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1999 TEXAS HEALTH LAW CONFERENCE

LIABILITY UPDATE

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1999 TEXAS HEALTH LAW CONFERENCE LIABILITY UPDATE

1. INTRODUCTION

During the past year, many appellate opinions were published in areas of healthcare and medical malpractice interests, including new cases on limitations, the DTPA, confidentiality, damage caps and expert testimony. The following information summarizes certain cases of particular interest during the past year. Although we hope this review is helpful, it is not intended to be a comprehensive discussion and analysis of all healthcare liability cases and topics.

2. LIMITATIONS

- A. *Voegtlin v. Perryman*, 977 S.W.2d 805 (Tex. App. -- Fort Worth 1998, no writ).**

Plaintiff contended that the defendant physician failed to diagnose breast cancer during a six year physician/ patient relationship. Plaintiff contended that the physician should have ordered a biopsy of a lump in the plaintiff's breast following one of any of five examinations, all of which occurred two years and nine months or more before plaintiffs filed suit. The court found that the Plaintiffs' claims were time barred, holding that there were ascertainable dates upon which the alleged acts or omissions occurred and indicating that there was no continuing course of treatment from which limitations would run.

The court also addressed an Open Courts claim in which the plaintiff asserted that the limitations provision of Article 4590i was unconstitutional as applied to her because she lost her

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cause of action before she knew or could have known it existed. The court noted, however, that the physician had proven that the plaintiff discovered her breast cancer and considered a legal claim within the limitations period. The court specified that if a plaintiff has a reasonable opportunity to discover the injury within the period of limitations, the application of a limitations defense to that plaintiff will not violate open courts. Accordingly, plaintiffs in this case could not rely upon the open courts doctrine to save their claims.

B. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999).

Plaintiff sustained a work related back injury in June 1991, for which he was treated by The defendant Physician who operated on plaintiff, fused his lumbar spine at three levels and inserted metal bone plates and screws. Plaintiff's condition gradually worsened and defendant reoperated to remove and replace the instrumentation previously implanted. Thereafter, plaintiff's condition deteriorated further. Plaintiff learned shortly after the second operations that the plates and screws had risks associated with them and that the product manufacturer had been sued by patients because of these risks.

Plaintiff sued defendant Physician within three months of the second operation, claiming negligence, fraudulent concealment, strict liability, and violations of the Deceptive Trade Practices Consumer Protection Act. Defendant moved for summary judgment, partly relying on the argument that the statute of limitations had elapsed. The trial court granted summary judgment on all grounds, but was reversed by the Court of Appeals.

The Supreme Court reversed the Court of Appeals on the issues relating to fraudulent concealment and the statute of limitations, finding that Ratliff had failed to raise a question of fact as to whether the statute of limitations should not toll from the original surgery. However, the court

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agreed that summary judgment should be reversed and remanded on the deceptive trade practices claim, finding defendant's supporting affidavit to be conclusory.

C. *Neal-Moreno v. Kitrell*, 1999 Tex. App. LEXIS 4106.

Plaintiff Moreno first sought care from Dr. Kitrell on March 20, 1995 due to irregular menses. Thereafter, Moreno became pregnant and returned to Dr. Kitrell on May 1, 1995 when the doctor performed a pap smear. Although the pap smear indicated an abnormality, Dr. Kitrell allegedly failed to inform Moreno of the result. In July of 1996, Moreno returned to Dr. Kitrell complaining of bleeding since the childbirth. On July 30, 1996, Dr. Kitrell performed an emergency endometrial biopsy, which revealed Moreno had cervical cancer.

Moreno filed suit on August 5, 1997, alleging that Dr. Kitrell was negligent in his care and treatment of her by failing to timely treat the cervical cancer. Dr. Kitrell filed a motion for summary judgment asserting the statute of limitations defense. The court noted that once it is determined that the date of alleged negligence is readily ascertainable, it is immaterial whether there was a course of treatment established for the condition (cervical cancer) upon which suit was based. In this case, the ascertainable date of the alleged negligence was May 1, 1995, when Dr. Kitrell performed a pap smear which revealed an abnormality, but failed to inform Moreno. Therefore, the trial court granted Dr. Kitrell's motion and Moreno's lawsuit was barred by the statute of limitations.

D. *Gross v. Kahanek*, 1999 WL 722248.

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Parents of a child who died of heart and liver damage resulting from abnormal levels of a drug prescribed by the defendant neurologist brought wrongful death and survival causes of action alleging negligence against the treating neurologist. The defendant neurologist began drug treatment for the child in July 1990 and last saw her in January 1992 when he authorized another physician to continue monitoring the child's prescription. The child died on June 13, 1993 while still taking the drug at issue.

The parents filed suit on June 6, 1995 and the defendant neurologist moved for summary judgment, claiming that the two-year statute of limitations began in January 1992, the last time he saw the child. The Court of Appeals held that because plaintiffs' allegations, taken together, constituted an attack on the defendant neurologist's "course of treatment", the statute of limitations commenced on the last day of the drug treatment, the day the child expired, June 13, 1993. Therefore, plaintiffs' claims were not barred by the statute of limitations.

The Texas Supreme Court reversed in part and affirmed in part, holding that the doctor's course of treatment ended when the other physician began prescribing the drug for the patient. Therefore, the plaintiffs' wrongful death action was barred by the two-year statute of limitations. **E. Wright v. Fowler**, 991 S.W.2d 343 (Tex. App. -- Fort Worth 1999, no writ).

Plaintiff received silicone cheek implants from the defendant doctor on December 4, 1989 and received injections of liquid silicone drops on February 26, April 19, and June 7, 1990. The plaintiff was treated by an allergist for two years beginning in 1993 or early 1994, and had the implants removed April 5, 1994. After the plaintiff filed his original petition in August of 1994 regarding alleged misrepresentations of safety of the implants, the trial court granted the defendant doctor's summary judgment on that medical malpractice claim.

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In affirming the trial courts decision, the appellate court rejected plaintiffs' claims that the trial court's ruling violated the open courts doctrine because he did not discover the local injury until the limitations period had expired. The court noted that the two-year limitations period is unconstitutional only if it cuts off a plaintiff's cause of action before the litigant ever knew or should have known of the injury or facts giving rise to the action. However, the evidence in this case established that the plaintiff had problems shortly after the procedure and had requested his medical records in 1990. Therefore, the appellate court held that he could have discovered his injury before the limitations period expired.

F. *DeRuy v. Garza*, 995 S.W.2d 748 (Tex. App. – San Antonio 1999, no writ).

In this case the patient filed a medical malpractice action against a gastroenterologist in June of 1995 upon learning that the doctor had misdiagnosed her gallbladder disease as biliary cancer. The doctor argued that the last date on which he provided medical treatment was October 9, 1991 and the statute of limitations therefore expired on October 9, 1993. The doctor's motion for summary judgment was granted on limitations grounds, and the patient appealed.

The San Antonio Court of Appeals reversed the trial court and stated that the limitations period under § 10.01 of the Medical Liability Insurance Improvement Act commenced at the time of the misdiagnosis of the gallbladder disease as biliary cancer which was in January of 1991. Therefore, the statute of limitations ran on the patient's claim in January of 1993. However, this was a year and a half before the patient knew about her misdiagnosis. Because of the impossibility of bringing an action for misdiagnosis before learning of the misdiagnosis, the patient argued that §10.01 violated the open court provision of the Texas Constitution in her case. Relying on other cases that held § 10.01 to be unconstitutional in situations where it cuts off an injured person's right

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to sue before the person has a reasonable opportunity to discover the existence of a cause of action, the Supreme Court agreed that § 10.01 was unconstitutional as applied in this case as well. Because reasonable minds can differ on whether one year was reasonable or not, the Supreme Court concluded that summary judgment for the doctor was improper and remanded the case for a new trial.

1. EVIDENCE

- A.** *Camp v. Harris Methodist Ft. Worth Hospital*, 983 S.W.2d 876
(Tex. App. -- Fort Worth 1998, no writ).

This case involves exclusion from evidence of a U.S. Department of Health and Human Services finding that the defendant hospital violated EMTALA. The plaintiffs in the case had offered the report in evidence as a public record and the defendant hospital objected that the report was unreliable because the department's investigators were not physicians. The appellate court agreed with the defendant's objection and the trial court's reasoning, holding that the trial court's decision that the report was unreliable was not an abuse of discretion.

- B.** *Horizon/CMS Healthcare Corp. v. Auld*, 985 S.W.2d 216, 234
(Tex. App. – Fort Worth 1999, writ granted).

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A jury found that defendant nursing home's negligence proximately caused plaintiff's injuries and the trial court rendered judgment for plaintiff. On appeal, the nursing home asserted error in admission into evidence written reports created by "surveyors" of the Texas Department of Human Services who inspect nursing homes to determine whether there is compliance with the state licensing requirements and federal and state Medicaid requirements. See Tex. & Safety Code Ann. § 242.037(8) (Vernon 1992); 42 CFR § 483, *et seq.* (1995). The nursing home argued such survey reports merely measured the extent of the home's compliance with contractual and regulatory standards, rather than whether it had negligently deviated from the appropriate standard of medical care. Among many objections, the nursing home asserted that all survey reports were irrelevant; were not offered by a sponsoring witness; were hearsay; were not admissible as public agency records under the hearsay exception of evidence Rule 803(8); and were not admissible under Texas Human Resources Code § 32.021(i). The plaintiffs argued for admissibility because the reports were not offered or admitted to prove violations of standards, but rather for impeachment, to show the nursing had timely knowledge of the plaintiff's condition.

The appellate court held that both the opening statement by defense counsel and eventual testimony by the nursing home's witnesses regarding the good quality of care given to the plaintiff opened the door to the admission of the survey reports and the use of its contents as impeachment material. The court noted that the plaintiffs did not offer the survey reports to prove that the nursing home had violated a standard for participation in the state Medicaid program, as described in Texas Human Resource Code Ann. § 32.021(i) (Vernon Supp. 1999). The appellate court noted that once the reports were admitted, the nursing home called no witnesses to deny or explain the information

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reported in the exhibit. Therefore, the appellate court concluded that the trial court did not abuse its discretion by admitting the survey reports.

2. CONFIDENTIALITY

A. In re: Marriage of Jones, 983 S.W.2d 377 (Tex. App. -- Houston [14 Dist.] 1999, no writ).

In this case, the father of a minor child sought the psychotherapy records of his daughter after learning the child had been in therapy for approximately three months. The psychologist declined to release such records, citing patient confidentiality and his assurances to the patient that the records would remain confidential from the child's parents. The psychologist contended that a release of the records would force him to break his promise to the patient, and would result in harm to her. The father eventually filed suit for the records and the trial court granted disclosure.

In affirming the trial court's decision, the Court of Appeals relied upon Texas Health and Safety Code Section 611.0045(f) which mandates disclosure of confidential records to certain persons under certain conditions. Such disclosure, according to the court must be made to a parent acting on the patient's behalf, even if the professional has no specific indication that the patient has consented to allow the parent to act on their behalf.

The court held that Section 611.045(b) does not permit a professional to refuse disclosure of records to the parent of a minor child. The subsection provides "the professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental or emotional health. Texas Health and Safety Section 611.045(b). The court held that such subsection applies only to the release of records to a patient and not the parent.

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3. EXCLUSION OF DTPA CLAIMS

- A. *MacGregor Medical Assn. v. Campbell*, 985 S.W.2d 38 (Tex. 1999).

This case concerns the assertion of DTPA claims against health care providers in connection with rendering medical services. Because of a patient's eventual death after accidental ingestion of formaldehyde, plaintiffs alleged that an internist failed to perform certain diagnostic and treatment procedures to ensure that all of the formaldehyde had been removed from the patient's body. Claims pursued by the plaintiffs included breach of contract, breach of warranty, DTPA, and negligence claims.

The Texas Supreme Court reversed the Court of Appeals holding regarding the DTPA, breach of contract, and breach of warranty claims. Although the professional association had advertised and marketed its services as being of high quality, the court held that the plaintiffs could not prove their DTPA, warranty and contract claims without proving that the physicians practicing in the association failed to meet the applicable standard of care. The court held that Article 4590i barred the DTPA claims and the statute of limitations for healthcare liability claims barred the contract and warranty claims.

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4. EXPERT REPORTS

- A. *Wood v. Tice*, 988 S.W.2d 829, 832 (Tex. App. -- San Antonio 1999, writ denied).

This case demonstrates that an expert's deposition does not constitute a "report" under Section 13.01 of Article 4590i. The plaintiff sued Drs. Tice, Smith, and Solomon and Dental Centers of America, LLC for negligent treatment of his chipped tooth. Plaintiff's attorney took the deposition of Dr. Smith, which was transcribed and given to Drs. Tice, Smith and Solomon, but not to Dental Centers.

After 180 days from the date the suit was filed, the defendants moved for dismissal of the case based on plaintiffs' failure to provide an expert report. In response, Wood filed a motion for extension of time and included an affidavit asserting that Dr. Smith's deposition satisfied the statute. The trial court granted the defendant's motion to dismiss.

On appeal the plaintiff claimed that he satisfied the Act's requirement that he furnish the defendants with an expert report establishing the basis for his claim by obtaining and thereby "providing" Dr. Smith's deposition testimony. The Court of Appeals held that Dr. Smith's deposition testimony failed to satisfy the requirements of Section 13.01. The court found that Dr. Smith's testimony failed to mention a defendants by name, failed to specify how the defendants breached the standard of care, and failed to establish causation and damages. Therefore, the court held as a matter of law, Dr. Smith's deposition testimony did not satisfy the Act's requirements.

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B. *Brato v. Mercy Hosp. of Laredo*, Tex. App. LEXIS 4623.

In this case, the court indicated that once a defendant files a Section 13.01(e) motion to dismiss, all the plaintiff can do is request a 30-day extension. In this case, the plaintiffs filed suit against Mercy Hospital of Laredo and Dr. Jorge Villa. Some six months after the lawsuit was filed, the hospital and Dr. Villa filed a joint motion to compel compliance with Section 13.01(a) of 4590i.

The appellate court held that once a Section 13.01(e) motion is filed, the only means that plaintiffs have of preventing dismissal is to request a 30-day grace period to permit the filing of the missing reports. Because the plaintiffs failed to do so, the case was properly dismissed.

C. *Martinez v. Lakshmikanth*, Tex. App. LEXIS 4742.

This case sets forth the premise that a defense attorney must file a motion to dismiss before the plaintiff's attorney files a motion for nonsuit and refiles the claim. The plaintiffs in this case failed to file either a expert report or motion for nonsuit within 180 days of filing suit in accordance with Section 13.01(d) of Article 4590i. On the 223rd day after filing suit, the plaintiffs voluntarily nonsuited their cause of action against the doctors without prejudice and refiled their claim in another state district court in the same county. The trial court sustained the doctors motion to dismiss the second suit pursuant to Section 13.01(e) of the Act for failure to file an expert report or nonsuit within 180 days of filing suit.

The court held the language of Section 13.01(e) placed the burden on defendant doctors to move the trial court to dismiss. The court held that after filing of such motion, the trial court has no discretion not to dismiss the cause of action with prejudice, but that the Act's specific requirement that affirmative action be taken by the defendant rendered defendants' failure to make

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the appropriate motion in a timely manner to be an effective waiver of the defendant's remedy of dismissal. The court noted that although such result theoretically created the possibility of a "race to the courthouse" on the 181st day after a healthcare liability claim has been filed, it would not reward defendants who "sit on their hands" for 43 days and allow the plaintiffs to nonsuit their cause of action and refile.

D. *Broom v. McMaster*, 992 S.W.2d 659 (Tex. App. -- Dallas 1999, n.w.h.).

In determining whether plaintiff's failure to timely file an expert report pursuant to Section 13.01 of Article 4590i was intentional or due to conscious indifference, the Court of Appeals looked to the acts and knowledge of plaintiff and her attorney. The court also noted that a failure to file a report is not intentional or due to conscious indifference merely because it is deliberate. (Citing *Smith v. Babcock and Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995).

The court held that the uncontroverted evidence showed plaintiff's attorney was unquestionably aware of the date by which he was required to provide an expert report. The reasons given by the plaintiff's attorney for his failure to timely file included lateness with which the case was referred to him, the large amount of work created by the case and others he was handling, and his assumption that the opposing counsel would not "press the issue" and seek strict compliance with the statute. The court found such reasons did not constitute a "mistake" or "accident" that would justify failure to meet a known statutory deadline.

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- E.** *Roberts v. Medical City Dallas Hospital, Inc.*, 988 S.W.2d 398, 404
(Tex. App. -- Texarkana 1999, writ denied).

Based on the language of the provisions of Article 4590i, the court held that if the plaintiff's failure to timely file their expert report was not intentional or the result of conscious indifference, then that the trial abused its discretion in not granting an extension of time. The court recognized that the statute is silent as to what constitutes "conscious indifference." Relying on the Texas Supreme Court's decision in *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995), the court found that some excuse, not necessarily a good excuse, is sufficient to show a lack of conscious indifference or intentional disregard. Although the court found that the plaintiff's attorney's failure to read the statute constituted negligence, it ruled that the plaintiff's attorney was not consciously indifferent. The court reasoned that the attorney's mistaken belief that the expert's affidavit did not need to be filed was an excuse sufficient to show lack of conscious indifference. The Court of Appeals found that a trial court abused its discretion in not granting the plaintiffs a 30-day extension to file an expert report.

5. DAMAGES

- A.** *Horizon/CMS Healthcare Corp. v. Auld*, 985 S.W.2d 216, 234
(Tex. App. -- Fort Worth 1999, writ granted).

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In this case, a jury found that the nursing home's negligence proximately caused the plaintiff's injuries and awarded \$2,371,000 as actual damages. The jury also found gross negligence and awarded the plaintiff punitive damages in the amount of \$90 million. The trial court accepted the nursing home's argument that it was a "healthcare provider" and that the suit was a "healthcare liability claim" as defined by Article 4590i; applied the Act's \$500,000 damage cap to reduce the actual damage award to \$1,541,203.13 after making a consumer price index adjustment; included prejudgment interest of \$211,968.21 in its judgment; held that the exemplary damage award was not subject to the Article 4590i damages cap; but further applied Texas Civil Practice and Remedies Code § 41.007 (as it existed in 1994 when the lawsuit was filed) which capped exemplary damage awards for personal injury suits; and court reduced the \$90 million final punitive damage award to \$9,483,766, or four times the actual damages award as found by the jury.

On appeal, the issues included whether in a survival suit plead as a "health care liability claim" against a "health care provider," (terms defined in Article 4590i), the statute's \$500,000 limitation on "civil liability for damages" restricts only the amount of compensatory damages the claimant may recover. The nursing home argued that since the damage cap expressly excludes a single category of damages, medical, hospital, and custodial care expenses, then a reasonable conclusion is that the cap inherently included every other category of damages such as punitive damages and prejudgment interest. The Court of Appeals rejected such argument and held that punitive damages and prejudgment interest were not capped by the statute.

The court made mention of the Medical Professional Liability Study Commission created by the Sixty-Fourth Legislature, which intentionally omitted all references to punitive damages from its discussion of tort damages. Therefore, the court held that it would be illogical to prohibit

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insurance coverage for punitive damages yet including those damages within the \$500,000 statutory cap. The court additionally rejected the nursing home's argument that prejudgment interest was capped under the statute, noting that accepting the nursing home's rationale would preclude the recovery of prejudgment interest by the plaintiff in this case and would be contrary to legislative intent, since the prejudgment interest statute was enacted after Article 4590i.

Based upon the court's opinion in this case, it is clear that the court of appeals was of the opinion that Article 4590i does apply to a survival actions in addition to statutorily created wrongful death actions.

B. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90 (Tex. App.–Houston [14th Dist.] 1998, no writ).

A life insurance applicant brought action against medical testing companies for negligence in the mishandling of blood tests which allegedly resulted in a false positive report of human immunodeficiency virus (HIV). The trial court entered summary judgment for the defendant testing companies and the plaintiff (life insurance applicant) appealed. On appeal, the court noted that the plaintiff's alleged reaction to the false report did not rise to the level of "serious bodily injury" that could form a basis for recovering mental anguish damages. At the time plaintiff received her false report, plaintiff's reactions included sweating spells, depression, withdrawal, insomnia and complaints of bruising and pain and suffering as a result of repeated blood work during the HIV followup. Nonetheless, the appellate court held that the plaintiff did not suffer the serious physical injury required to recover mental anguish damages and affirmed the trial court's judgment in that regard.

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6. EMTALA

- A. *Camp v. Harris Methodist Ft. Worth Hospital*, 983 S.W.2d 876 (Tex. App. -- Fort Worth 1998, no writ).

In this case, The Fort Worth Court of Appeals affirmed a judgment in favor of the defendant hospital despite findings that the patient was discharged with a emergency medical condition that had not been diagnosed. The Fort Worth Court of Appeals identified two duties imposed on a hospital by the Emergency Medical Treatment and Active Labor Act (“EMTALA”), including (1) a duty to provide an appropriate medical screening examination to determine whether an emergency medical condition exists, and (2) stabilization of any identified emergency medical condition or transfer to the patient to another facility.

The appellate court specifically held that a cause of action for failure to diagnose the existence of an emergency medical condition is not actionable under the provisions of EMTALA. The court noted that a failure to diagnose claim would be governed by the state medical malpractice law and not EMTALA. In other words, the court held that the hospital’s physicians must have actual knowledge of an emergency medical condition in order for an EMTALA claim to be established against the hospital. In this case, although both physicians recognized the patient’s condition was serious, neither considered the patient to have an emergency medical condition, so EMTALA provisions were not applicable.

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B. *Huffine v. Tomball Hospital Authority*, 979 S.W.2d 795 (Tex. App.–Houston [14th Dist.] 1998, no writ).

A patient sued a municipal hospital authority, alleging mistreatment and patient dumping under EMTALA. Plaintiff was admitted to the emergency room of the hospital in a state of dehydration. He was subsequently diagnosed with hepatitis A and B; was treated by the hospital for one week; and was then discharged in stable condition to go home. Several months later, the hospital received written notice from plaintiff’s counsel claiming damages for plaintiff’s emotional distress due to mistreatment by the hospital and suit ensued.

The hospital sought summary judgment that plaintiff’s EMTALA claim failed because plaintiff only alleged an “attempted transfer” by the hospital. In addition, the defendant hospital argued plaintiff was not in an emergency medical condition when he was discharged. EMTALA were intended to apply to persons who were discharged or transferred before stabilization. The trial court granted summary judgment and denied the patient’s motion for new trial.

On appeal, the court noted that the hospital had attached verified excerpts from appellant’s medical records evidencing that he was in a stable condition when he was discharged, and that plaintiff did not object to at the trial court level. The summary judgment evidence was legally sufficient to support that summary judgment and the trial court’s judgment was affirmed.

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C. *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999).

For the first time the United States Supreme Court has now addressed the Emergency Medical Treatment and Active Labor Act. In *Roberts*, the court held that no improper motive need be shown for a plaintiff to establish a violation of EMTALA's stabilization and transfer requirements. The plaintiff was initially admitted to the hospital after being run over by a truck. After six weeks of treatment she was transferred to another facility. Her condition deteriorated significantly and she was taken to a third facility where she remained for several months and incurred substantial medical expenses. Her guardian filed suit under EMTALA, alleging that the initial hospital had failed to stabilize her emergency medical condition before transferring her. The district court granted summary judgment for the respondent hospital and the Sixth Circuit Court of Appeals affirmed, holding that in order to state a claim under 42 U.S.C. § 1395dd(b), the plaintiff had to show that the inappropriate stabilization resulted from an "improper motive" such as the patient's indigence, race, or sex.

The United States Supreme Court reversed, finding no improper motive requirement in the EMTALA stabilization and transfer provisions. The court explained that the stabilization and transfer provisions in Section 1395dd(b) contained no such requirement of "appropriateness." The court found no express requirement that an improper motive be proven, nor one that the stabilization be "appropriate," and held that Section 1395dd(b) contained no "expressly or implied 'improper motive' requirement."

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7. SUMMARY JUDGMENT PRACTICE

- A. *Weathersby v. MacGregor Medical Assn.*, 983 S.W.2d 82 (Tex. App. -- Houston [14th Dist.] 1998, no writ).

In this case, plaintiff claimed that she had sustained a compression fracture while performing a test during a post-employment physical examination. The physician and professional association moved for summary judgment, alleging that a physician/patient relationship did not exist and that the examination and testing performed by the defendant was not a proximate cause of the plaintiff's injury. Plaintiff argued she was not asserting a medical negligence claim and that her allegations were based upon common law negligence principles. Although the court agreed that the claims were healthcare liability claims falling under Article 4590i, the statute was not enforced by the court because the defendant's motion had failed to sufficiently reference the statute in such a manner as to put the plaintiff on notice.

The court did not address the physician/patient relationship issue, but affirmed the judgment on proximate cause. The affidavit of the defendant physician discussed the particular machine on which the plaintiff claimed she was injured and the manner in which tests were administered. The doctor averred that no injury had ever occurred during plaintiff's testing and hundreds of tests he had performed over three years, and opined that a back injury was not reasonably foreseeable. The appellate court concluded that the physician's summary judgment affidavit was sufficient to negate both cause in fact and foreseeability.

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B. *Steinkamp v. Caremark*, 1999 Tex. App. LEXIS 7117 (Sept. 1999).

This case concerns a no-evidence motion for summary judgment sought by the defendant nurse and her employer on the plaintiff's nursing negligence claims. Defendant Patricia Arreola, a home care nurse employed by Defendant Caremark, was caring for plaintiff, who was homebound with a difficult pregnancy. A catheter which defendant inserted into a vein in plaintiff's arm began to disintegrate. Plaintiff had to undergo surgical removal of the catheter fragments, without benefit of anesthesia because of her pregnancy. Plaintiff sued Arreola and Caremark, contending that Arreola's negligent insertion of the catheter caused its disintegration. Plaintiff also sued the manufacturer of the catheter, Vygon Corporation which moved for and obtained summary judgment and severance. Arreola and Caremark filed a no-evidence motion for summary judgment in connection with plaintiffs' claims. Plaintiff's response relied in part upon evidence filed as part of Vygon's previous summary judgment motion which included affidavits from individuals and testimony excerpts from Arreola's deposition. Defendants objected to plaintiff's reliance on Vygon's summary judgment evidence, asserting that the evidence was part of the Vygon's severed case, and was not properly before the trial court. On appeal, plaintiff challenged the trial court's order striking some of her evidence and the trial court's ultimate decision to grant summary judgment in favor of Arreola and Caremark.

The appellate court stated that "while we do not interpret Rule 166a(i) as requiring a party to needlessly duplicate evidence already found in the court's file, a party must nevertheless ensure that the evidence is properly before the trial court for consideration in resolving the motion for summary judgment." The court also noted that it is the task of the party to ensure that the evidence is properly before the court either by requesting in the motion the trial court take judicial notice of

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the evidence that is already in the record or by incorporating that document or evidence in the party's motion.

Plaintiff argued that the first paragraph of her response to Arreola and Caremark's summary judgment motion started that she was relying in part upon Vygon's summary judgment motion, which necessarily included the attached summary judgment evidence. Additionally, in the body of her motion, plaintiff referred to certain express portions of Vygon's summary judgment evidence. The appellate court held that the plaintiff had met Rule 166a(i) requirements her motion for summary judgment evidence was properly before the trial court and the trial court abused its discretion in excluding the evidence.

C. *Aguirre v. South Texas Blood and Tissue Center* 1999 Tex. App. LEXIS 5353.

This case involves negligence claims that the defendant Blood Bank failed to exercise a degree of care that is ordinarily exercised by and expected of blood banks in its handling, screening and testing of blood products, and that such negligence proximately caused plaintiff to become HIV positive. Defendant South Texas successfully moved for a no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i). The appellate court reversed and remanded the summary judgment. The defendant Blood Bank sought rehearing upon which the appellate court found in the record no evidence of proximate cause. The plaintiff herself did not seriously contest such conclusion but claimed there was no evidence because the records she needed to prove causation had been destroyed. The Court noted that even if Plaintiff was able to find a way to prove proximate causation without the donor records, it was her unmet burden to have brought forth evidence of that predicament to overcome summary judgment while she more fully developed the evidence.

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The court noted that it is inconsistent with the goal of a no-evidence summary judgment to compel a defending party to trial where the preponderant party will have no evidence on an essential element and where the complete lack of evidence is apparent after a reasonable time for discovery has elapsed. Therefore, the court granted South Texas' motion for rehearing and affirmed the trial court's granting of South Texas' Motion for Summary Judgment.

D. *Garcia v. Willman*, 199 Tex. App. LEXIS 6513.

Plaintiff sued defendant doctor for medical malpractice. The plaintiff countered defendant's motion for summary judgment with an affidavit of her medical previously used by plaintiff to comply with the procedural expert report requirements of Article 4590i. The defendant doctor objected to the plaintiff's summary judgment evidence, arguing that the plaintiff was statutorily prohibited from using the affidavit of her 4590 expert. The trial court struck the affidavit and granted the defendant's motion for summary judgment.

On appeal, the court concluded the trial court properly struck the plaintiff's summary judgment affidavit. The court noted that under Section 13.01(k), a report filed to comply with Section 13.01 "shall not be used in a deposition, trial, or other proceeding." However, the court found that the trial court should have provided the plaintiff the opportunity to amend prior to granting the summary judgment, and remanded on that basis.

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8. NEGLIGENT CREDENTIALING

- A. *Bomar v. Walls Regional Hospital*, 983 S.W.2d 834 (Tex. App. -- Waco 1998, no writ).

This opinion arises from a no-evidence summary judgment granted in favor of the hospital as against claims of its employee nurses that a physician had sexually harassed them. The hospital had moved for summary judgment based upon the absence of evidence of malice as required in a negligent credentialing claim and defined in *St. Lukes Episcopal Hospital v. Agbor*, 952 S.W.2d 503 (Tex. 1997). In response to the motion, one of the plaintiff nurses filed an affidavit which, according to the court, claimed “that the hospital either knew or should have known of the physician’s behavior toward the plaintiffs before it reappointed the doctor to its staff.”

The appellate court held that the nurse’s affidavit concerning what her employer hospital knew or should have known about the physician’s sexual harassment was sufficient to raise a fact issue on malice in response to the defendant’s no-evidence summary judgment motion in connection with plaintiffs’ negligent credentialing claim. The court’s opinion does not indicate whether the affidavit was more specific with respect to the reasons the hospital either knew or should have known of the sexual harassment, although the opinion elsewhere indicates that plaintiffs were asserting they had complained of the physician to their supervisors. Further, the court does not address how the hospital’s knowledge of the behavior and the reappointment of the physician to the staff involved an extreme degree of risk rising to a level of legal malice.

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9. DUTY TO THIRD PARTIES

A. *Van Horn v. Chambers*, 970 S.W.2d 542, 543 (Tex. 1998).

In this case, the Texas Supreme Court declined to impose a duty on a physician to two hospital employees who were injured by the defendant physician's patient. The patient was taken to the emergency room for treatment of seizures and alcohol withdrawal. He was combative upon arrival, and the hospital personnel sedated him, administered anti-seizure medication and secured him with leather restraints. The next day, the patient was transferred to the hospital's neurological critical care unit where Dr. Van Horn was the attending physician. After a day of treatment, Dr. Van Horn determined that the patient no longer required critical care and transferred him to a private room.

After the transfer, the patient decided he wanted to leave the hospital and three hospital personnel confronted him with an intent to prevent him from leaving. A struggle ensued and all four men crashed through a large open air shaft, falling over twenty feet to a concrete floor. Two of the men died and two were injured. The parents of the dead and injured employees sued Dr. Van Horn alleging that the doctor's negligence and gross negligence caused the injuries and death to the employees involved. The trial court granted Dr. Van Horn's motion for summary judgment on the basis that he owed no duty to the plaintiffs, but the Court of Appeals reversed that decision, holding that Dr. Van Horn owed a duty to nonpatient third parties.

The Texas Supreme Court reversed the court of appeal's decision by noting that no physician/patient relationship existed between Dr. Van Horn and the plaintiffs. The court held that failure to properly diagnose the patient's condition could amount to negligence, but only as to the patient, rather than third parties.

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B. *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999).

The primary issue in this case was whether a mental health professional could be liable for negligence in failing to warn appropriate third parties when a patient made specific threats of harm toward a readily identifiable person. Because the legislature has established a policy against a common law cause of action, the court refrained from imposing on mental health professionals a duty to warn third parties of a patient's threats.

The Texas Supreme Court refused to follow the California Supreme Court's ruling in *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345-47 (Cal. 1976), which had recognized a cause of action for a physician's failure to warn of threats made by his or her patient. The court, citing Texas Health & Safety Code Ann. § 611.002 through 611.004 (Vernon 1992), found it persuasive that the legislature had enacted a statute classifying communications between a mental health professional and their patients as confidential and prohibiting disclosures to third parties unless an exception applied. The court reasoned that Dr. Thapar would have violated the confidentiality statute by disclosing threats, because the statute did not make an exception for disclosure of the third parties threatened by a patient.

10. **DISTINCTION BETWEEN MISNOMER AND ASSUMED NAME**

A. *Chilkewitz v. Hyson*, 199 Tex. LEXIS 63.

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The issue presented in this case was what effect a misnomer claim had on the tolling of limitations in medical malpractice action. Plaintiff injured his back in 1987 and sought treatment from an orthopedic surgeon who subsequently referred him to Dr. Hyson's office for preoperative tests. Dr. Hyson's medical technician, who was employed by Dr. Hyson's professional association, conducted the test. The medical technician also assisted in surgery on plaintiff that was performed by another doctor. Dr. Hyson was not present during the plaintiff's surgery. During the pre-operative procedure at issue, the technician from defendant's office performed somatosensory (SEP) monitoring. The surgeon subsequently used an electrocautery unit (ECU) during the surgery. Because the ECU was improperly grounded, the electricity from the ECU passed back to ground through one of the SEP monitoring electrodes and severely burned plaintiff's leg. Plaintiff brought suit under the Medical Liability and Insurance Improvement Act against the surgeon who was not present at the surgery, but was the sole shareholder of the professional association employing the technician. After the applicable limitation period expired, plaintiff filed amended pleadings naming the professional association as a defendant, claiming misnomer as a matter in avoidance of limitations. The Dallas Court of Appeals held that the doctrine of misnomer did not toll the Medical Liability Act's two-year statute of limitations. The plaintiff advanced the "misnomer" claim at trial, but the court distinguished this from the "misidentification" claim offered on appeal. The court held that such were distinct doctrines requiring separate analysis. The majority engaged in lengthy analysis of the legislative intent on § 10.01 of Article 4590i and concluded that most tolling positions do not apply to that section, including misnomer or misidentification. The Court of Appeals reversed and rendered judgment that Chilkewitz take nothing because Chilkewitz waived misidentification

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as a matter in avoidance of limitations because his pleadings included all a misnomer and assumed name under Texas Rule of Civil Procedure 28.

The Texas Supreme Court disagreed with the Court of Appeals because there was some evidence that Hyson’s professional association conducted business as “Morton Hyson, M.D.” As a basis for its holding, the Texas Supreme Court noted there was some evidence in the case that the association did do business in the name of an individual, such as stationery used by the association which bore the letterhead “Morton I. Hyson, M.D.” The court additionally held that Rule 28 simply provided an entity conducting business under an assumed name or common name, may be sued in that name and limitations is not tolled.

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11. INFORMED CONSENT

A. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999).

Plaintiff Ratliff sued Dr. Earle for failing to disclose risks attendant to the plaintiff's 1993 surgery. The claim was governed by the Medical Liability Insurance and Improvement Act and Texas Medical Disclosure Panel Provisions which include two lists; to wit: (List A) of treatments of procedures for which the risks must be disclosed, and the other (List B) of treatments and procedures for disclosure of risks is not required. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.01 (Vernon Supp. 1999). The statute requires that the panel identify what risks must be disclosed by the physician and the form in which disclosures must be made. The Act further provides that a physician who discloses to a patient the risks of List A procedure and the substance and form prescribed by the panel "shall be considered to have complied with the Act, and that a patient's consent to a List A procedure obtained as prescribed shall be considered effective." In *Earle*, it was undisputed that the surgery at issue involved List A procedures and that all risks were identified and disclosed manner required.

The Court of Appeals held that the disclosure of risk only created a rebuttal of presumption that Dr. Earle was not negligent in disclosing the risks of the surgery to Ratliff. However, Texas Supreme Court held that the Act does not permit a finding that a physician, who made disclosures as described by the panel, was negligent for not disclosing other risks and hazards associated with the recommended procedure. The court held that the Act permitted the presumption of proper disclosure to be rebutted only by some showing of invalidity of the consent form, such as a patient's forged signature the lack of capacity for signing. The plaintiff produced no evidence that his written

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consent was ineffective or invalid and failed to raise an issue whether Dr. Earle was negligent regarding disclosure of the risks of surgery.

12. EMPLOYMENT DISCRIMINATION

A. *NME Hospitals, Inc. d/b/a Sierra Medical Center v. Rennels*, 994 S.W.2d 142 (Tex. 1999).

This case involved the application of the Texas Commission on Human Rights Act to a tortious interference and employment discrimination claim between litigants who did not have a direct employer/employee relationship. The defendant hospital in this case moved for summary judgment urging that plaintiff Margaret Rennels, M.D. could not maintain causes of action against the hospital for violation of the Texas Commission on Human Rights Act (TCHRA) because the hospital was not her employer. The hospital also argued that because Rennels had no cause of action under the TCHRA, her derivative civil conspiracy claim must also fail. The trial court granted the hospital's motion for summary judgment and the plaintiff appealed.

The appellate court noted that, in interpreting the TCHRA, Texas courts try to correlate state law with federal law in the area of discrimination in employment. The appellate court admitted that it believed that Rennels' relationship with the hospital was one in which the TCHRA could be invoked, even though the hospital did not directly employ Rennels, because it had the power to adversely effect Rennels' business opportunities in much the same manner as a direct employer. The court noted that the 5th Circuit has specifically left unresolved the question of whether a person may bring an employment discrimination suit against a defendant who interferes with the plaintiff's employment opportunity with a third party, and that at least one federal district court within the 5th Circuit has adopted the rationale set out in *Sibley Mem'l Hosp. v. Wilson*, 160 U.S.App.D.C. 14, 488

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F.2d 1338 (D.C. Cir. 1973). The court noted that the application of the *Sibley* decision was wholly consistent with the defined purposes of the TCHRA and that at least one federal district court within the 5th Circuit has adopted the *Sibley* rationale without correction by the higher court. Therefore, the court concluded that neither the 5th Circuit precedent, nor in the court decision in *Guerrero v. Refugio County*, 946 S.W.2d 558 (1997) precluded their decision to reverse the summary judgment and remand for further proceedings.

The Texas Supreme Court subsequently addressed this case and held that to maintain an action under the TCHRA when no direct employment relationship exists between plaintiff and defendant, plaintiff must show: (1) that the defendant is an employer within the statutory definition of TCHRA; (2) that some sort of employment relationship exists between the plaintiff and a third party; and (3) that the defendant controlled access to plaintiff's employment opportunities and denied or interfered with that access based on unlawful criteria. The Supreme Court concluded that the plaintiff had shown that the hospital was in a position to interfere with her employment relationship and that she therefore had *Sibley* standing under the TCHRA. Accordingly, the trial court erred when it granted the hospital summary judgment based on the plaintiff's lack of standing.

13. PEER REVIEW PRIVILEGE

- A. *In Re The Methodist Hospital*, 982 S.W.2d 112 (Tex. App. – [1st Dist.] Houston 1998 n.w.h.).

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In this case the court determined whether certain documents containing data relating to hospital infection rates were exempt from discovery under Tex. Health & Safety Code Ann. § 161.032 (Vernon Supp. 1998) or Tex. Rev. Civ. Stat. and Art. 4495b, § 5.06 (Vernon Supp. 1998). The precise issue considered was whether the trial court abused its discretion in concluding documents were discoverable under an exception to the privilege because they were “later maintained in the regular course of business by a hospital.”

Methodist Hospital initially responded to a subpoena duces tecum by asserting that the requested infectious disease reports requested were privileged from discovery under the hospital and peer review committee statutes and moved for a protective order that it not be required to produce such documents. The court denied Methodist’s motion for protective order and this mandamus ensued. For the purposes of the opinion, the court assumed the records were confidential and privileged that were not subject to discovery unless they were “made or maintained in the regular course of business” of Methodist. The plaintiffs’ claimed to have met their burden of establishing that the documents lost their otherwise privileged status as a result of their having been made or maintained in the regular course of business in the hospital.

The court referred to *Memorial Hospital v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) in stating that the privilege does not prevent discovery of material which has been presented to a hospital committee if it is otherwise available. The court held that the trial court could have reasonably concluded the evidence supported a finding that the information and the infection surveillance reports were in administrative files apart from infection control committee deliberations and therefore could be proved up by means apart from the records of the committee. Accordingly,

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the appellate court held that the trial court did not abuse its discretion in concluding the subpoenaed documents were discoverable records made or maintained in the regular course of business.

B. *In re Donna Pack*, 996 S.W.2d 4 (Tex. App. -- Fort Worth 1999 n.w.h.).

In this original proceeding, the court addressed the issue of whether a nursing home investigation report prepared by the Texas Department of Human Services (TDHS), a nursing home's response to plans of correction, and the testimony of TDHS surveyors regarding their investigations are excluded from discovery under the peer review privilege. The nursing home contended that the TDHS records were prepared from confidential information that the nursing home's peer review committee provided TDHS. However, the court noted that there was no evidence that the TDHS records disclosed any such confidential information. The court noted that the mere fact that the nursing home's peer review committee may have reviewed the TDHS documents did not make them privileged. The court noted that the documents at issue were TDHS inspection reports, deficiency sheets and summaries, and their nursing home plans of correction. The court held that their disclosure was required by law, as all records maintained by the TDHS long term regulatory care division "are open to the public" as long as names and other personally identifiable data are removed. 42 Tex. Admin. Code § 19.2010 (a) (1), 19.2011 (e) (West 1998); *Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 643 (Tex. App. -- Fort Worth 1998, no pet.).

In a footnote, the court did specify that its decision should not be interpreted as a holding that all documents generated by TDHS are public information. *See, e.g.*, Tex. Health & Safety Code Ann. § 242.049) Vernon Supp. 1999), which provides that "quality improvement reports" developed by TDHS for nursing home use are not discoverable. However, documents such as TDHS survey

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and investigation reports are not quality improvement reports. *See Id.* § 242.049 (b); *Brewer*, 986 S.W.2d at 644.

C. *In re WHMC d/b/a Columbia West Houston Medical Center*, 996 S.W.2d 409 (Tex. App.–Houston [14th Dist.] 1999 n.w.h.).

The hospital in this case petitioned the appellate court for mandamus relief concerning an order requiring production of allegedly privileged documents in a wrongful death action. The request at issue concerned documents referencing the hospital's performance improvement project related to decreasing the amount of time patients spend in the emergency room. The defendant hospital objected to that request on the grounds that it sought documents protected by the peer review and/or hospital committee privilege. *See Tex. Rev. Civ. Stat. Ann. art. 4495b (Vernon Supp. 1999).*

The appellate court noted that the hospital committee privilege did not apply to documents gratuitously submitted to a committee or created without committee impetus and purpose. The court stated that the fact that a document was considered by a committee did not automatically transform that document into a committee record or proceeding. However, the court held that the plaintiffs failed to controvert or otherwise object to defendant's affidavit evidencing that the documents requested were records and proceedings of a hospital committee or peer review committee. The court held that in the absence of such proof or evidence establishing that the privilege was waived or inapplicable, the trial court clearly abused its discretion in ordering the hospital to produce the documents in question.

D. *Davis v. Methodist Hospital*, 1999 Tex. App. LEXIS 7498.

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The hospital suspended a doctor's admission, consultation and surgical privileges subsequent to an improperly performed surgery on a patient to relieve a bowel obstruction. The hospital's director of medical services notified the Texas State Board of Medical Examiners of the suspension. A code was placed on the report that corresponded to "incompetent/malpractice/negligence." The doctor subsequently sued the hospital for libel, based on the sections of the report stating that his clinical privileges were suspended and later terminated for "incompetence/malpractice/negligence." The hospital moved for summary judgment based on its assertion of immunity under the Health Care Act and Texas Medical Practice Act. The trial court affirmed the hospital's motion for summary judgment and the plaintiff doctor appealed.

The appellate court held that the doctor's summary judgment evidence did not raise a genuine issue of material fact as to the truthfulness of the hospital's reports. The court reviewed the basis for the credentials committee's recommendations, and concluded that they amounted to a finding that the doctor was, at a minimum, incompetent. Therefore, the hospital's summary judgment evidence was held to be sufficient to establish the reports were true. The court noted that the affidavits submitted by other doctors who gave their opinion as to whether a reasonable practitioner could have determined that the doctor was negligent, incompetent or guilty of malpractice, was an irrelevant attack on the medical judgment underlying the credentials committee's adverse recommendation. The court concluded that such evidence should not be considered when determining the veracity of the hospital's reports. Therefore, the court concluded that the trial court properly granted the hospital's motion for summary judgment.

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14. EXPERT TESTIMONY

A. *Steinkamp v. Caremark*, 1999 Tex. App. LEXIS 7117.

As indicated supra, this case involves allegations of negligence in connection with the plaintiff's surgery to remove catheter fragments without anesthesia because of pregnancy. The plaintiff contended that the nurse's negligent insertion of the catheter caused it to disintegrate. Due to the trial court's exclusion of plaintiff's expert witness testimony, the appellate court addressed whether the facts of the case demanded that plaintiff meet her burden of providing an expert witness at all. The court declared that no expert witness testimony was necessary because the doctrine of *res ipsa loquitur* applied. While Texas courts generally view *res ipsa loquitur* as to be inapplicable to medical malpractice cases, an exception applies where medical negligence is demonstrated by facts that can be evaluated by resort to common knowledge. In such case, expert testimony is not required because "scientific enlightenment is nonessential for the termination of an obvious fact" *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990).

The court specified that the present case was notably dissimilar to that of any other Texas case because this case turned on *leaving* a medical instrument inside the body, while other Texas cases turned on the *use* of the instrument. Although it was unclear how long the catheter fragment remained in Plaintiff's body, the present case was found to clearly fit within the common knowledge exception because it involved the act of leaving a part of a medical instrument within a patient's body, and it did not take a medical expert to know that a surgical instrument is not supposed to break and remain, either in part or whole, inside the body.

B. *Andrade Garcia v. Columbia Medical Center*, 996 F. Supp. 617 (E.D. Tex. 1998).

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Plaintiffs brought a medical malpractice case alleging wrongful intubation resulting in death. The court held that a medical school graduate, who had not completed a medical residency, was not a licensed physician, and had never engaged in the formal practice of medicine, was not qualified under Texas law to offer expert testimony against other physicians. Registered nurses are not qualified, under Texas law, to offer expert testimony against physicians regarding the alleged departure from accepted standards of care by hospital and its staff, although they can offer testimony against non-physicians.

Although expert testimony regarding hospital and physician ethical duties to patients might cause a jury to misinterpret the appropriate standard of care and result in a verdict relying on a breach of ethical duties rather than a departure from the standard of medical care, the dangers of unfair prejudice, confusion of the issues, and misleading the jury were found to not substantially outweigh the probative value of such testimony which was held admissible.

C. *Mills v. Angel*, 995 S.W.2d 262 (Tex. App. – Texarkana 1999, no writ).

The Mills family sued several doctors along with Pasadena Bayshore Hospital for injuries suffered by David Mills during a surgical procedure. Plaintiffs failed to present expert testimony in support of their claim of direct corporate liability for the hospital's alleged negligence in credentialing and supervision of doctors. The Mills appealed a directed verdict in favor of the hospital.

The appellate court noted that a hospital may be directly liable for negligence independent of the negligence of its physicians or employees. Generally, expert testimony is required to establish the standard of care and whether it was breached when the underlying issue involves performance of medical procedures, as the nature of the alleged negligence is not within the common knowledge

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of laymen. However, when the underlying negligence involves the standard non-medical, administrative, ministerial, or routine care at a hospital, no expert testimony is necessary because the jury is competent from experience to determine and apply the reasonable standard. The alleged negligence in the case, involving the standard of care and credentialing processes and physician supervision, is not within the common knowledge of laymen and expert testimony is required to establish the standard from which to judge the defendant's conduct. Therefore, the appellate court affirmed the trial court's judgment.

D. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 118 S.Ct. 2339, 141 L.Ed. 2d 711 (1998).

This case addressed the question of whether the analysis applied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) applies to non-scientific testimony. In this case, the right rear tire of a minivan driven by the plaintiff blew out. In the accident that followed, one of the passengers died, and the others were severely injured. In October of 1993, the plaintiffs brought this diversity suit against the tire's maker and distributor, referred to collectively as Kumho Tire, claiming that the tire was defective. The plaintiffs rested their case in significant part upon deposition testimony provided by an expert in tire failure analysis who intended to testify in support of their conclusion.

Kumho Tire moved the district court to exclude the expert's testimony on the ground that his methodology failed the Rule 702 reliability requirement. The court agreed with Kumho that it should act as a *Daubert*-type reliability "gatekeeper," even though one might consider the expert's testimony as "technical," rather than "scientific." The district court found that all the *Daubert*

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factors argued against the reliability of the expert's methods, and it granted the motion to exclude the testimony.

The 11th Circuit reversed and noted that the "Supreme Court in *Daubert* explicitly limited its holding to cover only the "scientific context" adding that a *Daubert* analysis applies only where an expert relies "on the applicable of scientific principles" rather than "on skill or experience-based observation." *Id.* at 1435-1436. It concluded that the expert's testimony, which it viewed as relying on experience, fell outside the scope of *Daubert* and the district court erred as a matter of law by applying *Daubert* in the case.

On appeal, the United States Supreme Court concluded that *Daubert's* general holding setting forth the trial judge's general "gatekeeping" objection applies not only to testimony based on "scientific" knowledge but also testimony based on "technical" and "other specialized" knowledge. See Fed.R. Civ. Evid. 702. The court also concluded that a trial court may consider one or more of the more specific factors that *Daubert* mentions when doing so will help determine that testimony's reliability. However, as the court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts on every case. The Supreme Court noted that the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

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E. Black v. Food Lion, Inc., 1999 W.L. 173001 (5th Cir. Tex.).

In this case, a customer brought a slip and fall action against a store in state court. After removal, the federal court entered a judgment for the customer and the store appealed. On appeal, the 5th Circuit addressed the adequacy of the plaintiff's expert testimony in light of the recent decision in *Kumho Tire v. Carmichael*.

The 5th Circuit noted that *Kumho Tire* does not undermine the use of the specific *Daubert* factors as a reference point for gauging the reliability of potential expert testimony. In addition, the court noted that *Kumho Tire* holding that a trial judge "may" consider several more specific factors in *Daubert* should not be misunderstood to grant open season on the admission of expert testimony by permitting courts discretionarily to disavow the *Daubert* factors. The 5th Circuit concluded that the plaintiff's expert in this case did not have the medical science supporting the exact process that resulted in fibromyalgia or the factors that trigger the process. Therefore, the court noted that no scientifically reliable conclusion on causation could be drawn. As the expert testimony was unsupported by specific methodology that could be relied upon in this case and contradicted by the general level of current medical knowledge, the 5th Circuit noted that the trial court abused its discretion by admitting the testimony.

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15. SETTLEMENT CREDIT

A. *Utts v. Short*, 987 S.W.2d 626 (Tex. App. -- Austin 1999, pet. filed).

The representatives of the patient sustained alleged wrongful death in a medical malpractice action brought against the doctor and the hospital. The patient's daughter settled with the hospital for \$200,000 and then nonsuited with prejudice the claim against the doctor. Other family members settled with the hospital for \$10 each and proceeded to trial against the doctor. The jury verdict attributed 25% of the negligence to the doctor and 75% of the negligence to the hospital, and a \$435,950 judgment was entered against the doctor. However, the doctor sought a \$200,000 credit toward the judgment which was denied by the probate court. The doctor appealed, and the Austin Court of Appeals held that the doctor was not entitled to credit for the hospital settlement with the daughter, since the appellees could not be considered as all "one claimant" according to Sections 33.011-012 of the Tex. Civ. Prac. & Rem. Code.

The Texas Supreme Court granted writ regarding this opinion and will be addressing these issues within the next few months.

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16. LEARNED INTERMEDIARY DOCTRINE

- A.** *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656 (Tex. App. – Houston [14th Dist.] 1998, no writ).

In this case breast implant recipients filed a products liability action against a manufacturer for failure to warn of the dangers of implants. The court held that the learned intermediary doctrine applied to plaintiffs' claims of failure to warn of the dangers of breast implants, based upon the physician/patient relationship, the breast implants recipient's reliance on the physician to give information on the procedure and product, and the physician's superior knowledge and ability to assess the risks and benefits.

While conceding that the Texas courts had previously applied the learned intermediary doctrine only to prescription drugs and not to medical devices, the court noted that Texas courts had not rejected the applicability of the doctrine to medical devices, and were unwilling to distinguish silicone implants from prescription drugs for the purposes of applying learned intermediary doctrine.

17. TEXAS RULES OF CIVIL PROCEDURE

- A.** **Discovery Control Plans - TRCP 190.**

Rule 190.1 provides that every case will be governed by a "discovery control plan" designed to limit volume or burden of discovery. There are three types or levels of discovery control plans under the new rules.

1. Level One

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Texas Rule of Civil Procedure 190.2 is designed for cases involving monetary relief of \$50,000 or less and certain other family law matters. In addition to the limitations set by the rules, Level One presumptively limits each party to six hours in which to examine witnesses in oral depositions, which may be extended to ten hours by agreement. Parties also are limited to a total of 25 interrogatories, which may be allocated among an unlimited number of sets. Finally, discovery must be completed by 30 days before trial. Parties must serve discovery requests sufficiently far in advance of the 30 day deadline so that the response comes due prior to the deadline.

Level One is the most restrictive level of discovery and expressly designed as a “safe haven” enabling plaintiffs of smaller cases to avoid being over-taxed by the opponent’s discovery. Plaintiffs involved in smaller cases are not required to utilize Level One if they desire broader discovery. The plaintiff invokes Level One by alleging it in the first numbered paragraph of the original petition and must affirmatively plead that he or she seeks only monetary relief of \$50,000 or less. Even after invoking Level One, plaintiff may amend his or her petition to invoke Level 2 of discovery or may seek additional discovery by agreement or court order. To protect defendants from unfair surprise, however, plaintiffs are required to obtain leave of court to amend their pleadings to change discovery levels within 45 days of trial, which may be granted only if good for filing the amendment exceeds any prejudice to the defendant. *See* Tex. R. Civ. P. 190.2(b). Defendants may also move a case out of Level One by court order or by asserting their own affirmative claim for relief that falls outside the scope of Level One, subject to the same restrictions applicable to the plaintiff’s right to amend.

2. Level Two

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Level Two discovery as set forth in Tex. R. Civ. P. 190.3 is the basic “default” discovery track that will govern most cases. Level Two permits essentially the same amount of discovery allowed under the preexisting Texas discovery rules, but with three significant limitations. First, discovery in cases must be completed within a “discovery period” beginning nine months after the earlier of the date of the first oral deposition or due date of the first written discovery requests served in the case, but no later than 30 days prior to trial. *See* Tex. R. Civ. P. 190.3(b)(1)(B). This supposedly ensures that discovery does not linger indefinitely, driving up costs. In recognition that a trial close to nine months in the future might not be a realistic possibility in some venues, Tex. R. Civ. P. 190.5 allows some flexibility in obtaining additional discovery after the close of the discovery period.

The second limitation in Level Two is an aggregate limit of 50 hours in which each “side” in the case may depose parties on opposing sides, experts retained by those parties, and persons subject to those parties’ control. *See* Tex. R. Civ. P. 190.4(b)(2). A “side” refers to all litigants with generally common interests in the litigation. Finally, interrogatories are limited in the same manner as under Level One.

3. Level Three

Level Three is a court-managed discovery somewhat similar to current federal court practice. It is designed for more complex cases that would not easily fit into the framework of Levels One or Two, although a party in any type of case may move the court to enter a Level Three plan. *See* Tex. R. Civ. P. 190.4(a). A court may also enter a Level Three plan on its own initiative. *Id.*

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A Level Three plan must set forth the trial date, discovery period, appropriate limitations on the amount of discovery, and deadlines for joining additional parties, amending pleadings, or designating experts. It may also address any issue concerning discovery, any limitation in the discovery rules, and any matter that may be addressed in a pretrial scheduling order under Rule 166a.

Rule 190 operates independently of the current Rule 166a, which authorizes trial courts to enter pretrial scheduling orders, although the two rules overlap somewhat. While a Level Three discovery control plan may include any matter than can addressed by a Rule 166a scheduling order, a Rule 166a scheduling order also can be entered separately and at any discovery level.

B. Statements and Identity of Witnesses - Tex. R. Civ. P. 192.

Texas Rule of Civil Procedure 166b(3)(C), with some exception, previously protected from discovery witness statements that were made after the occurrence and in anticipation of litigation. However, the 1999 amended Texas Rule of Civil Procedure 192.3(h) makes witness statements discoverable regardless of when made. A “witness statement” has been defined under the rules as (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness’s oral statement, or any substantially verbatim transcription of such a recording. However, the new rule makes it clear that notes during a conversation with the witness are not considered a witness statement.

Additionally, the identity of trial witnesses, which (except for experts) once enjoyed work product protection, is now expressly within the scope of discovery. *See* Tex. R. Civ. P. 192(d). Excluded from those to be identified are those the necessity of whom one cannot anticipate reasonably before trial.

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C. Experts - Tex. R. Civ. P. 195.

Under the 1999 Texas Rules of Civil Procedure, discovery of experts is permissible only through requests for disclosure, depositions, and expert reports. Texas Rule of Civil Procedure 195, provides that experts for the plaintiff must be designated 90 days before the end of the discovery period and the defendant experts must be designated 60 days before the end of the discovery period.

With regard to expert depositions, the plaintiff must make experts who have not provided reports available reasonably soon after designation. If the deposition date encroaches upon another party's designation date, the latter deadline is extended.

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D. No-Evidence Motions for Summary Judgment, Tex. R. Civ. P. 166a(i).

The Texas Rules of Civil Procedure were amended September 1, 1997 to include a no-evidence motion for summary judgment pursuant to Tex. R. Civ. P. 166a(i). The rule provides that, after an adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of the claim or defense on which an adverse would have the burden of proof at trial. The motion must identify the elements as to which there is no evidence and the court must grant the motion unless respondents produce summary judgment evidence raising a genuine issue of material fact. The comments to this new rule indicate that a no-evidence summary judgment should be based on the assertion that, after adequate opportunity for discovery by plaintiff, there is no evidence to support one or more specified elements of an average party's claim or defense. The Texas Supreme Court has commented within the rules that a discovery period set by a pretrial order should be an adequate opportunity for discovery, unless there is a showing to the contrary. Ordinarily a no-evidence motion would be permitted after that period, but not before.

18. CONCLUSION

The press of a new millennium has not deterred our courts from issuance of opinions and rules which continue to divine, and sometimes confuse, the rights and restrictions applicable to health care liability claims in the great State of Texas.