# 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.*

***"Hold on Kevin, how much is 19,154 pies divided by 61 pies?'" -- Oscar Martinez***

In ***Regent Care of San Antonio, L.P. v. Detrick,*** opinion delivered May 8, 2020, the Supreme Court of Texas reviewed the trial court's formation of a damages judgement and order for periodic payments under Chapter 74. No.19-0117; (Tex. May8, 2020). This case arose from care given in a skilled nursing facility (SNF) leading to spinal cord injury. *Id*. at 2. All other defendants settled with the Detricks before trial, a jury found the SNF 55% responsible for the injuries, and the SNF elected dollar-for-dollar settlement credit application under Chapter 33 and requested periodic payments, under Chapter 74, for the entire future medical expenses award. *Id*. at 2-3. The trial court ordered periodic payment for a partial amount of future medical expenses. *Id*. at 3. The SNF challenged the trial court's application of a dollar-for-dollar settlement credit, asserting it should be applied after the cap, and the court's order for periodic payment, asserting the amount was unsupported by evidence. *Id*. at 3-4. The Supreme Court of Texas cited *Roberts* and *Trevino's* distinction between a claimant's recovery and a defendant's liability, in finding that Chapter 74's damages cap limits the defendant's liability for noneconomic damages, not the claimant's recovery from all defendants and settling parties, and that it is Chapter 33 that controls the claimant's recovery. *Id*. at 7-8, see *Roberts v. Williamson*, 111 S.W.3d at 123; *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d at 82 (Tex. 1997). Therefore, applying Chapter 33's dollar-for-dollar settlement credit before applying Chapter 74's damages cap suffices the one satisfaction rule. *Id*. The court further found that the trial court's order for periodic payment was not supported as there was insufficient evidence to show that the Detricks would incur $1 million in future medical expenses soon after trial, but that the trial court did not abuse its discretion because the SNF and the Detricks did not put forth evidence of the *future value* of medical expenses; therefore, no other order for periodic payment of future medical expenses was possible without the trial court effectively discounting the award, as the figures in evidence were in present value. *Id*. at 11-13.

***"I knew exactly what to do, but in a much more real sense I had no idea what to do." -- Michael Scott***

The Supreme Court of Texas, in ***In re Turner***, addressed whether Chapter 74 prohibits the deposition of a non-party provider unless and until claimant serves the requisite Chapter 74 expert report on that provider, despite an already existing claim against another provider arising out of the same incident, in which an expert report had already been served on the existing defendant. 591 S.W.3d 121 (Tex. Dec. 20, 2019). This matter arose from labor delivery at a hospital, resulting in brain damage to infant, Turner. *Id*. at *2. Suit was brought

against the Hospital and an expert report was timely served. *Id*. The Hospital's nurses were deposed and shortly before the deadline to join parties had passed, Turner moved to extend the deadline citing additional discovery was needed to identify all potential parties, including the depositions of nurses *and doctors* involved in the delivery. Hospital opposed the motion, claiming Chapter 74 precluded presuit depositions, as it required an expert report be served on any such doctor. *Id*. at *3-*4. The Motion to extend the deadline was granted and Turner began attempting to schedule the deposition of the delivering OB, who refused to give a deposition absent an agreement not to file suit. *Id*. Turner served a deposition subpoena and subpoena duces tecum on the OB, requesting medical records, notes, a CV, communication between the OB and the Hospital's attorneys, and other documents. *Id*. The OB moved to quash the subpoena, asserting these were attempts to investigate a potential health care liability claim, disguised as nonparty discovery, violating Chapter 74's stay on presuit discovery. *Id*. at *5. Turner asserted the OB was a fact witness non-immune from providing non-party discovery. *Id*. The court of appeals conditionally granted mandamus relief, preventing claimant from deposing the OB before serving him with an expert report, and the Supreme Court of Texas granted petition. *Id*. at **5-*6. While reiterating that the Chapter 74 stay provides an exception to the stay for non-parties, the Supreme Court of Texas acknowledged its holding in *Jorden*, finding that Chapter 74's stay of discovery applies to presuit depositions under TRCP 202, to the extent a presuit deposition is intended to investigate a potential claim against a provider directly threatened by the dispute. *Id*. at *6-*10, *see In re Jorden*,249 S.W.3d 416, 419-20, 424 (Tex. 2008). However, the court also cited the factual distinctions in the instant case, specifically that Turner had a pending suit against the Hospital arising out of the same labor and delivery and that, in contrast with *Jorden*, an expert report had already been served on the Hospital, thereby crossing the legislature's intended threshold for weeding out frivolous claims. *Id*. at *10. Due to these distinctions, the court held that under these facts, the Chapter 74 discovery stay did not preclude Turner from obtaining discovery from the OB *if* it qualified as discovery in Turner's claim against the Hospital. However, the court also acknowledged that Chapter 74 does place limits on the scope of permissible discovery and that information sought from the OB would likely often be relevant to both the claim against the Hospital and the potential claim against the OB, as both "arise from one overarching incident." *Id*. at *12-*15, *see Jorden* at 126. For this reason, the court further held that questions and requests reasonably calculated to lead to the discovery of admissible evidence in *both claims* are permissible under Chapter 74, but that Turner could not embark on a fishing expedition, seeking information from the OB that would not be relevant to the claim against the Hospital.

***"Quiz. Mike. Should you drive the forklift?" -- Darryl Philbin***

In ***Christopher James Glenn v. Leal***, the Supreme Court of Texas again considered whether Chapter 74's standard of willful and wanton negligence applied to emergent medical care rendered in an obstetrical unit, when the patient was not first cared for in the hospital's emergency department. 2020 Tex. LEXIS 141, *1. This shoulder dystocia case involved the delivering OB/GYN (OB) and his Medical Group. *Id*. The patient underwent elective induction; however, during delivery, the OB recognized shoulder dystocia and nuchal cord. *Id*. at *2. Plaintiffs argued the OB failed to exercise ordinary care, proximately causing the injury. *Id*. The OB

argued Chapter 74's willful and wanton standard applied. *Id*. The case was tried to a jury and at the close of evidence, the OB moved for a directed verdict on the basis of insufficient evidence of willful and wanton negligence under Chapter 74, which was denied by the trial court. *Id.* at *2-*3. After a jury award for Plaintiff, the OB filed a motion for judgement notwithstanding the verdict (JNOV), on the same grounds as his directed verdict, which the trial court also denied. *Id*. On appeal, the OB claimed the trial court erred in denying his JNOV, arguing that Chapter 74's willful and wanton standard applied in emergency situations in obstetrical units and that the trial court erred in failing to submit the emergency medical care issues to the jury. *Id*. at *4. The court of appeals rejected the OB's claim, citing the Second Court of Appeal's decision in *Texas Health* in refusing to apply Chapter 74's willful and wanton standard to cases in which emergency treatment was only rendered in an obstetrical unit and not first in an emergency department. *Id*., *see D.A. v. Tex. Health Presbyterian Hosp. of Denton*, 514 S.W.3d 431 (Tex. App.-Fort Worth 2017), rev'd 569 S.W.3d 126 (Tex. 2018). The Texas Supreme Court acknowledged its rejection of the Second Court of Appeals' conclusion in *Texas Health*, again holding that Chapter 74's plain language covers emergency care rendered in an obstetrical unit even if care was not first rendered in an emergency department. The court found harmful error in the jury charge and remanded for a new trial. *Id*. at *5-*7.

***"Oh, what a summer. I ran over a turtle in the parking lot. But then I saved him by gluing his shell back together. I'm not that good at puzzles so I used stuff from around the office, but I couldn't get the pieces to fit right. Then one day while I was reaching for the glue, I crushed the shell again. But I rebuilt him a better shell that time. But then it turned out the turtle was already dead. Probably when I ran over him the first time." --Kevin Malone***

The Second District Court of Court of Appeals, on an interlocutory appeal in ***Tex. Health Care, P.L.L.C. v. E.D.***, considered whether an amended expert report was speculative and conclusory when, among other inconsistencies, it presumed the outcome would be changed if the OB requested accurate information from a nurse cited as being unable to provide accurate information. 2020 Tex. App. LEXIS 1924. In this labor and delivery case involving the use of Pitocin, suit was brought against the Hospital, OB, and others for care allegedly resulting in permanent injury to the infant. *Id*. at *2-*3. Plaintiff's served an expert report from an OB expert, which spoke to the care given by the Hospital's nurse and the OB. *Id*. at *10. Upon objections to the OB expert's report, the trial court found the report curable and 30 days was granted to amend the report. *Id*. The amended expert report set forth the factual circumstances of the case including a nurse's failure to properly identify non-reassuring fetal heart tracings. *Id*. at *11-*20. The OB expert opined that the OB would have delivered the infant within 30 minutes if he had been informed of the non-reassuring tracings by the nurse. *Id*. The report also detailed that the nurse did, in fact, call the OB communicating the tracings to him but that her interpretation of the tracings was inaccurate. *Id*. The OB expert opined the OB violated the standard of care by failing to get accurate information on the tracings from the nurse, while repeatedly citing that the nurse's "critical lack of understanding" in interpreting fetal heart tracings. *Id*. The Hospital and OB objected to the amended report, seeking dismissal of the claim, asserting the causation as to the OB was conclusory and speculative as it presumed what, if any questions, the OB failed to ask

the nurse without citing what the two actually discussed. *Id*. at *19-*20. The trial court denied the objections to the amended report. The Second District Court of Appeals, citing *Ezekiel*, found that the OB expert's opinions regarding the OB's negligence was conclusory and speculative to the point of being legally insufficient because it, among many other inconsistencies, relied exclusively on his counterintuitive inference that the nurse, who he consistently branded as being wholly unable to properly interpret tracings, would have somehow provided proper and accurate interpretation if the OB had only thoroughly interrogated her during their phone call. *Id*. at *24-26*; *see Ezekiel v. Shorts*, No. 14-12-00305-CV, 2013 (Tex. App--Houston [14th Dist.] Jan. 10, 2013, no pet.).

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