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.*

"The past is never where you think you left it." -- Katherine Anne Porter

In ***Coming Attractions Bridal & Formal, Inc. v. Tex. Health Res.***, opinion delivered February 21, 2020, the Supreme Court of Texas affirmed the court of appeals, finding that a corporation alleging a hospital failed in carrying out infection outbreak procedures economically injuring their business falls within Chapter 74 and requires a Chapter 74 expert report. 595 S.W.3d 659, 660 (Tex. 2020). In 2014, Dallas Presbyterian Hospital cared for an Ebola virus patient and a nurse caring for that patient later went to a bridal shop in Ohio. *Id*. After returning to Dallas, she was diagnosed with Ebola virus and Ohio health authorities required the bridal shop to close to prevent spread of the virus. *Id*. The shop reopened briefly but later closed permanently when business did not recover. *Id*. The bridal shop brought suit against the hospital alleging, among other things, failure to recognize the danger of Ebola entering its hospital, failure to develop and implement policies regarding how to respond to the virus in the patient population, failure to properly train nurses in proper protection from Ebola, and failure to instruct and warn its nurses about the dangers of travel and interacting with the public after potential exposure. *Id*. at 661. The hospital moved to dismiss for failure to file a Chapter 74 expert report. *Id* at 662. The bridal shop asserted that Chapter 74 was limited to patient claims and that it was not a 'claimant' under Chapter 74 because it was a corporation. *Id*. The trial court denied the motion and the court of appeals reversed, finding that a corporation falls within Chapter 74's definition of a 'claimant.' *Id*. The Court reasoned that because the legislature had provided direction that 'person' includes a corporation unless statute or context requires otherwise and that the common law meaning of 'person' includes a corporation, the definition of 'claimant' in Chapter 74 covers corporations. *Id*. at 662-663. The bridal shop further claimed it did not assert a health care liability claim as its allegations lacked a substantive nexus with the hospital's health-care-provider duties and because it was only claiming economic damages. *Id*. at 663. The Court cited the requirement that a claim must concern treatment, lack of treatment, or "a departure from accepted standard of medical care, or health care, or safety or professional or administrative services directly related to health care." *Id*.; *see Tex. Civ. Prac. & Rem. Code 74.001(a)(13)*; *see Tex. West Oaks Hosp., L.P. v. Williams* 371 S.W.3d at 179-80. The Court noted it defined 'safety' under the earlier version of the statute, as the Act did not define 'safety,' to mean "the condition of being 'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Id*. at 664; *see Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 501 (Tex. 2015). The Court additionally cited *Ross*'s requirement that "the alleged departures from safety standards must have a nexus to health care." *Id*. The Court found that the allegation that the hospital was negligent in controlling the

spread of the virus to its staff and the public implicated safety standards related directly to health care and that the risk of contamination the nurse presented to the public implicated the hospital's health-care-provider duties, sufficing the substantial nexus requirement. *Id*. at 664-5. The Court further found that the Act requires an expert report, regardless of whether only economic damages are claimed. *Id*. at 666-7. Additionally, the Court reasoned that because expert medical or healthcare testimony was necessary to prove or refute the allegations that the hospital infection control policies departed from the standard of care, the claim was a health care liability claim. *Id*. at 667.

"I always wanted to be somebody, but now I realize I should have been more specific."
-- Lily Tomlin

The Fourteenth District Court of Appeals, in ***In re Mem'l Hermann Health Sys.***, addressed on writ of mandamus, whether production of documents evidencing reimbursement rates with private and government payors for services a patient did not receive was impermissibly overbroad. *In re Mem'l Hermann Health Sys.*, 2020 Tex. App. LEXIS 7071. Plaintiff, Poole, was struct by a car driven by Duggan and Poole was treated at Memorial Hermann. *Id*. at 7071-2. Poole sued Duggan, the parties settled, and Poole asserted the hospital's lien was invalid, unenforceable, and fraudulent. *Id*. at 7072. The hospital filed its petition in intervention and suit for declaratory relief to protects its interest in the settlement funds. *Id*. Plaintiff Poole served discovery on the hospital, seeking price lists, fee schedules, master charge rates, and negotiated charge rates with public and private payors (Medicare, Medicaid, and *all* private insurers) in order to challenge the reasonableness of the hospital's charges. *Id*. The hospital objected on the basis that these requests were overbroad and sought confidential, and proprietary information, as well as information protected by trade secrets. *Id*. at 7073. The hospital also contended that the requests were not relevant as their charges were not required to be reasonable in this matter. *Id*. The trial court ordered the hospital to produce a charge list showing billed rates, government payor rates, and lowest, average, and highest reimbursement rates for their private payors. *Id*. at 7073-4. The trial court also ordered the hospital produce their charge master during the time of treatment, documents reflecting Medicare's reimbursement rate, documents reflecting Medicaid's reimbursement rate, all documents reflecting private insurers' reimbursement rates, and all documents illustrating their fee schedules at the time Plaintiff was treated. *Id*. at 7074-5. The Court of Appeals found that mandamus review was proper. *Id*. at 7075-6. Following *In re North Cypress Medical Center*, the court reasoned that the amounts a hospital is willing to accept as payment for care rendered to the vast majority of its patients is relevant to the reasonableness of their charges for the same services rendered to uninsured patients. *Id*. at 7111; *see 559 S.W.3d 128 (Tex. 2018)*. The court of appeals held that the hospital's reimbursement rates with government and private payors for the service rendered during the same time period were relevant to reasonableness for the same charges it provided to Plaintiff Poole. *Id*. at 7111-12. In *North Cypress*, the Plaintiff limited her request to charges for services she received and fees for those services in that same time period. *Id*. The court held that because Poole had limited his request only to the same time period but not to only the services received by Plaintiff, the requests were impermissibly overbroad because rates for services Poole did not receive would not be related to the reasonableness of the hospital's charges. *Id*. at 7112-13. The court further held that the

request for contracts with all government and private payors was also overbroad because it was not limited to certain payors, as the requests in *Cypress* were limited to Medicare, Medicaid, and four private payors. *Id*. at 7113.

"Mathematics may be defined as the subject in which we never know what we are talking about, nor whether what we are saying is true." -- Bertrand Russell

In ***Columbia Valley Healthcare Sys. L.P. v. Andrade***, the Thirteenth District Court of Appeals reviewed whether, in applying Tex. Civ. Prac. & Rem. Code Ann §74.503 (periodic payment statute), the trial court (i) must charge the jury on life expectancy and future health care expenses before and after the 18th year of age; (ii) charge the jury to make a finding as to future health care expenses for each year, both before and after 18 years of age; and (iii) whether the trial court must file findings of facts and conclusions of law regarding lump sum and periodic payments. 2020 Tex. App. LEXIS 5974. Plaintiffs brought a health care liability claim against Columbia Valley Healthcare System (CVHS). *Id*. at *1. The jury found in favor of Plaintiffs and awarded the minor $62,000 in past medical expenses, $9,060,000 in future medical expenses from trial until his 18th birthday, and $1,208,000 in future medical expenses after his 18th birthday. *Id*. at *4. Plaintiffs filed proposed judgements, each stating that five periodic payments of $604, 000 would compensate the minor for future damages and requested the balance of $7,310,000 be paid in a one-time lump sum. *Id*. CVHS filed a Request for Findings of Fact and Conclusions of Law, requesting the trial court to make substantive findings in support of the periodic payment award, which was formally denied by order. *Id*. CVHS's objections and motion to reconsider were also denied. CVHS then filed a Motion for New Trial, or in the Alternative, Request for Remittitur; as well as a Motion for Judgement Notwithstanding the Verdict and Motion to Reform Judgement. *Id*. at *4-*5. The hospital argued that the trial court erred in failing to charge the jury on the minor's life expectancy, asserting life expectancy was a controlling issue of fact and that Chapter 74.503(d)(4) necessitates a jury finding on life expectancy. *Id*. at *12. The court reasoned that the statute does not require the jury make a finding as to life expectancy, citing the trial court's broad discretion in determining proper jury instructions and the lack of jurisprudence supporting the requirement of proving life expectancy. *Id*. at *12-*13. The court also cited the Fort Worth Court of Appeal's conclusion in *Columbia Med. Ctr. of Las Colinas v. Bush ex rel. Bush*, finding that it would be impossible for a plaintiff to prove life expectancy within a reasonable degree of medical certainty because, by nature, life expectancy is uncertain. *Id*. at *13, *see* 122 S.W.3d 835, 863 (Tex. App. -- Fort Worth 2003, pet. denied). The hospital also asserted that the jury charge was erroneous as it did not instruct the jury to make findings as to the minor's future medical expenses for every year, before and after his 18th birthday, as such are controlling issues of facts needing resolution by the jury. *Id*. at *13-*14. The court overruled this argument and noted the statute was silent on this issue as well, and that there was again a lack of jurisprudence requiring the jury breakdown the award any further than an amount for before and after the minor's 18th birthday. *Id*. *14. The hospital additionally argued that the lump sum and five-year periodic payments were not supported by the evidence and that the trial court erred by failing to file findings of facts and conclusions of law as to the lump sum and periodic payments, claiming the division between the lump sum and periodic payments disregarded the jury's finding. *Id*.

The court of appeals, following *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, noted that the court may order future medical expenses be paid periodically, in whole or in part, but that the dollar amount of the periodic payments ordered must be the amount the evidence supports will compensate plaintiff for future damages. *Id*.; *see* S.W.3d, 2020 Tex. LEXIS 393, *14 (Tex. May 8, 2020). The court of appeals found this case differentiable from *Regent*, as in *Regent* nothing in the record supported awarding only a specific portion of the damages as periodic payment. *Id*. at *17. Whereas, in the case at bar, the court of appeals noted that Plaintiffs submitted evidence that they would incur $655,000 in annual medical expenses for the minor and the hospital submitted evidence that the annual cost would be $604,000. *Id*. at *18. Further, Plaintiffs submitted evidence of a life expectancy of 29 years, whereas the hospital put forth evidence of a life expectancy of 5 years. *Id*. For these reasons, the court of appeals found that the amount of periodic payments ordered by the trial court was based on sufficient evidence in the record. *Id*. Additionally, the court of appeals noted that the hospital failed to demonstrate that the trial court had any discretion to order a greater amount be paid periodically, stating that while requesting periodic payments entitles the defendant to have at least a portion of the payments paid periodically, "simply requesting periodic payments does not entitle a party to have the entire award paid out in periodic payments." *Id*. at *18-*19. The court of appeals also found that the figure ordered to be paid periodically was based on directly on the figure used by the jury to calculate damages, so the trial court's judgement did not disregard the jury's findings. *Id*. at *20.

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