TADC HEALTH CARE LIABILITY LAW NEWSLETTER

FALL 2011 EDITION

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NOTE: *This newsletter summarizes 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 this time period nor is it a recitation of every holding in the cases discussed. This newsletter is not compiled for the purpose of offering legal advice.*

COMMENT FROM THE EDITOR: *In this issue, I focused on the question: "what is a health care claim?" Over the time period covered by this newsletter, the Texas Supreme Court issued some very interesting decisions regarding "what is a health care claim?" Following are summaries of the four cases I found to be most intriguing, and in some ways, the most disturbing.*

A. A "SLIP"-UP: Plaintiff slipped and fell on lubricating gel that had been used during a bladder scan. His claim was held to be a health care liability claim and was remanded to the trial court for dismissal based upon his failure to file a Chapter 74 expert report.

In *St. David's Healthcare P'ship, LP, LLP v. Esparza,* 2011 Tex. LEXIS 609 **(Tex. 2011)**, the issue to be decided was whether or not a patient's claim against a hospital for injuries suffered when he slipped and fell on a lubricating gel that fell to the floor of his hospital room during or immediately after a bladder scan was indeed a health care liability claim. The Texas Supreme Court held that such a claim was a health care liability claim.

Esparaza, the patient, had been admitted to St. David's Hospital for acute kidney failure and bladder scans were ordered. The attending nurse allegedly used "copious amounts of lubricating gel" for the scan and when Esparza got up to use the restroom in his hospital room, he slipped on the gel. He sued the hospital asserting claims of negligence and premises liability. No expert report was filed and the hospital filed a motion to dismiss under §74.351(a)-(b)[1].

The court of appeals relied on the opinion in *Marks v. St. Luke's Episcopal Hospital* and held that Esparza's claims were not health care liability claims. Such decision in *Marks* was subsequently withdrawn.[2] The Court based its opinion on *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010), (whether a claim falls within the scope of section 74.001(a)(13) is not determined from the form of the plaintiff's pleadings) and reasoned that Esparza's claim stemmed from the nurse's performance of the doctor-ordered scan and her failure to properly dispose of the gel used in the procedure. The Court determined that such was an

[1] Requiring expert report to be filed within one-hundred and twenty days of filing suit and mandating dismissal if no report is served.

[2] *Marks v. St. Luke's Episcopal Hosp*., 52 Tex. Sup. Ct. J. 1184, 1188-1190 (Tex. 2009) *withdrawn on rehearing*, 319 S.W.3d 658 (Tex. 2010)(this case involved the alleged failure of a footboard to a bed and the Court, on rehearing, decided that the bed to the plaintiff is an inseparable part of health care services).

integral and inseparable part of Esparza's health care and the claims were properly classified as health care liability claims "because they arose from a departure from accepted standards that should have been performed or furnished."[3]

The Court held that the trial court should have dismissed Esparza's claim for failure to comply with the expert report requirements. The case was remanded to the trial court with instructions to dismiss Esparza's claims and for further proceeding consistent with the Texas Supreme Court's opinion.

NOTE:

Currently, although a case may be a health care liability claim and the factual development of that case may excuse the necessity of expert testimony at trial as a condition of recovery, if a health care liability claim is asserted, it is nevertheless a requirement of plaintiff to submit an initial expert report that examines the matter, addresses the standard of care, states that the standard of care was breached, and explains the causal relationship between such breach and the alleged injury and damages sought. Murphy v. Russell, 167 S.W.3d 835, 838-839 (Tex. 2005)(per curiam).

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[3] *St. David's Healthcare P'ship, L.p., LLP v. Esparza, 2011 Tex. LEXIS 609* (Tex. 2011).

B. ALONG CAME A SPIDER . . . : A spider bite claim brought against a nursing home-defendant was considered a health care liability claim and required an initial expert report.

In *Omaha Healthcare Ctr., LLC v. Johnson,* 344 S.W.3d 392 (Tex. 2011), Johnson, on behalf of the estate of her deceased sister, filed suit against Omaha Healthcare Center, a nursing home, alleging that while Reed was being cared for by Omaha, she was bitten by a brown recluse spider and died.

Omaha filed a motion to dismiss for failure to file an expert report, claiming that Johnson's claims were health care liability claims. Of course Johnson asserted that her claims were matters of ordinary negligence and did not fall under the statutory definition of a health care liability claim. The trial court denied Omaha's motion and Omaha filed an interlocutory appeal. The court of appeals affirmed. The Texas Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court with instructions to dismiss the case and consider Omaha's request for attorney's fees and costs.

The Court looked at the definition of a health care claim:

> **a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional administrative services directly related to health**

care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.[4]

The Court reasoned that although "*Health Care*" is defined in § 74.001(a)(10), that "*Safety*" is not defined in the statute. The Court applied the meaning consistent with common law which is the condition of being "untouched by danger; not exposed to danger; secure from danger, harm or loss." (the Court cited to *Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 855 (Tex. 2005)* when that case quoted BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)).

The Court reasoned that a nursing home is required to provide more than physical care and treatment and are required to provide "quality care" which includes things such as safety of the environment. (*citing TEX. HEALTH & SAFETY CODE §242.001(1), (8)*). The Court concluded that the underlying claim was a failure to take appropriate actions to protect the patient from danger or harm while caring for her and are health care liability claims. Plaintiff was required to file an expert report.

The dissent relied more on the language in the dissenting opinions of *Marks v. St. Luke's Episcopal Hospital*, 319 S.W.3d 658 (Tex. 2010), and *Diversicare* and thinks that this opinion will cause confusion. To this editor, it is not only confusing but mind-boggling. It is incredibly far reaching and outside of the traditional ideology of "health care" to state that a spider biting a resident or a patient is truly a health care claim. Based upon this case, what would not be a health care claim if brought against a health care provider and during a patient's or nursing home resident's "confinement" in or at a health care facility? Apparently nothing.

If the failure to protect against an insect (*a.k.a. nature*), despite such claim falling well-inside the definition of ordinary negligence, requires an expert report, then it is difficult to imagine what would not fall within such a definition. *Moral of the story*: no matter how absurd the claim, no matter how within the definition of ordinary negligence it may be, if you are a Plaintiff and suing a health care facility or a health care provider, file the Chapter 74 initial expert report.

C. ANYTHING GOES!: As long as *something* is served as an initial report within 120 days, Plaintiffs will have the opportunity to process and respond to Defendants' objections by having 30 extra days to "cure" deficiencies.

In ***Scoresby v. Santillan*, 2011 Tex. LEXIS 516 (Tex. 2011),** Catarino Santillan sued Dr. Tyler Scoresby and Dr. Yadranko Ducic, two otolaryngology (ENT) surgeons, on behalf of Samuel Santillan, a minor, alleging that they negligently performed a medial maxillectomy to remove growths from Samuel's sinus cavity. Allegedly, an incision made too far into Samuel's brain lacerated a blood vessel and required surgery to stop the bleeding, resulting in brain damage and partial paralysis.

[4] § 74.001(a)(3).

In this case, Santillan timely served the Physician-defendants with a letter from Dr. Marable. There was no curriculum vitae attached to the letter and the letter did not describe his credentials or experience other than to state that he was a "Board Certified neurologist."

The Physicians objected that the letter was inadequate as an expert report. The objections were set-forth in three parts: 1. A neurologist is not qualified to testify regarding the standard of care for an ENT surgeon for the procedure performed in the matter; 2. Marable's opinions regarding the Physician's standard of care, breach, and causal relationship to Samuel's injuries were conclusory and directed to both doctors collectively rather than individually; and 3. Marable's curriculum vitae was not included, as the Act requires. The physicians stated that the letter was so deficient that should not be considered an expert report filed under the Act.

After the 120-day deadline, Santillan served Marrable's curriculum vitae and amended report. At the hearing, the court did not consider the post-deadline amended report. The trial court, as is seemingly required these days, denied the Physicians' motion to dismiss and gave the Plaintiff their 30-day extension to "cure deficiencies" in the report.

The Physicians appealed. The court of appeals concluded that an interlocutory appeal in these circumstances was not permitted.

The Court attempted to clarify its holding in *Ogletree v. Matthews*, 262 S.W.3d 458, 461-462 (Tex. 2008)(the trial court's denial of a motion to dismiss, asserting the report's inadequacy, cannot be appealed if the court also grants a thirty-day extension to cure deficiencies). The Court said that this case requires the Court to determine whether a document served on a defendant can be so lacking in substance that it does not qualify as an expert report, and therefore, an immediate appeal from the denial of a motion to dismiss is available under *Badiga v. Lopez*, 274 S.W.3d 681, 685 (Tex. 2009)(if no expert report is timely served, the denial of a motion to dismiss is appealable, even if the court grants an extension).

The Court concluded that a thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated. "All deficiencies," whether in the expert's opinions or qualifications, are subject to being cured before an appeal may be taken from the trial court's refusal to dismiss the case.

The majority opinion opined that Dr. Marable's letter in the case easily meets the minimum standard set forth in this holding. Although his letter was deficient since it did not state the standard of care but only implied that the standard was inconsistent with the Physicians' conduct, it was enough to establish that Santillan's claim against the Physicians has merit. They found Marable qualified to give the opinion since he was a neurologist and his experience and practice was "relevant" to the claim set forth against the Defendants.

The Court stated that their goal was to eliminate the first, wasteful appeal and give Plaintiffs an opportunity to hear Defendants' objections to the reports and give the Plaintiffs an opportunity to cure any deficiencies in the report. In other words, as

long as *something* (anything) is served within 120 days, the plaintiff actually has another 30 days, after learning exactly what the defendant thinks should be drafted against a defendant through defendant's Chapter 74 objections to the first throw-away report, to file the "initial" Chapter 74 expert report against a defendant. In other words, borrowing the words of one of this editor's favorite musicals, certainly, "*Anything Goes*!" for a plaintiff's first Chapter 74 expert report draft.

D. "SLOWLY BUT SURELY WINS THE RACE," SAID THE TURTLE: Turtle Healthcare Group's failure to deliver a second battery to a client for her ventilator prior to a hurricane constituted a health care liability claim and yet again, an expert report was required.

In *Turtle Healthcare Group, L.L.C. v. Linan,* 337 S.W.3d 865 (Tex. 2011), the Texas Supreme Court withdrew their prior opinion and issued the following opinion in its place. The issue presented was whether claims based on the failure of a ventilator can be brought both as claims subject to the Texas Medical Liability Act (TMLA) and claims not subject to the TMLA. The court held that under the record presented, they cannot. The court found that all claims presented were subject to the TMLA and must be dismissed because no expert report was served.

Turtle Healthcare Group supplied a ventilator to Maria Linan and a respiratory therapist from the group made regular visits to ensure that the ventilator was operating properly. Yolanda Linan, Maria's mother and caretaker, contacted Turtle and requested an oxygen tank and two additional external ventilator batteries due to an impending hurricane. Turtle delivered the oxygen tank and one battery. When the hurricane indeed struck, the Linans' power went out around 7:00 a.m. The ventilator continued to function after the electricity went out but around 9:30 a.m. the ventilator failed to operate and Maria died.

The family brought suit against Turtle alleging that Maria died as a result of the equipment failure. No expert report was filed. Turtle filed a motion to dismiss on the grounds that the Linans' claims were health care liability claims and no expert report had been filed. Of course, as is the theme in this issue of this newsletter, the Linans asserted their claims were governed by a standard of ordinary care and were claims for common law negligence.

The trial court determined that the Linans' claims were not health care liability claims and denied Turtle's motion to dismiss. Turtle filed an interlocutory appeal. The court of appeals found that the alleged acts and omissions set forth by the Linans were inseparable from the rendition of medical services and that the Linans should have filed an expert report. However, the appellate court further held that the Linans' claims alleging Turtle was negligent by failing to provide functioning, charged batteries were *not* health care liability claims. The appellate court noted that such was within the common knowledge of the general public that functioning, charged batteries are required for electronic equipment and expertise in the medical field would contribute nothing to a determination of whether failure to provide such batteries was negligent. Turtle filed a petition for review, the Linans did not.

The Texas Supreme Court looked to the substance of the claims and held that the

Linans' claims are that Turtle failed to provide Maria with a properly functioning ventilator and that all claims are based on the same underlying theme: that Maria's death was caused by Turtle's negligence in the "operation and/or maintenance of the . . . ventilator and/or its components and accessories." The Supreme Court of Texas held that the Linans' claims were health care liability claims subject to the Texas Medical Liability Act; because respondents did not file the expert report required by TEX. CIV. PRAC. & REM. CODE ANN. §74.351(a), (b), the trial court erred by denying petitioner's motion to dismiss.

What is interesting in this case comparing it to the *Omaha* case supra, is in *Omaha*, the Court focused on the fact that although the case was set forth regarding a matter that involved ordinary negligence, the Court centered around the idea that the decedent was within the facility's capacity at the time the alleged ordinary negligence occurred. In *Turtle*, the decedent was at home when the alleged ordinary negligence occurred, yet this was still considered a claim under the TMLA. Personally, some comfort is taken that at least the device in question—the ventilator and its components and accessories—is closer to an integral part of the decedent's health care than is a spider. This case, to this editor, is not nearly as far reaching as the *Omaha* decision.

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