



Opinion Summaries May 06, 2022

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OPINIONS

MEDICAL LIABILITY

Expert Reports

E.D. v. Tex. Health Care, P.L.L.C., — S.W.3d — (Tex. May 6, 2022) (per curiam)

[\[20-0657\]](#)

The issue in this medical-malpractice case is whether an expert report reflects “an objective good faith effort” to satisfy the Texas Medical Liability Act’s “fair summary” standard in a suit alleging that negligent perinatal care during labor and delivery caused an infant’s brain damage and other serious health conditions.

The defendant doctor induced the mother’s labor after a full-term, healthy pregnancy. During the next day and a half, fetal heart-rate tracing showed intermittent signs of fetal distress. These tracings were not accurately charted by the attending nurse, but the doctor physically examined the patient at one point and communicated with the nurse about the patient’s condition at least two times. Shortly after the last communication between doctor and nurse, the situation became “very concerning” when the fetal heart rate plummeted, a condition called fetal bradycardia. Twenty minutes later, the baby was delivered in grave condition via emergency cesarean section, and she was subsequently diagnosed with hypoxic ischemic encephalopathy, cerebral palsy, and quadriplegia.

The baby’s parents sued the doctor, his medical practice, and others for negligence. After the plaintiffs timely served an amended expert report as required by the Medical Liability Act, the defendant doctor and his practice filed a joint motion to dismiss the healthcare-liability claims with prejudice. The motion asserted that the report inadequately articulated a demonstrable breach of the standard of care and was “conclusory, speculative, and disconnected from the underlying facts.”

The trial court denied the motion, but the court of appeals reversed, dismissed the claims with prejudice, and remanded to the trial court to award reasonable costs and attorney’s fees. The court found the report conclusory, speculative, and legally insufficient to support the healthcare-liability claims.

Without hearing oral argument, the Supreme Court reversed and remanded. The Court concluded that the expert’s report is adequate under the Medical Liability

Act’s “good faith” and “fair summary” standards because it (1) describes the standard of care the doctor owed to mother and child as requiring effective communication with the nurse or close personal monitoring of the fetal heart rate; (2) identifies the doctor’s breach as failure to timely and accurately evaluate the fetal heart-rate tracing markers, either personally or by making appropriate inquiries of the attending nurse; and (3) explains that earlier delivery would have avoided or lessened the injury the baby suffered and that the doctor’s failures delayed delivery too late to avoid injury.

The Court held that, in concluding to the contrary, the court of appeals failed to consider the report as a whole and impermissibly weighed the credibility of the expert’s opinions.

ATTORNEYS

Liability to non-clients

Taylor v. Tolbert, — S.W.3d — (Tex. May 6, 2022) [[20-0727](#)]

Under Texas law, attorneys are generally immune from civil liability to nonclients for actions taken within the scope of legal representation if those actions involve “the kind of conduct” attorneys engage in when discharging their professional duties to a client. But if an attorney engages in conduct that is not “lawyerly work” or is “entirely foreign to the duties of a lawyer” or falls outside the scope of client representation, the attorney-immunity defense is unavailable. In determining whether immunity applies, the inquiry focuses on the function and role the lawyer was performing, not the alleged wrongfulness, or even asserted criminality, of the conduct at issue. The issue in this case is whether attorney immunity applies to nonclient civil suits alleging an attorney has engaged in conduct criminalized by statute.

In this case, nonclients filed a civil suit alleging a lawyer violated state and federal law by improperly “using” and “disclosing” electronic communications illegally “intercepted” by the lawyer’s client and others during a child-custody modification proceeding. At some point during that proceeding, an iPad belonging to the client’s sister-in-law began receiving text messages and emails between the client’s ex-wife and other individuals. The client shared his ex-wife’s messages and emails with his attorney for use in the modification proceeding. The iPad was also turned over to a forensic expert for back-up imaging.

The attorney moved for summary judgment on the pleadings, arguing that attorney immunity precludes her liability as a matter of law. The trial court agreed, but a divided court of appeals reversed and remanded.

The Supreme Court held that immunity attached to the state wiretapping claims but not to the federal claims. The attorney conclusively established that the conduct at issue occurred within the scope of her representation and was not foreign to the duties of an attorney. But, the Court explained, conduct prohibited by statute is neither categorically excepted from the attorney-immunity defense nor categorically immune from liability. Rather, whether an attorney may claim the privilege depends on the particular statute at issue.

Here, the attorney was entitled to immunity on the state claims because the Texas wiretap statute has not abrogated the common-law attorney-immunity defense, either expressly or by necessary implication. The Court reached a different result as to the federal claims because the federal wiretap statute is worded differently and because informative federal authority persuaded the Court that federal courts would not apply

Texas's common-law attorney-immunity defense to a claim under that statute. In rendering a split decision, the Court reaffirmed that when the defense applies, counsel is shielded only from liability in a civil suit, not from other mechanisms that exist to discourage and remedy bad-faith or wrongful conduct, including sanctions, professional discipline, or criminal penalties, as appropriate.

The Court affirmed in part, reversed and rendered in part, and remanded the case to the trial court for further proceedings on the federal wiretap claims.

OIL & GAS

Covenants to Protect Against Drainage

Rosetta Res. Operating, LP v. Martin, —S.W.3d— (Tex. May 6, 2022) [[20-0898](#)]

This oil and gas dispute contained three issues: First, whether the lessee's obligation to protect against drainage was triggered under a poorly drafted lease addendum; second, whether the lessors were barred by res judicata from raising a lease-construction argument that was waived in a severed appeal; and third, whether the court of appeals erroneously reversed the trial court's summary judgment for claims not challenged on appeal.

The Martins, lessors-respondents, entered into a mineral lease agreement (the Martin Lease) with Mesquite Development, which later assigned its rights to lessee-petitioner Rosetta Resources Operating, LP. Shortly after the assignment, Rosetta joined Newfield Exploration Co. and Dynamic Production, Inc. (collectively Newfield) to create a pooled unit which contained the northern portion of the lease. Newfield subsequently drilled a well on the pooled unit (the Martin Well) and a well on nearby non-adjacent acreage (the Simmons Well). The Martins sued both Rosetta and Newfield under breach-of-contract, tort, and statutory theories. The Martins argued that Rosetta and Newfield did not protect against drainage from the Simmons Well as required under the Martin Lease's Addendum 18. On individual motions for summary judgment, lessees argued that the Simmons Well did not trigger an obligation to protect against drainage because it was drilled on acreage that did not adjoin the lease acreage. The trial court granted summary judgment for Newfield and severed the claims against it for appeal. During the Newfield appeal, the Martins argued that the Martin Well had triggered Addendum 18's covenant to protect against drainage from the Simmons Well. Concluding that such an argument was waived, the court of appeals affirmed the trial court's summary judgment because the Simmons Well did not trigger Addendum 18.

After the Newfield appeal but before ruling on Rosetta's summary judgment, the trial court invited the Martins to raise the Martin-Well argument in an amended petition and motion for summary judgment. Denying the Martins' motion, the trial court granted summary judgment for Rosetta on each of the Martins' claims. The court of appeals reversed and remanded, granting partial summary judgment for the Martins because the Martin Well triggered a general duty to protect against drainage and a specific duty to spud an offset well or release the undrilled acreage. Rosetta petitioned for review, arguing Addendum 18 could not be construed to allow separate triggering and draining wells, the Martins' argument was barred by res judicata, and the court of appeals erroneously reversed summary judgment on claims the Martins did not challenge.

First, the Court held that Addendum 18 is ambiguous regarding whether the Martin Well triggered Rosetta's obligation to protect against drainage from the

Simmons Well. Though Addendum 18 is mostly unambiguous, the Court concluded that Addendum 18 is subject to competing reasonable interpretations as to whether Rosetta’s drainage-protection obligation is limited to drainage from sources listed exclusively in the addendum’s first clause. Second, the Court held that res judicata does not prevent the Martins from raising their Martin-Well argument against Rosetta. The Court provided two independent reasons: res judicata does not preclude litigation of claims that have been severed by a trial court and Rosetta seeks to preclude an issue, not a claim. Third, the Court held that the court of appeals erred by reversing Rosetta’s summary judgment as to the Martins’ tort and statutory claims. Because a party must negate each possible summary judgment ground and Rosetta established economic-loss-rule and no-benefit grounds for summary judgment on the Martins’ tort and statutory claims, the court of appeals did not properly reverse summary judgment as to those claims.

The Court reversed the court of appeals judgment, reinstated the trial court’s summary judgment in part as to the Martins’ tort and statutory claims, and remanded for further proceedings on the Martins’ claim for breach of contract.

PROCEDURE—PRETRIAL

Discovery

In re Central Oregon Truck Co., Inc., — S.W.3d — (Tex. May 6, 2022) (per curiam) [[20-0945](#)]

In this personal-injury suit, the plaintiff alleges she suffered a traumatic brain injury and a corresponding diminution of her employment opportunities and earning capacity following a 2017 rear-end collision. The issue in the original proceeding is whether the defendants are entitled to seek (1) post-accident medical-billing information from the plaintiff’s medical providers and (2) third-party production of the plaintiff’s pre-accident medical, education, and employment records along with insurance records pertaining to injuries the plaintiff suffered in two prior accidents.

Although the Supreme Court determined the discovery requests seek relevant information, including information discoverable under *In re K&L Auto Crushers, LLC*, 667 S.W.3d 239 (Tex. 2021), the Court denied the mandamus petition without prejudice to allow the parties to confer and the trial court an opportunity to reconsider its orders in light of the extensive guidance *K&L Auto Crushers* provides for resolving the parties’ disputes about proportionality, undue burden, overbreadth, and confidentiality.