TADC HEALTH CARE LIABILITY LAW NEWSLETTER

SPRING 2012 EDITION

EDITOR: CASEY P. MARCIN

ORGAIN BELL & TUCKER, LLP

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. NOW WE NEED A TOLL CALCULATOR: Fellow defense attorneys, we need to now warn our clients about being dismissed before the 120-day expert report deadline has occurred—the nonsuit of a claim under Chapter 74 tolls the 120-day period.

In ***CHCA Woman's Hosp., L.P. v. Lidji, 2012 Tex. App. LEXIS 2228 (Tex. App. Houston 1st Dist. Mar. 22, 2012),*** Plaintiffs (Appellees) sued CHCA Woman's Hospital d/b/a The Woman's Hospital of Texas and Woman's Hospital of Texas, Inc. (collectively "CHCA") for medical malpractice arising out of complications from their child's birth. Plaintiffs nonsuited their claims with four days remaining in the 120-day time period for serving expert reports. Over two years later, Plaintiffs refiled their suit and simultaneously filed an expert report. CHCA moved to dismiss arguing that the report was untimely under Texas Civil Practice and Remedies Code §74.351.

The trial court denied the motion to dismiss. CHCA filed an interlocutory appeal contending in its sole issue that the expert report was not timely served. CHCA argued that the nonsuit did not toll the running of the 120-day time period to serve the expert report.

The appellate court disagreed and concluded that the nonsuit was filed prior to the expiration of the 120-day time period and did indeed toll the running of the 120-day period for filing expert reports.

Since CHCA was nonsuited on the 116th day and served simultaneously with an expert report upon the refiling of the claim, the appellate court held that the expert report was timely filed and that the trial court correctly denied CHCA's motion to dismiss.

B. NO JURAT?: In this case, the appellate court found that the record contained no proof of any facts that would have established whether a privilege applied because no testimony was presented and the purported affidavit of the witness was not able to be found by the court.

In ***Nighthawk Radiology Serv., L.L.C. v. Reyes, 2012 Tex. App. LEXIS 2078 (Tex. App. Eastland March 15, 2012)***, this case dealt with an interlocutory appeal where the appellate court addressed whether or not appellants, a physician and radiology services company, were entitled to privilege under Tex. Health & Safety Code Ann. §161.032(a)[1]. Plaintiff (Reyes) sought

[1] Under §161.032: (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena. (b) Notwithstanding

records by way of written questions sent to MMH's Radiology and Quality Management Departments and to the Operations Manager of MMH Radiology. Appellants filed their motions to quash and motions for protective order based upon the peer review and medical committee privilege.

The trial court denied the motions under the authority of *Martinez v. Abbott Labs. & Abbott Labs., Inc.*, 146 S.W.3d 260 (Tex. App.—Fort Worth 2004, pet. denied).

As the party asserting the privileges, the Appellants have the burden to prove that the privileges apply to the information sought.[2] For a prima facie showing of privilege, the Appellants were required to present evidence necessary to support the privilege: i) by testimony at the hearing; or ii) by affidavits served on the opposing parties at least seven days before the hearing. Tex. R. Civ. P. 199.6.

Appellants supposedly attached an affidavit of the Operations Manager for MMH Radiology but the court was not able to locate it in the record.

However, the appellate court went further to state that even if the affidavit were in the record, the affidavit was unsigned and contained no jurat.

The appellate court held that there was no record of any evidence to support the claim of privilege and therefore overruled Appellant's issue.

[intentionally left blank]

Section 551.002, Government Code, the following proceedings may be held in a closed meeting following the procedures prescribed by Subchapter E, Chapter 551, Government Code: (1) a proceeding of a medical peer review committee, as defined by Section 151.002, Occupations Code, or medical committee; or (2) a meeting of the governing body of a public hospital, hospital district, hospital authority, or health maintenance organization of a public hospital, hospital authority, hospital district, or state-owned teaching hospital at which the governing body receives records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer. (c) Records information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code. (d) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions. (e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services. (f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center of health science center, hospital district, hospital authority, or extended care facility.

[2] *Arlington Mem'l Hosp. Found., Inc. v. Barton*, 952 S.W.2d 927, 929 (Tex. App.—Fort Worth 1997, orig. proceeding).

C. "RETAILIATION IS RELATED TO NATURE AND INSTINCT, NOT TO LAW. LAW, BY DEFINITION, CANNOT OBEY THE SAME RULES AS NATURE:" Retaliation claim held not to be healthcare claim where Plaintiff's alleged nothing more than economic injury.

In *PM Management-Trinity NC, LLC v. Kumets, 2012 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20, 2012)*, this was an appeal arising from a lawsuit brought forth by plaintiffs and a group of healthcare providers, including a nursing home. Kumets was a resident at Trinity nursing home and Trisun Healthcare, L.L.C. ("Trisun") provided nursing home management services to Trinity and Threadgill was employed as Trinity's nursing-home administrator. Plaintiffs alleged that Kumetses was admitted to Trinity to recover from a stroke and, as a result of the treatment received, suffered a second debilitating stroke. Plaintiffs sued Trinity for: breach of contract; breach of fiduciary duty; violations of the Deceptive Trade Practices Act; fraud/negligent misrepresentation; negligence per se; medical negligence; gross negligence; negligent hiring, supervision, management, and retention; *and retaliation*.

Plaintiffs alleged causes of action against Trisun and Threadgill for fraud/negligent misrepresentation and violations of the Deceptive Trade Practices Act (but not retaliation).

After the process of serving and objecting to a first Chapter 74 report, the granting of the 30-days to cure, and objections to the amended report, the trial court signed three orders: i.) an order stating that all the claims the plaintiffs asserted against Trinity were healthcare liability claims except for the retaliation claim and, because the amended expert report was deficient as to all healthcare liability claims, dismissed all claims but for the retaliation claim; ii.) a second order dismissing all claims asserted against Trisun; and iii.) a third order dismissing all claims asserted against Threadgill.

Trinity appealed arguing that the retaliation claim was also a healthcare liability claim. Accordingly, the main issue on appeal was whether or not the term "injury" in Chapter 74's definition of a healthcare liability claim includes claims in which the only resulting harm is pecuniary.

The court looked at §74.451 for support that a healthcare liability claim must entail more than pure economic loss (*provision governing agreements to arbitrate healthcare liability claims*). The court also looked largely to the *Victoria Gardens v. Walrath*, 257 S.W.3d 284 (Tex. App.—Dallas 2007, pet. denied) case. That case revolved around the timeliness of an expert report and a claim for breach of contract. The court analyzed whether the breach of the contract proximately resulted in the injury and held that since the breach of contract claim did not contain the allegation that it proximately resulted in injury to or death of a claimant, that such was not a healthcare liability claim.

The appellate court concluded that because the plaintiffs did not allege in their retaliation claim that they or the resident suffered any harm other than pure economic injury as a result of the alleged retaliation, and because the facts underlying their retaliation claim were wholly distinct from the facts underlying the healthcare claims, the "injury to or death of a claimant"

element (third element of a healthcare liability claim) was missing and so the trial court did not err or abuse its discretion in denying Trinity's motion to dismiss. They also concluded that the trial court did not err or abuse its discretion in granting Trisun's and Threadgill's motions to dismiss related to the alleged fraudulent billing issue.

Bob Pemberton wrote a concurring and dissenting opinion. He cites to *Yamada v. Friend*, 335 S.W.3d 192, 197 (Tex. 2010) and states that the majority's analysis did not suggest any basis for distinguishing this case from *Yamada*. He states that the Plaintiff's claim was predicated upon the same underlying facts as the breach-of-fiduciary duty claim (for appellate purposes, established to be a healthcare liability claim). He states in his dissent that the holding in *Yamada* compels the court to dismiss this action.

D. TECH WRECK'E[D]?,: Appellate court denied Tech's (Texas Tech University Health Sciences Center) motion to dismiss claims against both governmental unit and its employees.

In *Tex. Tech Univ. Health Scis. Ctr. v. Villagran,* 2012 Tex. App. LEXIS 2303 (Tex. App. Amarillo Mar. 22, 2012), this was an interlocutory appeal brought by Texas Tech University Health Sciences Center, regarding the trial court's denial of its claim for sovereign immunity filed pursuant to the Texas tort Claims Act[3].

The assertion was that deviations from the standards of care proximately caused the decedent's (Villgran's) death. The original petition in the matter did not name Texas Tech University Health Sciences Center as a Defendant but named seven individually-named defendants. One physician-defendant, Dr. Tello, filed a motion seeking his dismissal pursuant to Section 101.106(f)[4] of the Tort Claims Act. Dr. Tello argued that he was acting within his employment at Texas Tech University Health Sciences Center and the suit could have been brought against that governmental unit because he was accused of misusing tangible personal property (failed to use appropriate technique in placing the chest tube to avoid intrathoracic injury).

Plaintiff (Appellees) filed an amended petition dismissing Dr. Tello and substituting Texas Tech University Health Sciences Center in as the defendant responsible for his acts. The six other physician-defendants remained defendants.

Tech then filed a motion to dismiss the six remaining physicians because Plaintiff had named both the governmental unit and its employees and the suit against the employees should be dismissed pursuant to subsection 101.106(e) of the Tort Claims

[3] Tex. Civ. Prac. & Rem. Code Ann. §§101.001-101.109 (West 2011).

[4] 101.106(f): 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. 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.

Act. In a separate action, Tech filed a motion to dismiss all claims filed contending that all claims were barred because Plaintiff had filed against its employees. The trial court dismissed the six remaining physician defendants and denied Tech's other Motion to Dismiss.

The appellate court found that they needed to reconcile the contradictory provisions of subsections 101.106(b),[5] 101.106(e),[6] and 101.106(f). The appellate court asked, "*how is it then that subsection (f) apparently provides for the filing of a claim against a governmental unit that subsection (b) has already 'immediately and forever' barred*?"

The appellate court looked at the plain meaning of each subsection and stated that to the extent that subsection 101.106(b) conflicts with subsection 101.106(f), that subsection (f) should control. As to the claims against Dr. Tello, the appellate court held that the trial court did not err in denying the motion to dismiss filed on behalf of Tech on the basis of the original suit filed against Tello (such substitution was accomplished within thirty days).

The appellate court found that Tech's Motion to Dismiss construed the "same subject matter" language too narrowly and pointed out that those claims were being asserted against different tort-feasors and arose from different alleged acts of negligence than those against Tello. The appellate court stated that, for that matter, they did not believe that the claims being asserted against Tech involved the same subject matter as the claims previously asserted against the remaining six physician defendants and that 101.106(b) was inapplicable to bar those claims.

The appellate court looked to *City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 Tex. App. LEXIS 8224, at 19-20 (Tex. App.—Houston [1st Dist.] Oct. 7, 2011, pet. filed) for the holding that when a claimant files suit against both a governmental unit and its employee, that the governmental unit cannot use both subsection 101.106(b) and 101.106(e) to require dismissal of all claims.

The appellate court held that the trial court did not err in denying the motion to dismiss.

[5] 101.106(b): The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

[6] 101.106(e): If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.