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EDITOR: CASEY MARCIN

EDITOR: DIVYA CHUNDRU

EDITOR: CHRISTINA HUSTON

COOKSEY & MARCIN, PLLC

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.

For this issue of the newsletter, we proudly present: "The Willful and the Wanton!" During the time frame that this newsletter is meant to cover, we had issued the appellate decision in Crocker v. Babcock, 448 S.W.3d 159 2014 Tex. App. LEXIS 11535 (Tex. App.—Texarkana 2014). Accordingly, we are going to present a brief history of the emergency standard (i.e. pre-Crocker) and then explore the Crocker decision. We will then investigate the long-awaited Ross decision. We will conclude this newsletter with a proposed law we think everyone should be aware of and watch.

A. "GENERAL HOSPITAL": A drama filled, soap-operatic, history of the Willful and Wanton Standard.

When Chapter 74 was originally passed, the Texas Legislature made a number of changes to the "good Samaritan laws" by addressing the liability exposure of physicians and other healthcare providers who render emergency care. *Crocker v. Babcock et al.*, 448 S.W.3d 159, 163 2014 Tex. App. LEXIS 11535 (Tex. App.—Texarkana 2014) *citing* Michael S. Hull et al., House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three, 36 Tex. Tech L. Rev. 169, 264 (2005). "The changes attempt to address concerns about access to emergency care and how the threat of lawsuits had discouraged some physicians and other providers from providing emergency care services." *Id.* Accordingly, the Texas Legislature passed § 74.153, "Standard of Proof in Cases Involving Emergency Medical Care." *Id.*

In a suit involving a health care liability claim against a physician or health care provider for injury to or death of a patient arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that the treatment or lack of treatment by the physician or health care provider departed from accepted standards of medical care or

health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with willful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances. Tex. Civ. Prac. & Rem. Code § 74.153.

The statutory definition comprises two elements: (1) the type of care provided; and (2) the circumstances under which those services are provided.

Although § 74.153 does not define "willful [sic] and wanton negligence." There is authority that it is equivalent to gross negligence as defined in Chapter 41 of the Civil Practice and Remedies Code. *Turner v. Franklin*, 325 S.W.3d 771, 780-781 (Tex. App.—Dallas 2010, pet. denied).

***TURNER V. FRANKLIN*, 325 S.W.3D 771, 778-780 (TEX. APP.—DALLAS 2010, PET. DENIED)**. *Franklin* involved a 14-year-old- boy who presented to the emergency room with testicular pain. The symptoms could have been testicular torsion, which is an emergency, or epididiymitis, which is not. The treating physician diagnosed the patient with epididiymitis and sent him home with antibiotics and pain medication. The patient was subsequently seen by an urologist who diagnosed torsion. The delay in diagnosis allegedly resulted in the loss of the testicle.

The Plaintiffs argued that the willful and wanton standard set forth in § 74.153 did not apply because the physicians diagnosed the patient with a non-emergent condition. The Court dismissed this argument because: (1) the diagnosis itself constituted medical care and was therefore covered under the statute; (2) the Plaintiffs' position would necessarily create a world where physicians assumed the worst in their differential to avoid liability; and (3) the Plaintiffs asked for the question to be a retrospective determination (hindsight) when the statutory language anticipated a prospective one.

The court also determined that "willful and wanton" is the equivalent of gross negligence.

Lastly, the court determined and upheld the summary judgment in the matter granted to one of the defendants thus rejecting the argument that summary judgment could not be rendered when the emergency standard was sought.

Other Key Holdings:

In ***CHRISTUS HEALTH SOUTHEAST TEX. V. LICATINO*, 352 S.W.3D 556, 562-563 (TEX. APP.—BEAUMONT 2011, NO PET.)** a heart attack killed Stacy Meaux hours after her discharge from the ER. The court held that evidence was legally insufficient to support a finding of willful and wanton negligence when there was no evidence that the nurses consciously disregarded their patient's welfare thus standing for the idea that either a trial court or a court of appeals may set aside a jury finding of willful and wanton negligence under § 74.153 if the evidence is insufficient to support that finding.

In ***GARDNER V. CHILDREN'S MED. CTR. OF DALLAS*, 402 S.W.3D 888, 891-894 (TEX. APP.—DALLAS 2013, NO PET)**, parents proceeded to a jury trial against a medical center. At the close of the evidence, the jury was charged with the heightened standard of proof required by § 74.153 (2011) for cases involving emergency medical care in certain facilities. The jury found that the emergency medical care rendered by the medical center was not performed with willful or wanton negligence. The Court held that requiring the elevated standard of proof for claimants receiving emergency care is not a violation of

the equal protection provisions of either the Texas or federal constitutions.

B. "THE BOLD AND THE BLUNT": Criticisms of *Turner v. Franklin*.

In *CROCKER V. BABCOCK, ET AL., 448 S.W.3d 159, 2014 Tex. App. LEXIS 11535 (Tex. App.—Texarkana 2014)* the Court of Appeals for the Sixth Appellate District of Texas at Texarkana held that the defendants in a healthcare liability lawsuit were entitled to utilize the willful and wanton negligence standard to determine whether their conduct departed from the accepted standard of care for emergency medical care in a hospital emergency department.

This matter was a permissive, interlocutory appeal from the entry of summary judgment. Tammy Crocker (Plaintiff) presented to the medical staff with a suspected stroke after Ms. Crocker had begun to experience stroke-like symptoms after collapsing on the floor of her home. She was described as alert, unable to speak, with facial droop and right-sided weakness. She was air lifted to Good Shepherd Medical Center in Longview. Allegedly, upon arrival, the ED nurse failed to activate the hospital's stroke code protocol.

Dr. Babcock, her treating physician, ordered a CT scan without contrast of her brain as well as additional tests including: a comprehensive metabolic panel, a chest x-ray, an ACG, and a complete urinalysis. Dr. Babcock's differential diagnosis included cardiovascular accident, transient ischemic attack, dementia, and paralysis. Dr. Babcock's later diagnosis was acute, non-hemorrhagic cardiovascular accident. Ultimately, she was indeed diagnosed with an ischemic stroke. Ms. Crocker filed a medical malpractice lawsuit alleging damages based upon missed diagnoses and failure to treat. Dr. Babcock claimed to have been providing medical services under §74.153.

Plaintiff claimed that she was entitled to summary judgment as a matter of law because Defendants did not provide emergency medical care to Tammy Crocker in the emergency department because there was no evidence that the Defendants diagnosed or treated Crocker for acute ischemic stroke. *Id*. at 162.

The *Crocker* court failed to follow the *Turner* analysis. Instead, the *Crocker* court focused its analysis on the context in which the emergency department care was provided. The court reasoned that Ms. Crocker was initially seen following a sudden onset of measurable neurological deficits. The court stated that the absence of immediate medical attention for this condition "could reasonably be expected to result in placing the patient's health in serious jeopardy."

The court concluded that the heightened standard of proof for cases involving emergency medical care applied under Tex. Civ. Prac. & Rem. Code Ann. § 74.153 because the patient presented with an emergency condition—a possible stroke—and the hospital took immediate action responsive to that condition. The result was not changed by the failure to initiate stroke protocol.

Please note that the *Crocker* court did seem to rely on the *Turner* court's holding to decide that the facts as presented did fall under the willful and wanton standard.

NOTE: The Court entered its order overruling Appellant's Motion for Rehearing. *Crocker v. Babcock*, 2014 Tex. App. LEXIS 13416, 1 (Tex. App. Texarkana Dec. 16, 2014).

C. "AS THE FLOOR BUFFER TURNS":

Supremes decide the *Ross v. St. Luke's* case.

The Supreme Court decided ***ROSS V. ST. LUKE'S EPISCOPAL HOSP., 2015 Tex. LEXIS 361*** on May 1, 2015, a case many have been watching closely with regard to the issue of falls in hospital settings. *Ross*, you may recall, was a suit involving **a visitor** to a hospital facility that fell in the hospital lobby, and the issue was whether that circumstance would fall under the "safety" prong of a health care liability claim ("HCLC"). Specific to visitors (not patients), the Supreme Court said it is not an HCLC "because the record does not demonstrate a relationship between the safety standards she alleged the hospital breached—standards for maintaining the floor inside the lobby exit doors—and the provision of health care, other than the location of the occurrence and the hospital's status as a health care provider." The Court held that based on its previous decision in *Loaisiga v. Cerda* (379 S.W.3d 248, 258 (Tex. 2012)), a safety standards-based claim does not come within the TMLA's provisions just because the underlying occurrence took place in a health care facility, the claim is against a health care provider, or both. "Considering the purpose of the statue, the context of the language at issue, and the rule of *ejusdem generis*, we conclude that the safety standards referred to in the definitions are those that have a substantive relationship with the providing of medical or health care…. [T]here must be a substantive nexus between the safety standards allegedly violated and the provision of health care. And that nexus must be more than a 'but for' relationship…."

Recognizing, however, that determining HCLC safety standards-based claims may still be difficult, the Supreme Court provided the following **non-exclusive** list of considerations in determining same:

(1) did the alleged negligence of the defendant occur in the course of the defendant's performing tasks with the purpose of protecting patients from harm?
(2) did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated?
(3) at the time of the injury was the claimant in the process of seeking or receiving health care?
(4) at the time of the injury was the claimant providing or assisting in providing health care?
(5) is the alleged negligence based on safety standards arising from professional duties owed by the health care provider?
(6) if an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care? **or**
(7) did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?

Note the **"OR"** in the Court's opinion. While the Court did not say that any specific number of answers to this particular list of "non-exclusive" considerations must be a "yes" or a "no" (and in this particular case, the answer was "no" to all), it seems apparent that the decision remains a balancing and consideration of, at the very least, these several factors. The Court did note that in *Ross*, no argument was made that the visitor fell in a "patient care area or an area where patients possibly would be in the course of the hospital's providing services to them," nor did the hospital defendant argue that the area had to meet particular cleanliness or maintenance standards related to the provision of health care or patient safety (*citing Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525 (Tex.2011)).

D. WITHOUT A GUIDING LIGHT:

Appeals Courts issuing similar opinions that essence or underlying nature of a claim must be examined in determining whether it is a healthcare liability claim.

As though reading the minds of the Supreme Court, the San Antonio appeals court decided ***BUENO V. HERNANDEZ*, (2014 Tex. App.**

LEXIS 9738 (Tex. App.--San Antonio) on August 29, 2014. In *Bueno,* the Appellee Melissa Hernandez filed suit alleging that while receiving care in the emergency room, she was sexually assaulted by an attending nurse, Appellant Andres Bueno. After Hernandez failed to meet the mandatory 120-day expert report deadline, prescribed by *Section 74.351(a) of the Texas Civil Practices and Remedies Code*, the trial court granted Bueno's motion to dismiss.

On March 25, 2011, Hernandez presented to the CHRISTUS Spohn Hospital Kleberg emergency room. She was attended to by Bueno, an employee of the hospital and a registered nurse. Hernandez alleges that after she was medicated, Bueno sexually assaulted her by touching and fondling her breasts and stomach.

On March 25, 2013, Hernandez sued Bueno for assault-infliction of bodily injury, assault-offensive physical contact, assault-threat of bodily injury, intentional infliction of emotional distress, and gross negligence. Specifically, Hernandez alleged Bueno "touched and fondled her breasts and stomach without her consent and removed her undergarments and inappropriately touched and gazed at her naked body." In his answer, Bueno contended that he never touched Hernandez in an inappropriate or unprofessional manner and that he performed his duties as a registered nurse in the emergency room in accordance with standards of practice.

Bueno's amended answer asserted Hernandez's claim was a health care liability claim under Chapter 74 of the Texas Civil Practices and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. ch. 74 (West Supp. 2014). Although Hernandez eventually served Bueno with a statutory expert report, the report failed to meet the 120-day deadline prescribed by *section 74.351(a)*. *Id. § 74.351(a)*. Bueno objected to Hernandez's expert report and moved to dismiss her claims for failure to timely file the expert report. *Id. § 74.351(b)*.

On November 4, 2013, the trial court concluded Hernandez's claims against Bueno were health care liability claims and Hernandez's failure to file the expert report within the mandatory 120-day deadline required dismissal of her claims against Bueno. The trial court dismissed with prejudice all of Hernandez's claims against Bueno and awarded him attorney's fees.

The Court of Appeals, when arriving at their conclusion, reasoned that they must examine the essence or underlying nature of Hernandez's claims against Bueno, and noted that all her claims stem from her allegations that he sexually assaulted her while she was a patient at CHRISTUS Spohn Hospital Kleberg. As this court previously determined, "[i]t would defy logic to suggest that a sexual assault 'is an inseparable part of the rendition of medical care' or a departure from accepted standards of health care." *Holguin v. Laredo Reg'l Med. Ctr., L.P., 256 S.W.3d 349, 353 (Tex. App.—San Antonio 2008, no pet.)* (quoting *Diversicare, 185 S.W.3d at 848*).

They further went on to state that the breadth of the statute's [Chapter 74] text essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patients care, treatment, or confinement. But the presumption is necessarily rebuttable. In some instances the only possible relationship between the conduct underlying a claim and the rendition of medical services or healthcare will be the healthcare setting (i.e., the physical location of the conduct in a health care facility), the defendant's status as a doctor or health care provider, or both. *Loaisiga v. Cerda, 379 S.W.3d 248, 255 (Tex. 2012)*

Being mindful of the *Loaisiga* presumption that a claim is a health care liability claim when it involves a physician or health care provider and is based on facts evolved during the course of the patient's care, the Court felt the record clearly supported that Bueno was a health care provider and the assault about which Hernandez complains occurred while she was receiving treatment at the emergency room under Bueno's care. Accordingly, there was a presumption that the claim is a health care liability claim.

Next, the Court determined whether Hernandez successfully rebutted the presumption. The gravamen of Hernandez's complaint was that she was inappropriately touched by Bueno while a patient at the emergency room. Hernandez presented at the emergency room complaining of severe stomach pain. Hernandez had to conclusively show that the allegation did not contain a:

> (1) . . . complaint about any act of [Bueno's] related to medical or health care services other than the alleged offensive contact,
>
> (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and
>
> (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place. *Id. at 257*; *compare id. at 255* (conducting "an examination for the purpose of diagnosing or treating a patient's condition, [wherein] a medical or health care provider almost always will touch the patient intentionally.") *with Buck v. Blum, 130 S.W.3d 285, 289-90 (Tex. App.—Houston [14th Dist.] 2004, no pet.)* (concluding neurologist's placement of his penis in patient's hand during neurological examination was not a HCLC).

Looking at the record as a whole, the Court could not conclude that Hernandez *conclusively* rebutted "the presumptive application of the [Texas Medical Liability Act's] expert report requirements." Because Hernandez failed to conclusively rebut the presumption that her claim was a health care liability claim requiring an expert report pursuant to *section 74.351(a)*, the Court of Appeals reversed the trial court's March 25, 2014 order, render judgment dismissing, with prejudice, Hernandez's claims against Bueno, and remand the cause to the trial court for a determination of court costs and attorney's fees to be awarded to Bueno pursuant to *section 74.351(b)(1). See Tex. Civ. Prac. & Rem. Code Ann. § 74.351*.

F. 9021 . . 0-H, I FORGET:

Alleged Illegal Acts Held to Be Inseparable from Health Care

BRAZIL V. HILLMAN,[1] decided by the Texas Supreme Court on September 25, 2014, determined that a physician alleged to have defrauded his patient, and conspired with non-health care providers to defraud his patient, by using the dementia and deteriorating memory of the patient for personal gain is a healthcare liability claim because such acts would be inseparable from the medical care rendered.

Brazil was brought on behalf of Jennie Stokes, an incapacitated woman, by her daughter and guardian of Estate, Mayrita Hillman. Ms. Hillman alleged that several persons, including Ms. Stokes' personal physician Dr. Brazil, had conspired to rob Ms. Stokes of her property and business during a period of time in which she had "memory issues, dementia, and was deteriorating" [mentally]. The story goes, that Ms. Stokes had hired an attorney named Michael Payne to help her collect a delinquent loan she had made to her daughter (Ms. Hillman). Instead, Attorney Payne "orchestrated the dissolution" of Ms. Stokes' living trust, helped Richard Bowen to obtain power of attorney over Ms. Stokes, and then assisted Richard and Brenda Bowen in obtaining over $1.5M in property and loans from Ms. Stokes. Dr. Brazil found himself a defendant in this lawsuit stemming from his eleven years of treating Ms. Stokes (1998 to 2009), during which period it is alleged that he knew of her incapacity but encouraged her to see Attorney Payne and then also supported Payne's and the Bowens' misdeeds. Ms. Hillman alleged claims against Dr. Brazil for breach of fiduciary duty, undue influence and duress, aiding and abetting, civil conspiracy, and money had and received.

Ms. Hillman failed to serve any expert report at the 120-day mark, and Dr. Brazil then filed the motion to dismiss at issue arguing that these claims were health care liability claims because they "center upon her allegation that Stokes did not have the mental capacity to understand the

[1] 2014 Tex. App. LEXIS 10725 (mem. opinion)

complained-of transactions that she conducted with the defendants… contrary to Dr. Brazil's treatment opinion that she was mentally competent to operate her businesses." Ms. Hillman's position was that the suit did not allege a violation of the standard of care but rather that Dr. Brazil was complicit in a scheme to defraud, i.e., that he did not negligently fail to properly diagnose but rather, after properly diagnosing Mom, he participated in a scheme to use her medical condition to defraud her.

There are several findings in this case applicable to health care liability claims generally. First, the Court held that there is a rebuttable presumption that if the claims are based on the defendant physician's conduct during patient care, treatment, or confinement that those claims **are** health care liability claims and, therefore, the onus lies on the plaintiff to rebut that presumption. The Court considered (1) determination of the type of claim requires an examination of the underlying nature (the gravamen) of the claim, not the pleadings; (2) departure from the standard of care is alleged if the act or omission complained of is an inseparable part of the rendition of medical services; and (3) if expert medical or health care testimony is necessary to prove the merits of the claim against the defendant, it is a health care liability claim. [*citing Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex.2005), *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex.2010), *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171 (Tex.2012)]. Finally, claims presented on facts that could support claims against a health care provider for departures from the standard of care **are** health care liability claims regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards.

Specific to the facts at issue, the Court found that "medical care means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed … for, to, or on behalf of a patient during the patient's care, treatment, or confinement" and, further based on the daughter's testimony that Dr. Brazil, as a responsible physician, should have contacted her or other family when he determined that her mother had increased signs of dementia and reduced mental facilities," the Court held that the cause of action, therefore, was a health care liability claim that required the service of an expert report establishing the standard of care for Dr. Brazil after he determined his patient's mental faculties were deteriorating. The Court stated, "[t]he essence of Hillman's claim against Dr. Brazil is that he assisted the other defendants in their fraud scheme by encouraging Stokes, whom he knew lacked mental capacity to make business decisions, to go see [Attorney] Payne…. Dr. Brazil, however, confirmed that he had no relationship with Stokes outside of his medical care for her. Consequently, he could not have known about Stokes's alleged lack of mental capacity – and then referred her to Payne to be taken advantage of – in the absence of performing medical care for her. In other words, Dr. Brazil's rendition of medical care to Stokes and his referral to Payne of a known incompetent are unquestionably inseparable [from medical care] and not mutually exclusive."

The Court also gave a friendly nod to *Saleh v. Hollinger*, 335 S.W.3d 368 (Tex.App.—Dallas 2011, pet. denied). In *Saleh*, the patient alleged that after an in vitro fertilization procedure performed within the standard the care, the physician Defendant then stole her fertilized eggs and illegally sold them. Ms. Saleh argued that "no accepted standard of medical or health care includes theft," but the Dallas appeals court ultimately concluded the subsequent theft was an inseparable part of the rendition of medical services by the physician Defendant. The Supreme Court found the *Saleh* decision "persuasive" because both plaintiffs were attempting to separate an alleged improper "extracurricular act" by a physician from the healthcare provided by the physician. However, the Supreme Court held that because the alleged extracurricular actions could not have occurred were it not for the opportunity presented by rendering medical care, therefore, the alleged wrongdoing(s) were thus inseparable from medical care, thus requiring 74.351 report(s).

G. [B]-RYAN'S HOPE:

Legislature Considers What is a Health Care Liability Claim

In what appears to be a direct response to *Texas West Oaks Hospital v. Williams*, House Bill 1403 unanimously passed the Texas House, hoping to exclude claims of an employee or a deceased employee's survivors against a non-subscriber healthcare employer from being considered as health care liability claims ("HCLC"). *Texas Lawyer* has reported the comments of the Texas Nurses Association's general counsel that the HCLC statute, as currently written, may currently apply to Title VII employment discrimination claims, a worker in an ambulance who was injured in a car accident, an employee's slip-and-fall claim, or a mother and son injured in a car accident with a doctor. One would be surprised to learn that the TTLA has spoken against the bill, but … "Rep. Sheets' bill does a good thing, but it only goes partway," said TTLA president Bryan Blevins. "We'd like to see it go further. We think the problem is bigger." There is the potential for future amendment on the House Floor as parties try to broaden the language to statutorily exclude other types of claims from HCLC designation. Proponents of broader language were happier with previous House Bill 956 by Rep. Chris Turner, who proposed that "claimant" could only include a patient or those who file a lawsuit on the patient's behalf, citing that to do so would ensure that future HCLCs would only include claims that would necessarily be directly related to health care.

COOKSEY & MARCIN, PLLC

The editors of this issue's newsletter are **Casey Marcin, Christina Huston,** and **Divya Chundru** of **Cooksey & Marcin, PLLC** (CML). CML is a law firm located in The Woodlands and San Antonio, Texas.

For more information, please contact us at:
25511 Budde Road #2202
El Paso Building
The Woodlands, Texas 77380;
281-719-5881;
Fax: 281-719-5847.

www.cookseymarcinlaw.com