone v. Swell*, 168 S.W.3d 243, 251 (Tex. App.—Fort Worth 2005, pet. denied). Fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence. It consists of four elements: (1) the existence of the underlying tort; (2) the defendant's knowledge or the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception. *Id*. at 252.

The patient's summary judgment evidence consisted of an affidavit from her expert, Devinder S. Bhatia, M.D. The court reviewed his opinions in the affidavit and held that the evidence was sufficient to raise a fact issue on the element of an underlying tort based upon performance of an unnecessary surgery. The affidavit also called into question that the physician knew or reasonably should have known that the surgical procedure was unnecessary. However, it is the third element of fraudulent concealment (proof that appellee used deception to conceal the wrongdoing) in which the evidence (the affidavit) failed. There was a required showing that the physician concealed the fact that he had wronged the patient by performing an unnecessary surgery. *See S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996). The court held that the patient failed to meet this burden. The patient also failed to produce evidence on the fourth element (her reasonable reliance on the concealment). The court concluded that the trial court did not err and that the claims were time barred.

[5] Quotation by Sophocles.

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