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Medical Malpractice Expert Reports: ***Asserted liability against a hospital for economic loss due to business shutdown from failure to prevent contagious disease exposure is a claim for which the Texas Medical Liability Act requires an expert report.***

A nurse who worked at Dallas Presbyterian Hospital visited an Ohio bridal shop after attending a patient suffering from the highly contagious disease caused by the Ebola virus. The hospital allegedly assured the nurse that it was safe to travel. After the nurse returned from Ohio, she was diagnosed with Ebola. To prevent further spread of the disease, Ohio health officials ordered the shop to close temporarily. The shop re-opened but went out of business allegedly due to its potential customers' fears concerning exposure to Ebola.

In *Coming Attractions Bridal and Formal, Inc. v. Texas Health Resources*, the shop sued the hospital for negligently failing to prevent the spread of Ebola by its employees by failing to properly control and manage them. Under the Texas Medical Liability Act ("TMLA"), a claimant asserting a "health care liability claim" must submit an expert report detailing the factual basis supporting the liability claim. The bridal shop claimed that its suit was not subject to the TMLA's expert report requirement because its claim was not one by a patient about health care supplied by the hospital. As such, according to the shop, its claim was not a "health care liability claim" to which the TMLA applied.

Before 2003, the TMLA only applied to claims by a brought by a patient. However, the statute was amended to apply to a "claimant," being any person seeking damages for a health care liability claim. In a unanimous opinion by Justice Bland, the court concluded the TMLA's current definition of "claimant" includes corporations and that a health care liability claim encompassed claims for both economic losses as well as physical injuries.

The court concluded that the shop's claim was one for "health care liability." Under the TMLA, such a claim is defined as "a cause of action against a health care provider … for[, among other things, a] claimed departure from accepted standards of medical care, … or safety or professional or administrative services directly related to health care…." Tex. Civ. Prac. & Rem. Code §74.001(a)(13). The court found such a relationship because the nurse's infection implicated whether the hospital developed and implemented training, treatment, and control policies concerning treatment of an infected patient. Indeed, the opinion pointed out that the plaintiff alleged the hospital failed to protect the public when it "unnecessarily unsafely exposed its nurses to the Ebola virus and failed to either prevent or warn the exposed nurses from interacting with the public.

Thus, the opinion reasons, there was "substantive nexus" between the hospital's alleged duties as a healthcare provider and the shop's alleged injury and forced closure because of the exposure to Ebola as a result of the nurse's visit. Because the claim was one to which the TMLA applied, the shop was obliged to file an expert report that supported its claim. Having failed to satisfy this requirement, the shop's claim was correctly dismissed as the TMLA required.

This decision and its underlying circumstances predate widespread business shutdowns to prevent the spread of COVID 19. Nevertheless, its rationale appears applicable to any claims against health care providers that are based on the alleged failure to prevent spread of the coronavirus and any resulting COVID 19 infections.

Statutorily Required Expert Reports - Extensions of Time: ***Deadline extension for a statutorily required expert report is ineffective without explicit reference to the statute.***

Effect of Failure on Derivative Claims Against Employee: ***Failure to timely comply with the expert report requirement protecting shooting range owner-operators from vicarious liability also requires dismissal of liability claims against shooting range employees.***

By *per curiam* opinion in *Shinogle v. Whitlock* the court also addressed a statutory expert report requirement applicable to liability suits against shooting ranges. Civil Practice and Remedies Code §128.053 mandates that a claimant suing a sport shooting range must serve each party with an expert report within 90 days of filing suit unless extended by the parties' written agreement.

In *Shinogle*, the plaintiff was shot in the leg when the gun he handed over to a shooting range employee discharged. The plaintiffs sued the employee and the shooting range for negligence. The parties entered a written agreed scheduling order that required the production of expert reports on a stated date. This scheduling order, however, did not specifically extend or mention the expert report required under §128.053. The court ruled that the scheduling order did not extend
the §128.053 expert report deadline because it did not specifically refer to the statutory expert report requirement.

The specific reference requirement was based on *Spectrum Healthcare Resources, Inc. v. McDaniel*, 306 S.W.3d 249 (Tex. 2010), involving the TMLA's expert report mandate. *McDaniel*'s reasoning was followed in *Crosstex Energy Services, L.P. v. Pro Plus, Inc*., 430 S.W.3d 384 (Tex. 2014), involving a certificate of merit for suits against architects and engineers. Neither case involved §128.053, but both concerned expert reports as vouchsafes against frivolous litigation. *McDaniel* reasoned the TMLA's expert report requirement targeted frivolous claims for "expeditious termination." According to *McDaniel*, parties intending to alter the statutory deadline by agreed scheduling order must clearly acknowledge that intent. Implication or inference would not suffice.[1]

With the shooting range entitled to dismissal with prejudice, the remaining issue was whether the employee was likewise entitled to have the claim against him dismissed for want of an expert report. §128.053 specifically mentions only shooting range owners and operators, not shooting range *employees*. It differs from the TMLA which, as discussed in *Coming Attractions*, specifically applies to a broadly defined category of defendants. Nevertheless, the court reasoned that because the plaintiffs sought to impose vicarious liability on the shooting range operator for the acts and omissions of the employee, the employee was an "implicated" defendant also entitled to dismissal with prejudice to fully achieve the Legislature's objective.

Consider how this result can be squared with the court's oft-stated refusal to add words to a statute or how a statute that specifically only protects the shooting range owner or operator from *vicarious* liability requires dismissal of a claim seeking to impose *direct* liability on the employee. It will be interesting to see if this rationale is applied to defeat direct liability claims against employees or agents when the lack of an expert report requires the dismissal of the vicarious liability claim against a principal or employer. Stay tuned.

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[1] The correlation of legislative purpose with the need for express reference is not entirely clear. The public has an interest not wasting judicial resources on frivolous litigation. But the defendant has an even greater interest in achieving the same objective. Apparently, the court is not willing to trust the defendant – the person with the greatest interest in the litigation's early termination – will be sufficiently diligent to protect that interest. If so, its thinking is contrary to the general rule that the parties are free to contract as they see fit unless it violates public policy. It is also contrary to the general Texas preference for competitive justice; that is, a rule of law that allows the parties to freely define and alter their substantive legal rights even by *inaction*, such as failures to specially except, Tex. R. Civ. P. 90, preserve charge error, Tex. R. Civ. P. 274-279, and request proper findings and conclusions. Tex. R. Civ. P. 299. Requiring a specific reference to the statute to extend its deadline elevates form over substance, which is something the court usually eschews.

Medical Malpractice: ***Texas Medical Liability Act §74.153 requires proof of willful and wanton negligence to impose liability for procedures to respond to emergency situations even if the initial patient admission was not to an emergency room.***

Charge Error: ***Timely objection to the submission of ordinary negligence preserved error and the erroneous submission of ordinary negligence warranted retrial.***

Civil Practice and Remedies Code §74.153 requires proof of willful and wanton negligence to impose liability on a physician for "emergency medical care." In *D.A. v. Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d 126 (Tex. 2018), the court held that §74.153 applied to more than emergency room admissions and included emergency medical procedures for obstetric patients who were admitted for routine delivery during which an emergency later developed. In *Glenn v. Leal*, an emergency arose during what was expected to be a routine delivery. As a result of the doctor's effort to dislodge the baby, the baby sustained a permanent brachial plexus injury. The jury found the doctor was ordinarily, but not willfully and wantonly, negligent. The obstetrician timely objected to the jury charge's submission of ordinary negligence as a basis for liability and unsuccessfully moved for judgment notwithstanding the jury's verdict.

In a *per curiam* opinion, the court overturned the obstetrician's liability, reiterating its ruling in *D.A.* that the obstetrician responding to an emergency situation arising during a non-emergency admission was protected nevertheless by the higher liability threshold imposed for emergency care under §74.153. Because the case was erroneously submitted on a theory permitting a liability finding based on a lower threshold of culpability, it was remanded for retrial.

Legal Malpractice - Proximate Causation: ***Whether criminal defense counsel's malpractice is a proximate cause of damage to a convicted client when the conviction is vacated but the client not affirmatively exonerated presents a question for the trier of fact.***

Limitations: ***Limitations tolls in actions for criminal malpractice during the pendency of post-conviction motions, appeals, and collateral attacks on the conviction.***

In *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995), the court held unless the client was exonerated after conviction the sole proximate cause of conviction was the accused's wrongdoing. In *Gray v. Skelton*, the court relaxed the exoneration requirement when a conviction is overturned for ineffective assistance of counsel.

In *Gray*, the accused attorney replicated a water damaged will by printing a copy from electronic records, pasted the signatures from the water-damaged original, and probated the reconstructed document without disclosing that it was a reconstruction, not the original. After the attorney was convicted of forgery, a jury found in the civil will contest that the attorney had not acted with fraudulent intent. The attorney then obtained habeas corpus relief for ineffective assistance of counsel. The conviction was vacated, and the State elected not to refile the charges.

The criminal defense counsel moved to dismiss the attorney-client's malpractice action as barred by limitations and for want of the *Peeler*-required exoneration. In a 6:3 opinion by Justice Devine, the court explored whether the overturned conviction and decision not to further pursue the criminal case satisfied *Peeler.* The opinion explained that "exoneration" under *Peeler* was more than the absence of a conviction, but further required "affirmative acts of exoneration." Overturning the conviction was necessary, but not sufficient, to establish "exoneration." However, the court did not deem the lack of exoneration *in the criminal proceedings* a bar to proving causation in the legal malpractice claim, provided that the malpractice jury decides actual innocence as a predicate to consideration of liability for legal malpractice. That question was to be decided by preponderance of the evidence on which the client bears the burden of proof.

With respect to limitations, the court ruled that the expiration of "limitations … should be tolled during both direct appeals and post-conviction proceedings" but only when a post-judgment motion, "direct appeal [or] post-conviction proceeding is pending." The theory here is the analog to legal malpractice in civil actions: the cause of action cannot accrue before the outcome of the underlying case is determined.

Justices Blacklock, Green and Bland dissented because they deemed inappropriate tolling limitations for the period between the decision to grant habeas relief and the district attorney's decision whether to re-file the criminal charges. In this case, the duration between conviction and the expiration of limitations was nine years. The dissenters maintained that limitations needs a bright-line rule for *Peeler* to properly effectuate legislative intent to deem these kinds of suits "stale" after two years.

Rule 91a Motions to Dismiss: ***The factual bases of the dismissal are limited to the allegations of the petition, but the court may consider affirmative defenses and other matters presented in other pleadings and arguments at the hearing to ascertain whether the cause of action is legally untenable.***

Attorney Immunity from Liability to Non-Client: ***Attorney is immune from liability to non-clients depends not on the propriety of the conduct but whether it relates to matters that are sufficiently connected to the client's representation.***

In *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C. et al.*, counsel for the defendant in personal injury case was accused of spoliating evidence by destructive testing of a braking system before plaintiff's counsel had the opportunity to inspect and document that system's post-accident condition. When the personal injury plaintiff sued defense counsel and his firm, they successfully moved to dismiss under Texas Rule of Civil Procedure 91a on the basis of the affirmative defense that lawyers are immune from civil liability to non-clients for conduct "in connection with representing a client in litigation."

Rule 91a restricts the factual *allegations considered to the petition, but not the* legal *theories.*

Rule 91a permits dismissal when a cause of action has no basis in law or fact, but the rule limits the evidentiary basis of that decision to facts alleged in the pleading of that cause of action. To preserve the right to trial of disputed fact issues, for purposes of a rule 91a motion, the court must presume the truth of the facts alleged. Because immunity is an affirmative defense, the plaintiff challenged the dismissal of her claim because consideration of an affirmative defense necessarily looked beyond the allegations of the petition. In a unanimous opinion by Justice Devine, the court ruled that rule 91a's restriction to consideration of the allegations of the cause of action limited only the *facts*, not the legal theories, that may be considered in deciding whether a suit has "no basis in law or fact." The wording of rule 91a and the procedures authorized for deciding motions to dismiss establish that courts are permitted to consider *legal* theories in the answer and other pleadings. Thus, the trial court did not violate rule 91a by ruling the facts alleged in the petition itself raised the *factual* basis for the attorney immunity defense.

Attorney immunity to third-party liability depends on connection to the client's representation regardless of the propriety of the attorney conduct.

The opinion then addressed whether the facts alleged, if true, established the applicability of the attorney immunity defense was appropriate under rule 91a. The court began by reiterating that attorney independence in representing the client precluded a crime or fraud immunity exception to immunity from liability to non-clients because the attorney's loyalty is owed solely to the client and the lawyer must remain independent to protect the client's interests. Other means exist to protect the client and the public from criminal or fraudulent misconduct in the course of client representation by a variety of means ranging from sanctions, to disciplinary action and even criminal prosecution in an appropriate case. The opinion also points out that attorney immunity is limited to conduct that involves client representation.

Having broadly defined the boundaries of attorney immunity, the court concluded that the alleged conduct in performing destructive testing on relevant physical evidence for purposes of investigating the facts, even if improper or inappropriate, was "the kind of action[] that are 'taken in connection with representing a client in litigation.'"

The court was quick to point out, however, that destruction of evidence for the sake of destruction alone would *not* be part of representing the client. The unanswered question is *why* the unilateral destructive testing of evidence, though wrongful, is part of client representation when the outright destruction of evidence that may be harmful to the client is not. The resolution of that issue remains unanswered by *Bethel.*

Oil and Gas – Scope of Interest Assignment: ***General language in assignments may enlarge the specific description of the interest assigned.***

Piranha Partners v. Neuhoff addressed the scope of interests transferred by an assignment of overriding royalty interests. Neuhoff Oil & Gas assigned its mineral interest in a specific section of a mineral leasehold while reserving a 3.75% overriding royalty in all production under the lease. Only on well existed at the time. The dispute between

the parties was over whether the assignment only transferred an interest in that well, or whether it included any later well on the lease.

The assignment provided that the assignor "does hereby assign, sell and convey unto [the grantee] ... all of [assignor]'s … interest in and to the properties described in Exhibit "A," which identified the interest conveyed to include "[l]ands and [a]ssociated [w]ell(s)" preceding its designation by name of the only well then on the property and a description of the assigned land as "NW/4, Section 28, Block A-3, HG&N Ry Co. Survey."

After the assignment was executed, several other wells in the assigned area were completed. The grantor claimed that an overriding royalty interest was owed only on production from the only well identified by name in the assignment. The grantee claimed that it was owed an overriding royalty on the production from the later developed wells in addition to the well identified in the assignment.

In a 7:2 opinion by Justice Boyd, the court deemed Exhibit A "ambiguous" as to exactly what interests were intended to be conveyed. But it ruled that other provisions established the parties objectively intended by its agreement "to convey 3.75% overriding royalty interest in *all production* under the … Lease." (Emphasis added).

The paragraph immediately following the granting clause limited the conveyance to "interests, INSOFAR AND ONLY INSOFAR AS set out in Exhibit A" regardless of that interest was a leasehold interest, overriding royalty interest, or both" and included any working interest, leasehold rights, overriding royalty interests and reversionary rights held by [the assignor]."

Although this paragraph seemingly limited the assigned interest to those that the assignor held at the time, the court deemed the next paragraph to enlarge the interests assigned because it also granted the rights assigned to include

> [a]ll presently existing contracts to the extent … assignable and to the extent they affect the *Leases*, including agreements for the sale or purchase of oil, gas and associated hydrocarbons, division orders, unit agreements, operating agreements, and all other contracts and agreements arising from, connected with, or attributable to the production therefrom.

The reference to "the Leases" instead of the specific well or particular portion of the lease was deemed to demonstrate the assignor's intent to transfer all rights that it held under the lease, not just those in the well specifically identified. This conclusion is consistent with the exhibit's description to include not only the well specifically named but also a particular geographic area of the lease.

The opinion illustrates the risk involved in paying less attention to general than specific provisions that illuminate the interests intended to be transferred. The "boilerplate" of these agreements is often written broadly to have a one-size-fits-all flexibility. The liberalization in general language about the interest conveyed may well support a broad reading of the specific description of that interest as it did here. The bottom line here is that it is essential to critically read the fine print. What prospectively seems inconsequential may *retrospectively* be deemed dispositive of unanticipated disputes about what an agreement means.

Justices Bland and Lehrmann did not find the assignment unambiguously conveyed an overriding royalty in the later developed wells. They would have required the jury to resolve the perceived ambiguity about the interest conveyed.