

**22ND ANNUAL
COOPER & SCULLY, P.C.
INSURANCE SEMINAR**

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HEALTHCARE COVERAGE ISSUES

**BLURRING THE LINES BY THE
TEXAS SUPREME COURT**

Texas West Oaks v. Williams, 371 S.W. 3d 71 (Tex. 2012)

- Williams altercation with psychiatric patient
- Patient's estate sues facility and Williams
- Williams cross claim for failure to train, supervise and warn
- Held: Health Care Liability Claims
- Case Dismissed!

Ross v. St. Luke's Episcopal Hospital,
2013 W.L. 1136613 [14th Dist.-2013, pet. granted]

- Based on Williams, a slip 'n fall involving a non-patient was a health care liability claim
- An allegation pertaining to “safety” is sufficient to be a HCLC.
- No expert report
- Case Dismissed

ROSS USES

**“THIS IS ABSURED”
ARGUMENT**

Is a valet parking incident at a retirement home a health care liability claim?

(Yes, according to the 14th Court in Houston)

Is a cow in the road case med mal
if a retired doctor owns the cow?

TEXAS SUPREME COURT
GRANTED WRIT

ORAL ARGUMENT WAS IN
NOVEMBER

BUT

**WHO WILL COVER THE SLIP 'N
FALLS THAT ARE DEEMED TO BE
HEALTH CARE LIABILITY CLAIMS
BY THE SUPREME COURT?**

Commercial General Liability Policy (CGL)

- Excludes negligence arising from professional services

Standard Professional Liability Policy (PL)

- Provides coverage for medical incidents “arising out of the providing or failure to provide professional medical services.”

H.B. No. 956

A BILL TO BE ENTITLED

AN ACT

Relating to the scope of a health care liability claim.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sections 74.001(a)(2) and (13), Civil Practice and Remedies Code, are amended to read as follows:

(2) “Claimant” means a patient ~~[person]~~, including a deceased patient’s ~~[decedent’s]~~ estate, seeking or who has sought recovery of damages in a health care liability claim. In a cause of action in which a party seeks recovery of damages related to injury to another person who is a patient, or other harm to the patient, “claimant” includes both the patient and the party seeking recovery of damages. ~~[All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.]~~

(13) “Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or healthy care, or safety directly related to health care, or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract. The term does not include claims arising from an injury to or death of a person who is not a patient, including employment and premises liability claims.

SECTION 2. The amendment to Section 74.001, Civil Practice and Remedies Code, by this Act is intended to clarify rather than change existing law.

SECTION 3: This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

**WILFUL AND WANTON
NEGLIGENCE UNDER
C.P.R.C. 74.153**

CPRC §74.153 STANDARD OF PROOF IN CASES INVOLVING EMERGENCY MEDICAL CARE

In a suit involving a health care liability claim against a physician or health care provider for injury or death of a patient arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant [must] show by a preponderance of the evidence that the physician or health care provider, with **wilful and wanton negligence**, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances.

Turner v. Franklin,

325 S.W. 3d 771 (Tex.App.-Dallas 2010, pet. denied)

“[T]he legislature intended ‘wilful and wanton negligence,’ as used in Section 74.153 of the Civil Practice and Remedies Code, to mean ‘gross negligence.’”

PUNITIVE DAMAGE EXCLUSION

- Example of PL policy provision provides:

VII. EXCLUSIONS

This policy does not cover You for: Punitive or exemplary damages unless that coverage is required by the state where You practice.

TEXAS LAW EXEMPLARY DAMAGES EXCLUSION

(a) Except as provided by Subsection (b), a medical professional liability insurance policy issued to or renewed for a physician or health care provider in this state may not include coverage for exemplary damages that may be assessed against the physician or health care provider.

(b) The commissioner may approve an endorsement form that provides for coverage for exemplary damages for use on a medical professional liability insurance policy issued to:

- (1) a hospital; or
- (2) a for-profit or not-for-profit nursing home or assisted living facility

**CAN THE PLAINTIFF PLEAD THE
PROVIDER OUT OF COVERAGE
AND/OR A DEFENSE BY PLEADING
“WILFUL AND WANTON” ACTION?**

PUTS DEFENSE COUNSEL IN A BOX

1. Adjuster should encourage filing of no-evidence summary judgment on “wilful and wanton.”
2. If lose, raises red flag that there may be no coverage.
3. Do not blow coverage for your client.

**FAILURE TO DISCLOSE A CLAIM
ON A CLAIMS MADE P.L. POLICY**

**WHEN IS A FAILURE TO
DISCLOSE A CLAIM IN AN
INSURANCE APPLICATION A
DEFENSE TO COVERAGE?**

NOT A LOT OF CASE LAW

**WHEN DOES AN INSURED
HAVE NOTICE OF A CLAIM?**

NO BRIGHT LINE TEST

REQUEST FOR MEDICAL RECORDS

- When is a request for medical records a “claim” or “medical incident” which was known or should have been known
- Any **claim, medical incident, or suit** which was known, or should have been known, by a **named insured** as of the **effective date** of this **policy** is not covered.

NO UNIFORM LANGUAGE

REQUEST FOR MEDICAL RECORDS

- Bad result
- Bad result plus records request from social services
- Bad result plus request for records by plaintiff's counsel

REQUEST FOR MEDICAL RECORDS

- Bad result plus request for records by plaintiff's counsel stating request was for "litigation" purposes
- Threat of litigation and request that letter be forwarded to E&O carrier
- Request for medical records with a demand that seeks damages

CH 74 NOTICE LETTERS

- ARE THEY CLAIMS?
- SAYS SO IN THE STATUTE
- WHO ARE THEY CLAIMS AGAINST?

THE RECEIPT OF SUMMONS OR CITATION

**AGENT SHOULD DO A
“CLAIMS DROP”**

WHEN IN DOUBT REPORT

**CONSENT TO SETTLE
ASSUMPTION OF
OBLIGATIONS**

SETTLEMENTS BY INSUREDS

- No **Named Insured** shall admit liability, voluntarily make a payment, assume any obligation, or incur any expense without **INSURER's** prior written consent. Any such payment, obligation or expense, will not be reimbursed by **INSURER**, even if it is a cost that would otherwise be covered under the **policy**.

- Prohibition against the voluntary assumption of costs on behalf of the insured.
 - Insurer's tool to control costs of
 - Defense
 - Indemnification
- Consent to Settle
 - Texas: insured right to consent to settle unless policy states that consent not required
 - Other states: insured's consent to settle required even if policy provides otherwise.

- Coverage issues:

- Whether obligation incurred by insured prejudices insurer?
- Whether insurer responsible for payment of attorney's fees incurred prior to insurer's notice of lawsuit.

*** Settlement does not void coverage unless settlement prejudices insurer or deprived it of a valid defense.**

*** Insurer not responsible for attorneys' fees incurred by insured prior to insured's notice.**