TADC HEALTH CARE LIABILITY LAW NEWSLETTER

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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.

"Somebody just gave me a shower radio. Thanks a lot. Do you really want music in the shower? I guess there's no better place to dance than a slick surface next to a glass door." --Jerry Seinfeld

In ***Kerr v. PIRF Operations, LLC***, opinion delivered August 27, 2019, the Fifth District Court of Appeals of Texas reviewed the distinction between Chapter 74 expert reports that are deficient but demonstrate merit and reports that do not. **2019 Tex. App. LEXIS 7783, *9-10**. This case arose from Kerr's fall while showering as a patient in an inpatient rehabilitation facility when a certified nursing assistant left her unattended in the shower. *Id*. at *2-*3. Kerr timely filed an expert report authored by a Nurse Practitioner, which addressed standard of care, breach, and causation. *Id*. at *4-*5. Following the tenant of serving the interest of justice in preserving a claim if any potential merit is seen, from *Scoresbey* and *Samlowski*, the court held that the trial court erred in dismissing Kerr's claim for failure to produce an expert report, because although a nurse practitioner cannot speak to causation, that is a deficiency that is curable; therefore, Kerr should have been provided 30 days to cure the expert report. *Id*. at *18 (See *Samlowski v. Wooten*, 332 S.W.3d 404, 410-12 (Tex. 2011); see also *Scoresby v. Santillan*, 346 S.W.3d 546, 558 (Tex. 2011)). The court further held that the expert report was a good faith effort to comply with the requirements of Chapter 74 because the report provided enough information to inform *PIRF* of the complained of conduct and provided enough information for a court to conclude the claim had merit. *Id*. at *23-*24.

"Tackle the root cause not the effect" -- Haresh Sippy

***Lovitt v. Colquitt*, 2019 Tex. App. LEXIS 5727**, is an opinion by the Court of Appeals of Texas, Fifth District, Dallas, delivered July 9, 2019. The Appellate Court, in their review of a trial court's ruling on the sufficiency of an expert's report, found that the trial court, which sustained objections to the expert report and granted thirty days, and found the revised report sufficient, found that the report was actually not a good faith effort. Although we rarely report on expert report rulings in this newsletter, we find it instructive to report when an Appellate Court finds that the report is not a good faith effort. (We are Texas Association of Defense Counsel). Here, Colquitt alleged that Lovitt, Baylor University Medical Center, and Nurse Khadija Finger, were negligent in the care and treatment of Colquitt in connection with surgery performed by Lovitt. Colquitt was admitted to Baylor on May 16, 2015, complaining of stomach pain. Lovitt determined that Colquitt's gallbladder should be removed laparoscopically. The surgery was performed on May 18, 2015, and Colquitt was discharged approximately six hours after the surgery. The next day,

Colquitt fell at his home injuring his right hip and right foot. He alleged he fell due to the "liver bleed after cholecystectomy," dehydration, acute blood loss, and being over-medicated. *Id*. at *3. Colquitt timely served the expert report of Stella Fitzgibbons, MD in support of his claims. The report stated that the defendants were negligent in discharging Colquitt within hours of his surgery, and that he was a high risk for falling due to his impaired mobility, weakness due to his pain medications, and possible blood loss, and should not have been discharged "for at least one more day, or until his condition improved." Lovitt objected and moved to dismiss. He argued the expert was not qualified to render opinions in the matter and the report was insufficient as to breach, standard of care, and causation. The trial court sustained Lovitt's objections and granted Colquitt thirty days to file an amended report. Colquitt served an amended report omitting several defendants he dismissed in the interim and otherwise made minor changes to the original report. Lovitt renewed his objections and motion to dismiss. Fitzgibbons is a hospitalist and the Appellate Court looked to her qualifications to opine on post-surgical management of a patient such as this. The court stated that the report's conclusion that blood loss contributed to Colquitt's high risk for falling before he was released from Baylor is not linked to the facts in the case. Even though the report lists several standards of care, it did not explain how Colquitt could be protected from falling, what an adequate and comprehensive plan of care would entail, or what Lovitt was required to do to closely monitor Colquitt and follow up with urgency. The report did not identify what prompt treatment should have been given that would have been effective at improving Colquitt's pre-existing conditions. The report provided no insight or guidance as to what "appropriate care and treatment" Colquitt should have received but did not. The statements of the standard of care were found to be conclusory because they did not provide a standard. The report also failed to describe what additional treatment could have been done had the patient stayed and how that treatment would have been effective at reducing the patient's risk of falling. The court looked at the medical records (reviewed by the expert) and stated that they did not support the implied assumption that Colquitt suffered from this condition at the time he was discharged. Because the report lacked any explanation linking the expert's conclusion to the relevant facts, it failed to explain how and why the alleged breach proximately caused the injury. The report was accordingly deemed conclusory and did not satisfy the requirements of Chapter 74. It was held that the trial court abused its discretion in denying Lovitt's motion to dismiss.

"I think a good product that doesn't work very well is ugly." --Jonathan Ive

In ***Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie***, opinion delivered June 28, 2019, by Justice Lehrmann, the McKenzies sued M.D. Anderson alleging that the use of a sugar water solution in a cancer surgery caused the wrongful death of Ms. McKenzie. **2019 Tex. LEXIS 679, *4-5.** The Texas Supreme Court, in reviewing a ruling by the appellate court that denied M.D. Anderson's plea to the jurisdiction based on immunity under the Texas Tort Claims Act, addressed the issue of whether use of non-defective property is sufficient to establish waiver of immunity under the Texas Tort Claims Act when the allegation is that the property should not have been used at all, as opposed to an allegation that it had been used incorrectly. *Id*. at *12. M.D. Anderson argued that the decision to use or not use a solution is medical judgement and should therefore be

covered by immunity. The Court held that use of the solution, in an instance where it should not have been used at all, combined with a causal link of harm is as much a claim for negligently used property as a claim alleging the solution was improperly used. *Id*. at *13. The Court noted that, while a complaint regarding medical judgement is insufficient to waive immunity, the allegation by the McKenzies did not involve *only* medical judgement. *Id*. at *16. The Court elaborated further, stating that the use of the solution caused the injury and the fact that the solution was administered properly and that the use of the solution was preceded by exercise of medical judgement would not affect their analysis. *Id*. at *17. Chief Justice Hect, joined by Justices Green and Brown, dissented, outlining that the use of the solution was required for the procedure and that without use of the solution, the procedure could not occur *e.g.* the decision whether or not to perform a procedure is medical judgement and would therefore not waive immunity. *Id*. at *31-2. The dissent also voiced concern that the court's decision would broaden the Texas Tort Claim Act's immunity waiver, running contrary to the Court's prior decisions that its waiver be limited. *Id*.

"History implies someone noticed." --Nitya Prakash

On June 21, 2019, the Supreme Court of Texas denied petition to review ***Tex. Tech Univ. Health Scis. Ctr. v. Bonewit***, a case which would have considered whether a governmental unit had actual notice of a potential claim against it, under the Texas Tort Claims Act, based on the fact that a surgical complication that occurred at its facility in a procedure performed by an employed physician and was later discovered and repaired by another employed physician at its facility. **2017 Tex. App. LEXIS 10775**.

In Bonewit, the Seventh District Court of Appeals of Texas found that Texas Tech University Health Sciences Center (TTUHSC) had actual notice of a potential claim due to evidence showing that injuries from an initial surgery performed by two employed physicians at (TTUHSC) were found and repaired by a third employed physician during a subsequent surgery at TTUHSC 2017 Tex. App. LEXIS 10775, *6. The court held this information showed that "TTUHSC was subjectively aware of its possible fault as ultimately alleged by Bonewit." *Id*. This notice was sufficient to overcome Bonewit's failure to provide TTUHSC with notice of a claim within six months, under the Texas Tort Claims Act waiver provision in §101.101(a) and sufficed the actual notice provision in §101.101(c), which allows for actual notice by the governmental unit, that the claimant received some injury because the later discovery of the injury by the third employed physician meant that TTUHSC had subjective awareness of its fault in producing or contributing to the injury as imputed to it through its agent, the third employed physician, who had a duty to gather facts and report to TTUHSC. *Id. at *11-6.*

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