



CTH & G Quarterly

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WELCOME TO THE SPRING EDITION OF THE CTH & G QUARTERLY!

As we begin 2009 and commence our Eleventh Volume of the *CTHG Quarterly*, we take this opportunity to express our appreciation to you, our readers.

In this issue of the *Quarterly*, we spotlight recent decisions concerning the relationship between Stowers liability with the Medical Liability Act and expert reports in medical malpractice suits and. Additionally, we highlight a recent decision of the Tyler Court of Appeals regarding the issue of paid and incurred medical expenses. If we have overlooked an area that may be of particular interest to you, please inform us! We are always interested in receiving your comments and suggestions for how we might improve our publication to make it of greater value to you. Please forward any suggestions you may have to merwin@cthclawfirm.com. Previous editions of the *Quarterly* may be accessed on our website: www.cthglawfirm.com. We look forward to hearing from you and providing you with timely updates to assist you in 2009.

STOWERS DOCTRINE DOES NOT PIERCE THE MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT'S PROTECTION FOR PHYSICIANS.

Phillips v. Bramlett, 2009 Tex. LEXIS 94, 52 Tex. Sup. J. 422 (Tex. 2009).

Vicki Bramlett's survivors ("Bramlett") sued Covenant Medical Center and Dr. Benny Phillips ("Phillips") for negligence in the care and treatment of Vicki, who died from post-operative complications following a hysterectomy. The Medical Center settled the case, and the action against Phillips proceeded to trial.

At conclusion of the trial, a jury found Phillips and the Medical Center negligent and awarded \$11 million in damages, and divided the responsibility 75% to Phillips and 25% to the Medical Center. The jury also found Phillips was grossly negligent and awarded another \$3 million in punitive damages. Upon entering its ruling, the trial court refused to limit Phillips' liability under the Medical Liability and Insurance Improvement Act of 1977 ("Medical Liability Act"). Rather, the trial court found that the Stowers Doctrine exception applied in this case and therefore the cap limits under the Medical Liability Act did not apply to either the insurer or Phillips. The court of appeals affirmed the trial courts verdict; Phillips appealed and the Texas Supreme Court granted review.

The law in effect at the time of the cause of action provided that under the Medical Liability Act, a physician's liability was limited to \$500,000. However, the Act also made an exception to the cap

for insurers under the Stowers Doctrine. The Stowers Doctrine arises because of the common law duty for “insurers to settle third-party claims against their insureds when reasonably prudent to do so.” The Doctrine applies when: (1) coverage exists for the third-party’s claim, (2) there is a settlement demand within policy limits, and (3) reasonable terms “such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured’s potential exposure to an excess judgment.” The question before the Court was how to apply this provision within the legislature’s intent of the Medical Liability Act; does the mandated cap protect physicians alone, or does it extend to protect insurers?

Holding: The Court compared the case before it with a similar case from the Fort Worth Court of Appeals. It noted that under the Fort Worth Court’s reading of the statutes, “the potential liability of the insurer cannot exceed the cap, although the insurer’s liability may exceed its policy limits if those limits are below the cap, and Stowers facts exist.” This holding directly conflicts with the *Phillips* Court, that found the Stowers exception not only bypasses the cap for the insurer, but also for the physician. The Supreme Court found that the legislative intent behind the Medical Liability Act was two-fold. First, it capped the liability for a physician. Second, where Stowers facts exist, the cap should not benefit an insurer. As such, the Court concluded that when the physician’s insurance coverage exceeds the Medical Liability Act’s cap, the “physician is fully protected...” and the judgment against the physician may not exceed the set cap.

RELIEF FOR DOCTORS LURKS AROUND THE CORNER: MEDICAL MALPRACTICE EXPERT REPORTS AND THE FUTURE.

In re Watkins., No. 06-0653, 2009 Tex. LEXIS 11 (Tex. 2009)

Mr. Gary Jones (“Jones”) filed a medical malpractice suit against Dr. Mary Louise Watkins (“Dr. Watkins”), after he sustained an injury to his eye during a treatment to a lesion on his face.

Under Texas law, a plaintiff in a medical malpractice case must file an expert report within 120-days of filing the suit. Jones submitted an expert report within the 120-days timeframe established by Texas law. However, Dr. Watkins objected to the report as

being “a narrative of treatment, and [that it] failed to address the standard of care, breach, or causation.” as required by law. The trial court overruled Dr. Watkins objection and granted Jones a 30-day extension to submit a proper expert report, which he did.

Dr. Watkins sought an interlocutory appeal and filed an original proceeding in the court of appeals seeking dismissal of the action. The court of appeals dismissed the interlocutory appeal because such an appeal is permissible only where no expert report is served. The court also denied mandamus relief to hear Dr. Watkins’ second issue on whether the trial court abused its discretion in granting Jones an extension. Dr. Watkins only brought the later issue to the Supreme Court.

Holding: The Texas Supreme Court recited the rule regarding appellate procedure as follows “[i]f no report was served, interlocutory appeal was available, so mandamus is unnecessary. If the report was merely deficient, then an interlocutory appeal was prohibited, and granting mandamus to review it would subvert the Legislature’s limit on such review.” Thus, the Court swiftly rejected Dr. Watkins’ argument, stating that since she failed to bring both issues before the Court, neither could be resolved and her petition for mandamus was denied.

Writing in a concurring opinion, Justice Willett provided insight to the Court’s exasperation with the inadequacies of expert reports. Through the analysis of prior case law, colorful analogies, and even some symbolism, Justice Willett made it clear that he (and likely the remainder of the Court) is ready to lay to rest the question of whether any ‘expert report’ is sufficient to extend the plaintiff’s 120-day timeframe. Justice Willett stated, “[f]or the third time in barely a year we encounter an issue that we cannot reach: whether any health-related document, no matter how irrelevant its content, suffices to warrant an unreviewable thirty-day extension.”

Justice Willett noted that the report in this case failed to meet any of the requirements of an expert report, particularly since “a medical-expert report must at some point actually accuse someone of committing malpractice.” However, no matter how distasteful Justice Willett found the automatism behind granting 30-day extensions to plaintiffs who are in control of the timeframe to begin with, he acknowledged that in this case, the law is clear that mandamus relief is

unavailable to Dr. Watkins.

ACTUALLY PAID!

Escabedo v. Haygood, 2009 Tex. App. LEXIS 1101 (Tex. App.—Tyler 2009).

In a lawsuit to recover damages for an automobile collision, Aaron Glenn Haygood (“Haygood”), submitted evidence of medical bills for \$110,069.12 to the trial court. The defendant, Margarita Garza de Escabedo (“Escabedo”) challenged this amount because after the required Medicare adjustments, the medical bills totaled a fraction of the amount, \$ 27,774.43.

Escabedo argued that Texas Civil Practice and Remedies Code § 41.0105, limited evidence to the actual damages “paid or incurred” by Haygood. The trial court disagreed with Escabedo and allowed Haygood to present the full amount to the jury. The jury returned a verdict in favor of Haygood and awarded past medical care expenses in the amount of \$110,069.12. After the verdict, Escabedo filed a motion for judgment notwithstanding the verdict, however, the trial court overruled the motion and signed the verdict for the full amount.

On appeal, the appellate court noted that although the amount of damages awarded is a question of fact for the jury; the proper measure of damages is a question of law for the judge. The court of appeals then reviewed the statute in question, which reads, “[i]n addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”

Holding: The court of appeals noted that this statute was enacted as part of the tort reform legislation in 2003. With this caveat in mind, the court found that the plain language reading of the statute expressly limited recovery to the amount actually paid. Furthermore, the court found that the statute does not permit a claimant to present evidence of an amount initially incurred; where that amount has been reduced. The court stated, “medical bills reflecting only the amount “initially incurred,” and understood by the trial court and the parties to omit evidence of the amount “actually incurred,” are irrelevant and should be excluded at trial.” In conclusion, the court stated there was insufficient evidence to support the amount of the jury award; and suggested a voluntary

remittitur for the trial court to adjust the verdict on damages accordingly within 15-days.

“DEATH RACE 2000”: HOW ONE TEXAS COURT FLIPPED THE TABLES ON PEDESTRIAN’S RIGHT OF WAY.

Singleton v. U.S., 2008 U.S. Dist. LEXIS 78967 (S.D. Tex. 2008)

Carl Singleton (“Singleton”) sued the United States (“US”) after Jennifer Cantu (“Cantu”), a United States Postal Service (“USPS”) employee, struck Singleton with her vehicle. The issue in front of the District Court Judge was whether USPS had met the burden of proof required to sustain its request for summary judgment.

Singleton filed suit against US under the Federal Tort Claims Act (“FTCA”), in which the United States “is liable for the negligence of its employees “in the same manner and to the same extent as a private individual under like circumstances.”” US filed a motion for summary judgment claiming that Cantu was not negligent in her driving and that Singleton caused his own injury by walking in the middle of a street with his back turned to oncoming traffic.

To grant a summary judgment motion, the court must find that no genuine issue of material fact exists. Additionally, in a case such as this, where the moving party is not the same party that has the burden of proof at trial; the moving party must show “there is an absence of evidence to support the nonmoving party’s case.” The Court followed Texas negligence law, since under FTCA “the law of the state where the alleged act or omission occurred governs.”

In Texas a plaintiff must prove by a preponderance of the evidence that the defendant: (1) had a duty of care, (2) breached that duty, and (3) the breach proximately caused the damages suffered by the plaintiff. Typically, Texas courts hold the proximate cause question is a question fact for the jurors to decide; it may become a question of law where the “circumstances are such that... reasonable minds could not arrive at different conclusions.” Additionally, contributory negligence exists, if the plaintiff is fifty percent or more responsible for his injuries, and thus cannot recover damages.

Holding: The undisputed facts of this case led the Court to determine that Cantu acted in a manner consistent with the “ordinary prudent person”

standard, and thus was not negligent. Of greater importance, the Court noted that under the Texas Transportation Code section 522.006(b), “pedestrians are prohibited from walking in the center of roadway.”

Additionally, the Court followed the precedent set in *Lane v. Dallas Transit Co.*, 331 S.W.2d 821, 823 (Tex. Civ. App.—Amarillo 1059, writ ref’d n.r.e.), stating all pedestrians have a “duty to maintain a proper lookout...whether or not the pedestrian has the right-of-way.”

The Court found that since Singleton walked in the middle of the road, with his back turned to oncoming traffic, he failed to comply with Texas statutory and common law. In granting the government’s motion for summary judgment and dismissing the case, the Court ruled as a matter of law, “the postal service driver was not negligent and Singleton was.”



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