TADC HEALTH CARE LIABILITY LAW NEWSLETTER

FALL 2015 EDITION

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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.

A. THE "BAIN" OF MY EXISTENCE: Resident's (of assisted living facility) claims of negligence were properly categorized as health care liability claims.

In *Bain v. Capital Senior Living Corp.*, 2015 Tex. App. LEXIS 6704 (Tex. App. Dallas June 30, 2015), Drucilla Bain was an 88-year old resident of Azalea Trails Assisted Living & Memory care located in Tyler, Texas. Bain was wheelchair-bound due to a polio-related syndrome. She had a routine appointment to see a doctor at a separate location, unaffiliated with Azalea Trials. Azalea Trials transported Bain to her physician. Frazier (an employee of Azalea Trails) wheeled Bain into the van, secured the wheelchair to the van, but did not secure Bain to the wheelchair, using the wheelchair's lap belt. Bain claimed Frazier drove recklessly to the physician appointment, throwing Bain from the wheelchair and onto the van floor. She sustained injuries including broken femurs, a broken nose, and a black eye. Her injuries required her to move from Azalea Trials.

Bain sued on March 3, 2013, alleging that Frazier was negligent and that Azalea Trails was negligent and also vicariously liable for Frazier's negligence. On September 24, 2013, 206 days after Bain filed suit, the Defendants filed a motion to dismiss Bain's claims pursuant to the Texas Medical Liability Act, Chapter 74 of the Texas Civil Practices and Remedies Code. Defendants relied primarily on the Court's decision in *Sherman v. HealthSouth Specialty Hospital Inc.*, 397 S.W. 3d 869 (Tex. App.—Dallas 2013, pet. denied), arguing that the dismissal was mandatory because Bain's claims constituted healthcare liability claims and no Chapter 74 expert report had been served. Bain argued that her claims are ordinary negligence claims, not health care liability claims. After the hearing, the trial court signed an order granting Defendants' motion to dismiss, but denying their request for attorneys' fees and costs. Bain appealed, claiming that the claim against Frazier for negligent driving is not a health care liability claim and that Defendants (then Appellees) waived their right to seek dismissal under Chapter 74 because they failed to timely plead that Bain's claims were allegedly health care liability claims requiring the service of an expert report within 120 days.

Whether a claim is a health care liability claim is a question of law that is reviewed de novo. The court focused on the question of whether the underlying nature of the cause of action is a

healthcare liability claim and not on the pleadings. Azalea Trials argued that Bain's claims implicate the "safety" prong of Section 74.001(a)(13). The court cited to the opinion in *Ross v. St. Luke's Episcopal Hospital*, No. 13-0439, 2015 Tex. LEXIS 361, 2015 WL 2009744 (Tex. May 1, 2015), wherein the Texas Supreme Court explained that a safety standards-based claim against a health care provider constitutes a health care liability claim under Chapter 74 if there is "a substantive nexus between the safety standards allegedly violated and the provision of health care." *Ross* at 6. In other words, "[t]he pivotal issue in a safety standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety." *Id*.

In this case, Bain's claims implicate appellees' duties to provide for patient safety.

In looking at whether appellees had forfeited their right to seek dismissal under Section 74.351(b) because they waited until after the 120-day deadline had passed before asserting for the first time that Bain's claims are health care liability claims, the Appellate Court found that Bain had not presented her complaint to the trial court on this issue. As a result, the trial court was not afforded the opportunity to consider her complaint prior to ruling. Accordingly, they did not address it on appeal.

Appellees had raised the issue regarding the trial court's denial of their request for attorney's fees and costs. Section 74.351(b) states that the court "shall" award reasonable attorneys' fees and costs of court incurred by a health care provider when a health care liability claim is dismissed with prejudice and the defendant requests fees and costs. The Appellate Court found that the trial court was required to award reasonable fees and costs and abused its discretion when it denied request for the same.

The decision of the trial court was affirmed and the issue as to attorneys' fees and costs of court was reversed and remanded to the trial court.

B. YES LITTLE CATERPILLAR, HEALTH CARE CAN ALSO BE FRADULENT:

Trial court correctly entered a directed verdict as to a patient's fraud claim against a neurosurgeon where the gravamen of the essence of the claim was a health care liability claim.

In *Cook v. Neely*, 2015 Tex. App. LEXIS 7799 (Tex. App. San Antonio July 29, 2015) Cook began suffering from pain in her left hip, left leg, and lower back. Cook sought medical care and treatment from Neely, a neurosurgeon. Neely performed surgery on Cook and removed a herniated disc in the lower region of Cooks' spine and inserted two medical devices in place of the removed disc. Over the next twenty months, Cook visited Neely's office several times and Neely told Cook that the "bone plugs" inserted during surgery were in "excellent" or "good" position. Neely recommended a second surgery to address the other portion of Cook's spine and Cook was then examined by another surgeon, Dr. Cyr, who advised that the bone plugs that had been implanted by Neely were compressing her nerve roots. Cyr recommended that the bone plugs be surgically removed.

On June 29, 2010, Cook filed suit against Neely, claiming that he committed medical negligence pursuant to Chapter 74. Cook later amended her petition to add a fraud claim. The case was tried to a jury. After Cook presented her evidence, Neely moved for directed verdict on the fraud claim, arguing that Cook's purported fraud claim was actually a healthcare liability claim. Initially, the trial court denied the motion for directed verdict on the fraud claim yet ultimately

granted the motion and directed verdict on the fraud claim, finding that they came under the health care services. The jury found against Cook on her health care liability claim and the trial court rendered a take-nothing judgment.

The Appellate Court reasoned that a claim based on one set of facts cannot be spliced or divided into both a health care liability claim and another type of claim. Here, the facts supporting Cook's purported fraud claim involved treatment or lack of treatment by a physician. Given that Cook's purported fraud claim was inseparable from the rendition of medical or health care and involved a departure from accepted standards of medical or health care, the gravamen or the essence of the claim was a health care liability claim.

Cook also argued that Cook should have been able to present evidence to the jury of Neely's financial interest in the OTI bone plugs. Neely objected as to its relevance and being highly prejudicial. The court performed a balancing test under Rule 403 of the Texas Rules of Evidence and sustained Neely's objection, and excluded the evidence.

Cook had the burden to show that exclusion of the evidence probably caused the rendition of an improper judgment. Cook neither argued nor showed that the exclusion probably caused the rendition of an improper judgment.

The judgment of the trial court was affirmed.

C. NOT CAGED BY CHAPTER 74: Visitor slip-and-fall did not need a Chapter 74 expert report.

In *Cage v. Methodist Hosp*., 2015 Tex. App. LEXIS 7089 (Tex. App. Houston 1st Dist. July 9, 2015) Cage sued Methodist for personal injuries sustained when she slipped on a wet floor. Cage's petition was pleaded on a premises liability basis, allegedly the presence of an unreasonably dangerous condition. Cage claimed invitee status, having gone there for the purpose of assisting a patient as that patient's nurse. Methodist filed a Motion to Dismiss for failure to file a Chapter 74 expert report, arguing that Plaintiff's claims against Methodist are healthcare liability claims. The trial court granted Methodist's motion to dismiss Cage's claim and Cage brought this appeal.

Because the appeal poses a question of statutory construction (i.e. whether age's claims are health care liability claims) the Appellate Court applied a de novo standard of review.

The Appellate Court cited to the *Texas West Oaks Hospital v. Williams* opinion, a slip-and-fall claim by a non-patient against a medical provider, wherein the Court determined that an expert report is not required. The Appellate Court also looked at the *Ross v. St. Luke's Episcopal Hospital* matter, and the "non-exclusive considerations" set out in that case:

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?

The Appellate Court reasoned that the record here reflects that Cage went to Methodist as a visitor, not a patient. Cage slipped and fell on a wet floor in the hospital lobby that had been recently mopped. Because there is not a "substantive nexus between the safety standards allegedly violated and the provision of health care," Cage's claim is not a health care liability claim requiring an expert report. (*quoting Ross*, 2015 Tex. LEXIS 361, 2015 WL 2009744 at 6).

D. TWINS??????!!!!!!!!!!!!!!:

Summary judgment for attorneys and a law firm in a client's legal malpractice action (underlying suit alleged negligence of a fertility clinic for failing to investigate and obtain consent from the unwitting sperm donor), was proper as the underlying suit would never have recovered any damages.

In *Pressil v. Gibson*, 2015 Tex. App. LEXIS 9567 (Tex. App. Houston 14th Dist. Sept. 10, 2015), a lawsuit was filed by "the Gibson Parties" on behalf of Pressil against Advanced Fertility Center of Texas and Omni-Med Laboratories, L.L.C. (collectively, the "Clinic"). In 2006, Pressil and Anetria Burnette were involved in a sexual relationship. The couple used condoms for birth control. Pressil later learned that Burnette had surreptitiously collected samples of his sperm and taken them to the Clinic. Burnette apparently told the Clinic that she was Pressil's wife and that the couple needed help conceiving a child. The Clinic successfully inseminated Burnette, and Burnette eventually gave birth to healthy twin boys. According to Pressil, other than the sexual intercourse, all of this occurred without his knowledge or consent.

Pressil hired the Gibson Parties and sued the Clinic for negligence, conversion, violations of the Texas Theft Liability Act, and conspiracy (hereinafter, the "Fertility Lawsuit"). Pressil sought damages for mental anguish, loss of opportunity, loss of enjoyment of life, child support, the cost of raising two children, lost earnings, and lost earning capacity. Pressil sought exemplary damages as well. The Clinic moved to dismiss the Fertility Lawsuit on the ground that Pressil's claims were health care liability claims under Chapter 74, and Pressil did not timely file the requisite expert report. Pressil responded that he was not a claimant and his claims were not health care liability claims. The trial court disagreed with Pressil and dismissed the Fertility Suit with prejudice. Pressil's lawyers did not appeal the dismissal.

After the Fertility Lawsuit was dismissed, Pressil sued the Gibson Parties for legal malpractices. In the negligence portion of his petition against the Gibson Parties, Pressil claimed that his medical malpractice claim against the Clinic would have been successful if the Gibson Parties had obtained the requisite expert report. Alternatively, assuming that the Gibson Parties were correct in their assessment that the Fertility Lawsuit was not a health care liability claim governed by Chapter 74, Pressil alleged that an appellate court would have reversed the dismissal and he would have been successful in a suit against the Clinic for medical negligence.

The Gibson Parties moved for traditional summary judgment. The trial court granted the motion on the third ground, stating in its order that Texas law does not recognize damages for the birth of healthy children. Second, the trial court granted the motion on the ground that the Clinic did not owe Pressil a duty in tort. Even if the Gibson Parties had acted competently, they would not have been successful in the Fertility Lawsuit. The breach of fiduciary duty claim was severed from the negligence claim.

The Appellate Court stated, "although the unique facts of the Fertility Lawsuit defy classification, the case seems to fall into the subgroup of medical malpractice claims described as wrongful pregnancy actions." In general, a wrongful pregnancy action is simply a lawsuit brought by the parents of a healthy, but unexpected, unplanned, or unwanted child against a medical provider for negligence leading to conception or pregnancy. (*citing Flax v. McNew*, 896 S.W.2d 839, 841 n. 3 (Tex. App.—Waco 1995, no writ)).

As an initial matter, in Texas, a plaintiff cannot recover damages related to the support and maintenance of a healthy child born as a result of the medical provider's negligence. This is because the intangible benefits of parenthood far outweigh the monetary burdens involved. Here, the Appellate Court concluded that the measure of damages available to plaintiffs in wrongful pregnancy cases is limited to the medical expenses associated with the failed procedure that produced the healthy but unwanted child. (*following Crawford v. Kirk*, 929 S.W.2d 633 at 635, 1996 Tex. App. LEXIS 4101 (Tex. App.--Texarkana 1996) and rejecting the damages analysis utilized in *Flax*). Here, none of the damages sought by Pressil in the Fertility Lawsuit are recoverable under Texas Law as he did not request damages for the medical expenses associated with any medical procedure. In fact, no medical procedure was performed on him. Therefore, the trial court properly granted the Gibson Parties' motion for summary judgment on the ground that the claims in the Fertility Lawsuit would have failed as a matter of law because there were no damages even if Pressil had been represented by a reasonably competent lawyer. Accordingly, they did not reach the second issue—whether the trial court erred in concluding that the Clinic did not owe Pressil a legal duty. At the core, the underlying suit remained a "wrongful pregnancy" related tort action. As such, Pressil was limited to damages recoverable within that context. Accordingly, motion for summary judgment was also proper on the alternative theories.

The Appellate Court also decided that any expert testimony on whether Texas law would afford Pressil a remedy in the Fertility Lawsuit would have been inadmissible.

The trial court's judgment was affirmed.

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