# Chapter 74 Update

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- This presentation provides information on general legal issues. It is not intended to provide advice on any specific legal matter or factual situation, and should not be construed as defining Cooper and Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel.

# Notice of Ch. 74 Claim

- *Carreras v. Marroquin*, 339 S.W.3d 68 (Tex. 2011).
- Pre-suit notice of claim – section 74.051
- If "given as provided" in statute, will toll limitations for 75 days
- 74.051: notice "must be accompanied by" authorization for release of medical records that complies with 74.052

- Two days before limitations, plaintiff sent notice letter but not authorization
- Sued two months later
- Six months later, provided second notice letter and authorization
- Because first authorization not HIPAA-compliant, sent another ten months later

- Doctor sought summary judgment based on expiration of limitations; trial court denied
- Supreme Court reversed – if notice letter not accompanied by compliant authorization, limitations is not tolled
- HB 4 changes required both notice and written authorization for tolling

# Is it a Health Care Liability Claim?

- *Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525 (Tex. 2011).
- Plaintiff had knee replacement surgery
- During post-surgery hospitalization, patient slipped on wet floor while getting out of bathtub
- Sued hospital for her injuries

- Underlying nature of claim was for a "departure from accepted standards of safety" relating to an act that should have been performed or furnished by the hospital during the patient's medical care, treatment, or confinement

- Services a hospital provides necessarily includes services required to meet patients' fundamental needs, such as cleanliness and safety – whether hospital has employee clean the patient, or whether patient cleans herself
- Thus, claim is a safety claim relating to failure to meet fundamental needs

# Also …

- *Stanford v. Cannon*, 2011 WL 2518856 (Texarkana 2011, pet. filed).
- Plaintiff served no expert report
- Is claim for burns and scarring as a result of cosmetic laser hair removal a health care liability claim?
- Court of Appeals said it was a "hairy question" but answered "yes"

- Court distinguished earlier cases holding laser hair removal is not a HCLC
- Here, procedure supervised by licensed physician, and physician-patient relationship formed
- Patient completed medical history and signed consent form, doctor made medical records

# Expert Report Deadline

- *Stockton v. Offenbach*, 336 S.W.3d 610 (Tex. 2011).
- Discussed – but did not decide – whether service requirements of rule 21a TRCP and related "due diligence" exception (which tolls running of statute of limitations) applied to 120-day deadline in section 74.351

- Court said that, *assuming* that a due diligence exception applied to 74.351 deadline, the evidence was legally insufficient to raise the issue
- Plaintiff's inaction for four-month period, coupled with a failure to express the urgency of her need for substituted service, showed a lack of diligence

# Chapter 74 Expert Reports – Content

- Focus in majority of cases is on subject matter of opinions in expert reports
- Recent trend toward requiring expert to opine about whether defendant "proximately caused" injury or death
- *E.g.,Hollingsworth v. Springs*, 353 S.W.3d 506 (Dallas 2011, no pet.).

- Whether defendant's conduct was a substantial factor in bringing about the injury, and without which the injury would not have occurred
- *Padilla v. Loweree*, 354 S.W.3d 856 (El Paso 2011, pet. denied).
- *Estorque v. Schafer*, 302 S.W.3d 19 (Fort Worth 2009, no pet.).

- Some also find sufficient a report that addresses foreseeability element of proximate cause
- *E.g., Otero v. Leon*, 319 S.W.3d 195 (Corpus Christi 2010, pet. denied).

- Courts are also requiring the expert to explain how the patient would have had a different and better outcome if the defendant had met its responsibilities
- *E.g., Hollingsworth v. Springs*, 353 S.W.3d at 519; *Estorque*, 302 S.W.3d at 28-29; *Baker v. Gomez*, 276 S.W.3d 1 (El Paso 2008, pet. denied).

# Chapter 74 Expert Reports – Legal Theories?

- Recently, Dallas Court of Appeals joined Fort Worth Court of Appeals in holding that an expert report must address each theory of negligence raised by plaintiff to avoid dismissal of that theory
- *Hollingsworth v. Springs*, 353 S.W.3d at 522.

# But see …

- *Certified EMS, Inc. v. Potts*, 355 S.W.3d 683 (Houston [1st] 2011, pet. granted).
- 74.351 refers to "cause of action," which means a group of operative facts that gives rise to one or more bases for suing

- Because statute requires expert report for "cause of action," report need not address every liability theory under that cause of action
- If expert report addresses at least one liability theory within a cause of action, the entire cause of action may proceed, even on liability theories not addressed

- Plain language of 74.351 focuses on each defendant and the cause of action against that defendant, not each basis for suing or each theory of liability
- Court held expert's opinions on vicarious liability claim sufficient and did not require opinion on direct liability claim
- Texas Supreme Court has granted review

# Chapter 74 Expert Reports - Preservation

- For those courts of appeals that do require an expert report to address each theory of liability, courts are now requiring defendants to object as to each theory for which the expert report is deficient, or waive objection
- *E.g.*,*Binzer v. Alvey*, 359 S.W.3d 364 (Fort Worth 2012, pet. filed).

# Expert Report – Extension

- After the hard-to-decipher *Samlowski v. Wooten* opinion, the Texas Supreme Court issued *Scoresby v. Santillan* to identify the criteria for granting a section 74.351(c) extension to cure deficiencies in expert reports
- *Scoresby v. Santillan*, 346 S.W.3d 546 (Tex. 2011).

- First discussed deficient versus absent expert reports under Chapter 74
- A document qualifies as an expert report if it contains (i) a statement of opinion by an individual with expertise, (ii) implicating the defendant's conduct, and (iii) indicating that the claim asserted by the plaintiff has merit

- Lack of qualifications and inadequacies in opinion are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so
- Trial court should err on the side of granting additional time and must grant it if the deficiencies are curable

- This lenient standard avoids expense and delay of multiple appeals, and gives plaintiff fair opportunity to show claim is not frivolous
- All deficiencies are subject to being cured before an appeal may be taken
- Thus, court dismissed interlocutory appeal for lack of jurisdiction

# Post-*Scoresby*

- Several cases have held documents did not constitute an "expert report" under *Scoresby* standard and denied extension
  - *Velandia v. Contreras*, 359 S.W.3d 674 (Houston [14th] 2011, no pet.)
  - *Haskell v. Seven Acres Jewish Senior Care Servs., Inc.*, 2012 WL 243325 (Houston [1st] 2012, no pet. h.)

- *Laredo Texas Hosp. Co., L.P. v. Gonzalez*, 2012 WL 76155 (San Antonio 2012, no pet. h.)
- *McKeller v. Cervantes*, 2012 WL 1330270 (Texarkana 2012, no pet. h.)

- *Velandia*:
  - Claim for dental negligence
  - Plaintiff served consultant's letter, dental records, notes from chart
  - Court held dentist letter contained no opinion that claim had merit and none of 74.351(r)(6) elements
  - Thus, letter did not meet minimum standard for "expert report" set out in *Scoresby*

- *Haskell*:
  - Similar to *Velandia*
- *Laredo Texas Hospital*:
  - Called *Scoresby* standard a "three-part test"
  - Held M.D's report did not identify defendant and did not implicate defendant's conduct (third prong)
  - Thus, trial court should have dismissed

# Report "Absent" on an Element? No Extension

- Also in *Hollingsworth v. Springs*, the Dallas Court of Appeals held:
- A court may not provide an opportunity to cure when expert report is "absent" as opposed to deficient. If expert report fails to address all required elements of a claim, trial court may not consider an extension

- *See also Fung v. Fischer*, 2012 WL 1288978 (Austin 2012, no. pet. h.)
- Expert report that failed to address standard of care or state that defendant did anything wrong was "no report," not deficient report
- Plaintiff not entitled to 74.351(c) extension

# More Than One Extension?

- *TTHR, L.P. v. Moreno*, Fort Worth 2011
- Birth injury case
- Direct and vicarious liability claims against hospital
- Expert reports only addressed causation of fetal brain injury (asphyxia), not how hospital's or nurses' conduct allegedly caused brain injury

- Trial court granted plaintiff 30-day extension to cure deficiency as to causal relationship between hospital and nurses' alleged misconduct and the brain injury
- Court of Appeals holds new expert report sufficient on this causal relationship

- However, Court holds original expert reports were deficient on hospital's standard of care and breach, and on breach of nursing standard of care
- Court remands to allow trial court to decide whether plaintiff entitled to extension to cure these newly identified defects

- Because trial court never found these elements deficient, it never granted any extension to cure these particular deficiencies
- Trial court's order only referenced the causal relationship deficiency
- Texas Supreme Court has granted review

# Future Periodic Payments

- *Christus Health v. Dorriety*, 345 S.W.3d 104 (Houston [14th] 2011, pet. denied).
- Analyzed whether adult child's award for past and future pecuniary loss as a result of mother's death should have been paid in future periodic payments under section 74.503
- Contrasted sections (a) and (b)

- Section 74.503(a) says:
  - At request of defendant, court **shall** order medical, health care or custodial services be paid in periodic payments rather than lump sum

- Section 74.503(b) says:
  - At request of defendant, the court **may** order future damages *other than* medical, health care, or custodial services be paid in periodic payments rather than lump sum

- The issue in *Dorriety* was whether the sums awarded to the adult child for the death of his mother were "custodial care" that the statute required to be awarded in periodic payments under 74.503(a) or "other than" custodial care that fell under 74.503(b) (may award)

- The jury question defined the "pecuniary loss" as "the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of actual economic value" that the child would have received from the mother had she lived

- The court of appeals held the "pecuniary losses" awarded by the jury were for the mother's "unique familial contributions of various kinds" and not mere "custodial services" that could be obtained in the marketplace
- Also – Legislature did not include "pecuniary losses" in 74.503(a)

- Thus, the jury's award for "pecuniary losses" were not "custodial care services" that fell within 74.503(a)
- Instead, the award was for "other than" custodial care, which fell within 74.503(b) (may award)
- Thus, trial court did not abuse its discretion in denying periodic payments

# Case to Watch:

- *Prabhakar v. Fritzgerald*, No. 05-10-00126-CV, Dallas Court of Appeals
- Complaint of trial court's failure to order periodic payments for payment of future medical expenses
- Argued 2-8-2012

# Caps

- *Chesser v. LifeCare Hospital, et. al.*, 356 S.W.3d 613 (Tex. App.—Fort Worth 2011, pet. filed)
  - Prejudgment interest accrued on past non-economic damages is an economic damage not limited by section 74.301
  - Section 41.001 definition of "economic damages" as compensatory damages intended to compensate claimant for actual economic or pecuniary loss
  - PJI is form of damages recognized to compensate for economic or pecuniary loss: for lost use of money

# "Bad Result" Instruction

- *Chesser v. LifeCare Mgmt. Servs.*, 356 S.W.3d 613
- No error in refusing to submit unavoidable accident instruction regarding pre-existing conditions and recognized complications of procedure
- "Bad result" instruction required under 74.303(e)(2) adequately informed jury of inferential rebuttal defenses

# "Bad Result"

- Statutory "bad result" instruction instructs the jury about negligence of HCP defendant
- "A finding of negligence may not be based solely on evidence of a bad result to Curtis Paul Chesser, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence."

# "Bad Result"

- Unavoidable accident instruction:
  - An unavoidable accident "is an event not proximately caused by the negligence of any party to it."
- Thus, unavoidable accident instructs jury about proximate cause of the harm

# "Bad Result"

- Purpose: "advise the jurors, in the appropriate case, that they do not have to place blame on a party to the suit if the evidence shows that conditions beyond the party's control caused the accident in question"

# Collateral Issues

- CPRC 41.0105 – "Paid or Incurred"
  - *Haygood v. Escabedo,* 356 S.W.3d 390 (Tex. 2011)
  - Statute says: "In addition to any other limitation under law, recovery of medical or health care expenses is limited to the amount actually paid or incurred by or on behalf of the claimant."
  - TSC says effect of statute is to prevent windfall to claimant, but collateral source rule still applies

- Plain language: "actually paid or incurred" means expenses that have been or will be paid and excludes the difference between that amount and charges the service provider bills but has no right to collect
- Evidence of unadjusted medical expenses is not relevant and not admissible at trial
- Trial court cannot adjust post-verdict because amount, reasonableness, causation of medical expenses may be fact determinations

# Post-*Haygood*

- *Big Bird Tree Service v. Gallegos* (Dallas 2012, no pet. h.)
  - Charitable medical care expense can be recovered from tortfeasor
  - Charitable medical care "does not fit neatly" into *Haygood* or 41.0105
  - Charitable expenses were "actually incurred" on behalf of plaintiff
  - But, because contract allowed HCP to seek repayment if patient recovered medical expenses, 41.0105 did not limit to amount "actually paid" (did not bar recovery)

# Post-*Haygood*

- *Henderson v. Spann* (Tex. App.—Amarillo 3/27/12, pet. filed)
- Follows Haygood – admission of unadjusted medical expenses, and exclusion of adjusted medical expenses, constitutes error
- No evidence to support jury's award
- Trial court cannot cure error post-verdict by reducing to adjusted amount because award involves factual determinations
- Concurring justice – encourages TSC to revisit

# The End – Thank you!

Questions?

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