

**TADC HEALTH CARE
LIABILITY LAW
NEWSLETTER**



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EDITOR: CASEY MARCIN

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.

A. SHE DID WHAT?!!: Media reported on Board determination of a local pediatrician and stated she had relations with her “patient” and the Board sanctioned accordingly. Media left out the fact that the “patient” was 60 years of age.

KBMT Operating Co., LLC v. Toledo, 492 S.W.3d 710, 2016 Tex. LEXIS 499, 59 Tex. Sup. J. 1257 (Tex. 2016). In this opinion Chief Justice Hecht delivered the opinion of the Court, in which Justice Green, Justice Guzman, Justice Lehrmann, Justice Devine, and Justice Brown joined. Justice Boyed filed a very dramatic, and brilliantly written dissenting opinion in which Justice Johnson and Justice Willett joined.

The Texas Medical Board disciplined Minda Lao Toledo, a Port Arthur physician, for “unprofessional conduct.” The Board issued a two-sentence press release stating

that Toledo “behaved unprofessionally when she engaged in sexual contact with a patient and became financially or personally involved with a patient in an inappropriate manner.” The press release further stated that Toledo had entered into an agreed order requiring her to complete ethics training, pass a professionalism course, and pay \$3,000, as an administrative penalty.

Toledo’s profile on the Board website included the text of the press release, also had a link to the order, which Toledo and her legal counsel agreed as to the wording. The order stated that Toledo was 51 years old and “primarily engaged in the practice of pediatric medicine.” The order further stated that she “used her medical license to obtain testosterone and human growth hormone for JC while she was in an intimate relationship with him and that she “accepted gifts from JC during the time she was treating him.” The order concluded that the Board was authorized to discipline Toledo for “unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public,” “engaging in sexual contact with a patient,” “becoming financially or personally involved with a patient in an inappropriate manner,” “prescribing or administering a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed,” and the “commission of an act that violates . . . state or federal law . . . connected with the physician’s practice of medicine.”

KBMT, an ABC-affiliated television station in Beaumont, learned of the press release and found it on Toledo's profile. KBMT aired for 30-seconds about the Board's action. The story ran four times in 24 hours. Only on the last airing did the anchor add that Toledo's patient was "an adult." Toledo sued KBMT and three of its employees for defamation, alleging that by stating she was a pediatrician, and by omitting that she was treating the patient with whom she had had sexual contact, with testosterone, the report falsely implied that the patient was a child, when, in fact, he was a 60-year-old man with whom she had been in a long-term dating relationship. KBMT moved for dismissal under the Texas Citizens Participation Act (the "Act"), which allows for the early dismissal of a legal action implicating the defendant's free-speech rights unless the plaintiff can establish each element of her claim with clear and specific evidence. The trial court denied KBMT's motion and the court of appeals affirmed, concluding that Toledo had established a prima facie case of defamation. The court concluded that Toledo had shown the requisite falsity because the gist of the broadcast was that she had had sexual contact with a child.

The Act provides that a suit based on a defendant's exercise of his/her free speech rights must be dismissed unless the plaintiff "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question."

The Court held that requiring the media to independently investigate the facts before reporting on official proceedings would ill

serve the public's interest in government activities. When the privilege applies, the gist of an allegedly defamatory broadcast must be compared to a truthful report of the official proceedings, not to the actual facts.

The Court held that the Plaintiff did not meet her burden under the Texas Citizens Participation Act of establishing by clear and specific evidence a prima facie case that the media defendants' broadcast was false, an essential element of her defamation claim, the Court held that the defendants were entitled to dismissal. The Court reversed the judgment of the court of appeals and remanded the case to the trial court for further proceedings. A private individual who sues a media defendant for defamation over a report on official proceedings of public concern has the burden of proving that the gist of the report is not substantially true—that is, that the report was not a fair, true, and impartial account of the proceedings. That burden is not met with proof that the report was not a substantially true account of the actual facts outside the proceedings.

B. KICK IN THE TEETH:

Civil penalties under Tex. Hum. Res. Code Ann. §36.006 sought against Dental Groups did not qualify as damages or monetary relief.

Nazari v. State, 2016 Tex. App. LEXIS 6441. This case involves dismissal of the counterclaims against the State. An opinion had been issued on February 26, 2016, and this opinion was substituted (June 17, 2016), denying The Dental Groups' motion for rehearing. This was

before Justices Puryear, Goodwin, and Bourland. It stems from orthodontic services that were provided to Texas citizens and paid for by Texas Medicaid. The State alleged that the Dental Groups “submitted or caused to be submitted false statements, information or misrepresentations of material facts, or omitted pertinent facts to Texas Medicaid to obtain Medicaid prior authorization and payment for orthodontic services and appliances.” The State said that the Dental Groups misrepresented the severity of the cases and, amongst other things, engaged in an unlawful ‘kickback’ scheme involving the referral of Texas Medicaid patients to a third party/parties for the provision of oral and maxillofacial surgery services. The State sought to recover the amount of the allegedly improper Medicaid payments made to the Dental Groups, prejudgment interest on those payments, “two times the amount or the value of such payments,” additional civil penalties for specific violations, as well as the costs, attorney’s fees, and expenses that the State incurred in seeking relief under the Act. In response, the Dental Groups filed counterclaims against the State and Xerox. The State entered into a contract with Xerox where Xerox reviewed the prior-authorization requests submitted by providers seeking to perform and to be reimbursed for orthodontic services. The Dental Groups alleged that the State conspired with Xerox to induce the Dental Groups into a reasonable belief that the prior authorization and payments were true and correct. The Dental Groups further alleged that the State failed to properly supervise

Xerox. The Dental Groups alleged fraud by making false representations to the Dental Groups.

“Orthodontic services for cosmetic reasons only are not a covered Medicaid service, but Medicaid can be used for the treatment of severe handicapping malocclusion and other related conditions as described and measured by the Texas Medicaid Provider Procedures Manual.” 25 Tex. Admin. Code §33.71(a) (2015)(Tex. Dep’t of State Health Servs., Orthodontic Servs. And Prior Authorization). The Provider Manual in effect during the relevant time specified that “providers are responsible for obtaining authorization for a complete orthodontic treatment plan.” Provider Manual §18.20.1. The Provider Manual explained that when submitting a claim for reimbursement, “the provider certifies” that, among other things, “the information on the claim for is true, accurate, and complete” and that the treatment is medically necessary. *Id.* § 2.2.7. To ensure compliance with the various Medicaid requirements and to prevent the improper depletion of Medicaid funds, several enforcement mechanisms have been created. Tex. Penal Code § 35!02; 1 Tex. Admin. Code §§ 371.1601-1719(2015)(Tex. Health & Human Servs. Comm’n, Medicaid & Other Health & Human Servs. Fraud & Abuse Program Integrity).

Nothing in the provisions could be construed as a waiver of immunity as to the State for the claims at issue in the case. The Supreme Court has explained that it has generally deferred to the Legislature to

waive immunity because the Legislature is better suited to address the conflicting policy issues involved. Further, the civil penalties that the State was seeking against the Dental Groups do not qualify as damages for monetary relief. Although the State initiated the enforcement action forming the subject of the appeal, the State did not “leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to” the claims that the state asserted.

The Court found that such dismissal was proper because the civil penalties under Tex. Hum. Res. Code Ann. §36.006 that the State was seeking against the Dental Groups did not qualify as damages or monetary relief since the State sought to punish the Dental Groups by using the enforcement measures in the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. §§ 36.001-36.132, to require the payment of civil penalties that well exceeded any amount of Medicaid funds that were expended by the State; the provision authorizing those penalties did not refer to them as damages and did not limit the recovery to any type of overpayment.

**C. “ALL RIGHT, MR. DEMILLE, I’M READY FOR MY CLOSE-UP”:
In camera inspection means the court actually has to review the documents in question.**

In re Christus Santa Rosa Health Sys., 492 S.W.3d 276, 2016 Tex. LEXIS 413, 59 Tex. Sup. J. 998, 2016 WL 3157558

(Tex. 2016). This is a mandamus proceeding where CHRISTUS Santa Rosa Health System (CHRISTUS) challenges the trial court’s order compelling production of its medical peer review committee’s records pertaining to a surgery performed by Dr. Gerald Marcus Franklin. CHRISTUS contended that the documents sought were protected from production by the medical peer review committee privilege (§ 160.007(a) of the Texas Occupations Code) and that the trial court abused its discretion in ordering CHRISTUS to produce the documents to Dr. Franklin. Dr. Franklin contends that the documents are subject to disclosure under the exception to peer review committee privilege provided in § 160.007(d). The Court conditionally granted mandamus relief and directed the trial court to actually inspect the documents at issue to determine whether Dr. Franklin was entitled to the medical peer review committee documents.

In March of 2012, Dr. Franklin performed surgery on Leslie Baird to remove the left lobe of her thyroid. Originally, he was just going to remove a sample so diagnosis could be made via cryostat machine. Dr. Franklin removed thymus gland tissue instead of thyroid tissue. Baird then needed to undergo a second surgery to remove the left lobe of her thyroid. After the failed surgery, CHRISTUS convened a medical peer review committee to review. The committee did not recommend discipline or any other action.

In March of 2013, Baird filed suit against Dr. Franklin. Dr. Franklin filed to

designate CHRISTUS as a responsible third party. The cryostat machine was not available during the surgery and Dr. Franklin alleged that failure to explain the machine's unavailability to him was negligent. Baird then named CHRISTUS as a defendant. Franklin served his first request for production to CHRISTUS asking for documents from the medical peer review file. CHRISTUS timely served responses and objections and filed a motion for protective order and privilege log listing all of the documents withheld based on an assertion of privilege. Dr. Franklin filed a motion to compel.

After hearing, the trial court ordered CHRISTUS to produce the documents to Dr. Franklin under a protective order, requiring that the documents remain confidential. CHRISTUS filed a motion to reconsider and that motion was denied. CHRISTUS then filed a petition for writ of mandamus in the Court of Appeals, which was also denied. CHRISTUS subsequently filed a petition for writ of mandamus to the Texas Supreme Court.

CHRISTUS argued that the trial court abused its discretion when it erroneously ordered production of documents protected from discovery by the medical peer review committee privilege under Tex. Occ. Code § 160.007(a). Whether a discovery privilege applies is a matter of statutory construction. The disclosure of the recommendation and decision to the affected physician under the exception "does not constitute waiver of the confidentiality requirements established under the statute." § 160.007(d).

CHRISTUS filed an affidavit from the director of quality and patient safety, the Medical Staff Bylaws, and a privilege log to establish its prima facie case for privilege. CHRISTUS also tendered the documents in camera for review. Because CHRISTUS presented a prima facie case for the privilege and tendered the allegedly privileged documents to the trial court, the trial court was obligated to review them before compelling production. (The original trial judge was not available and another judge heard argument. However, the trial court had opportunity to fix the error of not reviewing the documents upon hearing CHRISTUS' motion to reconsider).

After a very in-depth analysis of § 160.007, the Court held that the trial court did not adequately review the documents submitted for in camera inspection and such review is critical to the privilege issue in the case. Accordingly, the trial court abused its discretion in ordering that the medical peer review documents be disclosed. The trial court was directed to vacate the parts of its August 19, 2014, order, ordering the compelled production of the medical peer review committee records at issue and to determine whether, upon further examination, the § 160.007(d) exception to the medical peer review privilege applies in the case. The opinion was authored by Justice Green.

D. “WHEN WILL MANKIND BE CONVINCED AND AGREE TO SETTLE THEIR DIFFICULTIES BY ARBITRATION”-BENJAMIN FRANKLIN:

Under theory of direct-benefits estoppel, arbitration clause was enforceable.

***Specialty Select Care Ctr. of San Antonio v. Juiel*, 2016 Tex. App. LEXIS 7650.**

This is an interlocutory appeal from a trial court's order denying appellant Specialty Select Care Center of San Antonio, LLC d/b/a Casa Rio Healthcare and Rehabilitation's ("Casa Rio") motion to compel arbitration. On appeal, Casa Rio raises two issues challenging the trial court's order, arguing: (1) it was unnecessary for the parties' arbitration agreements to comply with § 74.451 of the Texas Medical Liability Act ("TMLA") because that provision is preempted by the Federal Arbitration Act ("FAA"), and the McCarran-Ferguson Act ("MFA") does not alter the applicability of the FAA; and (2) the parties entered into valid and enforceable arbitration agreements under the FAA. The Court of Appeals of Texas, Fourth District, San Antonio, reversed the trial court's order denying the motion to compel, render judgment granting the motion to compel, and remanded this matter to the trial court for further proceedings consistent with the appellate court's opinion, including the grant of an appropriate stay.

This appeal concerns two unrelated individuals — Nora Nieto and Bertha Juiel — who were residents of Casa Rio, a

nursing home facility. Nora Nieto was admitted as a Casa Rio resident in 2011. Prior to her admission, Nora completed and signed an admission agreement and numerous other documents, including a document entitled "Resident and Facility Arbitration Agreement." Pursuant to that agreement, Nora agreed to arbitrate "any legal dispute, controversy, demand or claim . . . that arises out of or relates to the Resident Admission Agreement or any service or health care provided by Casa Rio . . ." Bertha Juiel was admitted to Casa Rio in 2012. Prior to Bertha's admission to the facility, her daughter, Anna M. Juiel signed the Casa Rio admission agreement as well as numerous other documents, including the "Resident and Facility Arbitration Agreement," which included the same language as the one signed by Nora. Both residents are deceased.

In 2014, appellees Adolfo R. Juiel, Individually, Anna M. Juiel, Individually and on Behalf of Isaac Juiel, Individually, and as All Heirs of the Estate of Bertha Juiel, Deceased (collectively "Juiel") and Lisa Ochoa, as Representative of the Estate of Nora Nieto, Deceased ("Nieto") filed a health care liability claim against Casa Rio. Both Nieto and Juiel alleged Casa Rio "failed to properly and timely render appropriate medical and nursing care, and failed to ensure that [Nora and Bertha were] free from neglect." After the petition was filed, Casa Rio filed its answer, and subsequently a motion to compel arbitration based on arbitration agreements signed by Nora and on behalf of Bertha. Casa Rio also sought to stay all trial court proceedings pending arbitration.

After a hearing, the trial court denied Casa Rio's motion to compel. Thereafter, Casa Rio perfected this appeal.

The appellate court focused on *Fredericksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513 (Tex. 2015), *cert. denied*, 136 S. Ct. 798, 193 L. Ed. 2d 765 (2016) (stating no Act of Congress shall be construed to invalidate, impair, or supersede any state law enacted for purposes of regulating "the business of insurance" unless such Act was enacted for purposes of regulating insurance); 9 U.S.C. §§ 1-16 (provisions of Federal Arbitration Act) and other related Supreme Court decisions. Based on their analysis, the appellate court held that the trial court erred in denying Casa Rio's motion to compel arbitration to the extent its decision was based on the failure of the arbitration agreements to comply with section 74.451 of the TMLA. The Supreme Court has held that the TMLA arbitration provisions were not enacted for the purpose of regulating the business of insurance; therefore, such provisions are preempted by the FAA.

The appellate court then looked to see if the arbitration agreement was valid. The claim was that because Anna Juiel signed the arbitration agreement on behalf of Bertha, Casa Rio had to prove actual or apparent authority to act on Bertha's behalf. Casa Rio argued that Anna Juiel's authority is irrelevant because under either third-party beneficiary theory or direct-benefits estoppel theory, Juiel was required to arbitrate. There was some discussion as to preservation. The

appellate court stated that based on the exchanges during argument at the hearing on the motion to compel arbitration in the trial court, the theory of direct-benefits estoppel was brought to the attention of the trial court and the argument was preserved for appellate review. Bertha's claims are subject to arbitration under the theory of direct-benefits estoppel because the appellate court read the admission agreement and arbitration agreement as a unified instrument, and the patient obtained substantial and direct benefits from the admission agreement through the services provided by Casa Rio.

The Court of appeals accordingly reversed the trial court's order denying the motion to compel, rendered judgment granting the motion to compel arbitration, and remanded the matter for further proceedings consistent with the court's opinion, including the grant of an appropriate stay.



The editor of this issue's newsletter is **Casey Marcin**. CML is a law firm located in The Woodlands and San Antonio, Texas.

For more information, please contact us at:

25511 Budde Road #2202
The Woodlands, Texas 77380; or
202 E Locust Street
San Antonio, Texas 78212
281-719-5881;
Fax: 281-719-5847.
www.cookseymarcinlaw.com