

SUMMER 2015 VOL. 21 NO.1

TPJ

Texas Paralegal Journal

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Medical Torts Update





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PRESIDENT'S *Message*

Clara Luna Buckland, C.P.

As I sit here thinking about what I wish to convey in my final president's message, I am struck with many, many thoughts. I am finding it difficult to siphon all that I want to express succinctly, as this year has been a tremendous learning experience for me. I have led this organization to the best of my ability, opening myself to suggestions and learning from others. Then there is humor—as in everything I do, at the forefront is humor and my desire to have fun and not take myself too seriously, especially when a situation is painful. There is always a silver lining and I hope you will seek it out regardless of the circumstances.

As I type this, I am in my office over the lunch hour with the door closed, listening to music and looking out my office window for inspiration, but also looking within. The sun is shining brightly, the pale blue sky is clear, and I can see our beautiful mountains. It is a lovely day which takes me back to a certain memory from my childhood and one which represents one of the first lessons



I recall my mother taught me. I was in the first grade, growing up with three sisters. My mother would pack our lunch every day and come to school during the lunch hour. We would run to the park across the street to meet her to enjoy our daily picnic—it was a real treat! Spanish was my first language and I recall telling my mother with

frustration about the difficulty I was having expressing myself in English. She would smile and in her beautiful Spanish encourage me not to give up, to keep trying, and that it would be fine. Just as I overcame my language barrier, although I still manage to make quirky comments, and many other obstacles throughout my life, you too can overcome that which inhibits you resulting in your personal growth—just believe in yourself and let no one tell you otherwise.

My goal as your president this year was to empower each of you and our profession, and I hope I have stirred something in you to help you. Whether it is to take yourself out of your comfort zone, or to remind you that you are not alone when you

are feeling overwhelmed or unsure of what you are doing—many of us have been there. It is a matter of pushing past those insecurities and obstacles. The level of our view of ourselves and others determines what we see. Surrender the lower personal views you have and give way to a higher view, a greater reality, transcending beyond any personal limitations—allow your soul to grow and experience joy! Just as water springs up with force from deep within the earth and gives life to everything it touches, such is your ability, so long as you tap into it.

In closing, I want to acknowledge and thank certain individuals who have been with me on this journey as they have assisted me by sharing their knowledge, wisdom, consult and enthusiasm: our PD Coordinator, Norma Hackler; and 2013-2014 President Misti Janes. Also, my Executive Committee, 2014-2015 President-Elect Erica Anderson, Parliamentarian and District 3 Director, Megan Goor; Treasurer and District 14 Director Mona Tucker, and Secretary and District 12 Director Michelle Beecher. I also want to thank my fun loving, but hard working 2014-2015 Board of Directors, Committee Chairs and Committee Sub Chairs. All of these individuals have served us and the Paralegal Division well—thank you all—I could not have done it without you!

PARALEGAL PULSE, the Paralegal Division's e-Newsletter

Each month, in our ***DID YOU KNOW*** section (of the Paralegal Pulse e-Newsletter), the PD strives to bring you useful tips and tricks contributed by paralegals like you, specifically for fellow paralegals.

The best tips and tricks are learned by practicing paralegalism. Please share your wealth of knowledge...send your comments, suggestions, and advice to the e-Newsletter Committee at e-newsletter@txpd.org.

Thank you for your participation!

"One kernel is felt in a hog's head; one drop of water helps to swell the ocean; a spark of fire helps to give light to the world. None are too small, too feeble, too poor to be of service. Think of this and act."—Hannah More

I hope you will strive to be that kernel, that drop of water, that spark of fire and step up in your service of others!

A handwritten signature in cursive script that reads "Clara".

TPIJ

Texas Paralegal Journal

Focus on...

Medical Torts Update, Part 1

In 2013 and 2014, reported opinions in the medical torts arena have addressed a number of issues, including primarily the exceptions to governmental immunity, and whether injury claims of a non-patient constitute health care liability claims that are subject to the expert report requirements.

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EDITOR'S *Note*

By Heidi Beginski, Board Certified Paralegal, Personal Injury Trial Law, Texas Board of Legal Specialization

This month's cover article is the first installment of a look at the 2013 through 2015 updates to medical tort law in Texas. Attorney H. Keith Myers highlights the significant recent reported court opinions, such as the latest on expert opinion reports (despite previous rulings, appeals have proliferated on this front), governmental immunity and non-patient claims. We will continue Mr. Myers' article in the Fall issue.

Do you own a home or know someone who does? You'll want to read Attorney Scott Alagood's article on Residential Construction Defects in this issue, which discusses the history of residential construction claims in Texas, as well as the current legal framework for home owners and builders.

As most paralegals know, there is an additional responsibility to protect documents which include personal identifying information. With the ever-increasing reliance on electronic storage of documents, you will want to read this month's *Scruples* column by Ellen Lockwood, ACP, RP about the ethics of utilizing cloud storage for documents containing such information.

The ABLE Act of 2014 went into law in December 2014 as part of the tax extenders bill and establishes private tax advantaged savings accounts for the disabled. The article in this issue covers the important topics such as criteria for opening such accounts and how much can be contributed.

President Clara Buckland's account of the 2014 PD trip to Provence in this issue makes you feel like (and wish) you were there. As she recaps the many highlights of the year's trip, please look for information on next year's trip and plan to join in the fun in 2015!

Addendum

The following PD member was inadvertently omitted from the list in the Spring 2015 issue of the TPJ has having recently passed the TBLS exam:

Nelly Soriano—Civil Trial Law—Austin



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Publications:
Heidi Beginski, TBLS-BCP, Editor
Clara Luna Buckland, C.P., President
Norma Hackler, CMP, Coordinator
Mona Hart Tucker, ACP, Board Advisor

Art Direction

David Timmons Design. 4703 Placid Place, Austin, Texas 78731. Phone 512-451-4845, Fax 512-451-1087. E-mail: dtimmonso@gmail.com

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DEADLINE FOR FALL ISSUE IS AUGUST 3, 2015

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Certification Matters

www.tbls-bcp.org

Announcing Our New Paralegal Website

The Texas Board of Legal Specialization would like to announce its new website, www.tbls-bcp.org, specifically for Texas' Board Certified Paralegals. This website is an informational tool used to promote the presence and exclusive status of the TBLS paralegal certification process. It also acts as an Intranet for the Board Certified Paralegal (BCP) community and Texas attorneys interested in specialized paralegal matters.

This is only the initial phase of the website, with more video, online member services and social media options to be added in the future.

We welcome any questions or thoughts about the website!

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Paralegal Certification Application Update

We want to inform you that the 2015 application process for the Paralegal Board Certification will commence in late spring. As soon as we have more details regarding the availability of the application and any other updates we'll be sure to send out a separate announcement to you all. Feel free to email tbls@tbls.org with any questions or thoughts in the meantime.





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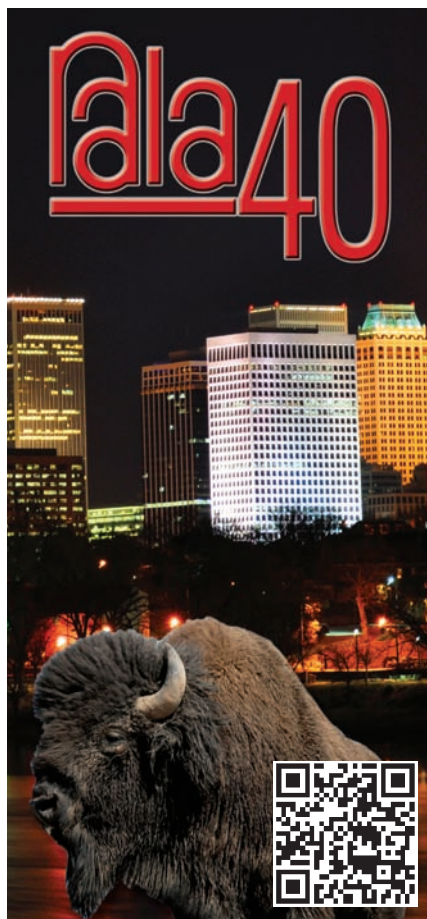
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Medical Torts Update. Part 1

By H. Keith Myers

This paper aims to highlight significant recent decisions from the Supreme Court of Texas and various Courts of Appeal (several of which are presently in the petition-for-review mill) that have broadened, clarified or muddled the principles of medical tort law.

I. OVERVIEW.



Over the years the bulk of appellate decisions in medical tort cases involved challenges to expert reports. Tex. Civ. Pract. & Rem. Code 6 74.351 requires that, not later than the 120th day after the date each defendant files its original answer (formerly 120 days after filing suit), a claimant must serve on that party or his attorney one or more expert reports, with the CV of each expert, setting forth the applicable standard of care, the manner in which the care rendered by each defendant allegedly failed to meet the standard, and the causal relationship between that failure and the injury, harm or damages claimed. Failure to do so results in mandatory dismissal with prejudice of all claims against the defendant, plus the award of attorney's fees and costs. *Id.* 6 74.351(b). If, however, a report is filed but deemed to be deficient, the trial court may grant one 30-day extension to the claimant in order to cure the deficiency. *Id.* 6 74.351(c).

Since 2003, appeals have been permitted from interlocutory orders that deny all or part of the relief sought by a motion to dismiss under 6 74.351(b), except that an appeal may not be taken from an order granting a 30-day extension. *Id.* 6 51.014(a)(9). Tex. R. App. P. 28.1(a) provides that such appeals are accelerated.

Because of the apparent difficulties in complying with the statutory requirements for an expert report, and the prospects of obtaining dismissal with prejudice when no report is submitted or when a report fails to constitute a "good-faith effort" at compliance, medical torts defendants filed objections and motions to dismiss, almost as a matter of routine. Regardless of the ruling thereon, appeals proliferated.

Cognizant of the scores of appellate decisions involving challenges to Chapter 74 reports, the Supreme Court of Texas has seemingly relaxed the stringency by which the reports are to be evaluated, so as to lessen the harshness of the consequences (mandatory dismissal, plus award of costs and attorney's fees) when a report fails to pass muster. In *Scoresby v. Santillan*, 346 S.W.3d 546 (Tex. 2011), the Court acknowledged that "the trial court should be lenient in granting thirty-day extensions and must do so if deficiencies in an expert report can be cured within the thirty-day period." *Id.* at 554. The *Scoresby* Court additionally characterized its prior holding in *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007), as rejecting the argument that a deficient report equates with "no report" and thus automatically subjects the claims to dismissal:

An inadequate expert report does not indicate a frivolous claim if the report's deficiencies are readily curable.

We conclude that a thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the



opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated. We recognize that this is a minimal standard, but we think that it is necessary if multiple interlocutory appeals are to be avoided, and appropriate to give a claimant the opportunity provided by the Act's thirty-day extension to show that a claim has merit. All deficiencies, whether in the expert's opinions or qualifications, are subject to being cured before an appeal may be taken from the trial court's refusal to dismiss the case.

346 S.W.3d at 556-57 (emphasis added). In the wake of the *Scoresby* decision, the flow of appeals of rulings on 6 74.351(b) motions has not stopped, but has certainly slowed.

In 2013 and 2014, reported opinions in the medical torts arena have addressed a number of other issues as well, including primarily the exceptions to governmental immunity under the Texas Tort Claims Act, and whether injury claims of a non-patient, such as a slip-and-fall victim, nevertheless constitute health care liability claims that are subject to the expert report requirements of 6 74.351.

This paper aims to highlight significant recent decisions from the Supreme Court of Texas and various Courts of Appeal (several of which are presently in the petition-for-review mill) that have broadened, clarified or muddled the principles of medical tort law.

II. GOVERNMENTAL IMMUNITY.

Medical torts claims against a governmental unit must comply with, and be governed by, the Texas Medical Liability Act (Chapter 74 of the Texas Civil Practice and Remedies Code) as well as the Texas Tort Claims Act (Chapter 101). By definition, "governmental unit" includes the State of Texas and any political subdivision thereof, including a public health district.

Tex. Civ. Pract. & Rem. Code 6 101.001 (3) (A) & (B).

A political subdivision of the State retains governmental immunity, except where that immunity is waived:

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Pract. & Rem. Code 6 101.021.

What constitutes "a condition or use of tangible personal ... property" has continued to plague litigants and appellate tribunals.

Titus Regional Medical Center v. Roach, 418 S.W.3d 675 (Tex. App.—Texarkana 2011, pet. denied).

Facts

Plaintiff fell from a hospital bed in which she had been placed following surgery. She alleged that the defendant's staff failed to raise the bed's safety rails and left her unattended while she was still under the influence of anesthesia, and failed to notify her family that she had been placed in a room. Defendant filed a plea to the jurisdiction, asserting governmental immunity. The trial court overruled the plea, determining that the pleadings alleged a cause of action for which immunity was waived under 6 101.021(2).

Issue

Defendant contended that the allegation that the hospital staff failed to raise the safety rails equates to an allegation that the hospital did not use the safety rails; therefore, plaintiff's claim derived from a non-use of property, rather than the use of it, for which there is no waiver. Defendant's argument analogized to situations involving failure to give medication or to give medication in a particular format.

Holding

The Court of Appeals affirmed the trial court's rejection of the claim of governmental immunity, ruling that the use of the hospital bed (with its safety rails) constituted a use of tangible personal property as contemplated in the statute.

In *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582 (Tex. 1996), the state hospital discharged a patient who had been treated for mental illness, providing him with oral medications to take at home. Thereafter he murdered his estranged wife. Her parents filed suit, claiming that the hospital was negligent in prescribing such oral medications and that the patient should instead have been medicated by injection. The Supreme Court of Texas held that "failure to administer an injectable drug is non-use of tangible personal property and therefore does not fall under the waiver provisions of the [Texas Tort Claims] Act." *Id.* at 584. In its opinion, the *Kerrville* Court narrowed the precedential value of previous cases (one involving the failure of a football coaching staff to provide a brace to an injured player, and one involving failure to provide a life preserver to a child, known to suffer seizures, who was taking swimming lessons under the care of a governmental entity and drowned), both of which had found waivers of governmental immunity because the withheld equipment was part of the uniform/attire that had been provided to the injured party. Those cases were limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that



the lack of the integral component led to the injury. *Id.* at 585. On the other hand, the *Kerrville* Court declined to extend the waiver to a situation where the staff had failed to administer an injectionable drug, a situation of non-use rather than use. Defendant Titus argued that similarly, plaintiff's allegation that the hospital staff failed to raise the safety rails equated to an allegation that the hospital did not use the safety rails, and thus no waiver occurred.

Instead, the *Titus v. Roach* Court followed the reasoning of *Hampton v. University of Texas*, 6 S.W.3d 627 (Tex. App.—Houston [1st Dist.] 1999, no pet.), which also involved a patient's falling from a hospital bed where the safety rails had not been engaged. The *Hampton* Court found that the hospital had provided a bed with attached safety equipment that did not function until it was activated, a virtually identical to situations where governmental units provided personal property lacking some integral safety component. 6 S.W.3d at 631. Failure to activate safety equipment did not, therefore, constitute a non-use of property:

It is difficult for us to contemplate how, when a patient is placed in a bed as part of the hospital's treatment of that patient, the bed is not being used in the treatment. The rails are quite different from the knee brace in *Lowe* or the life preserver in *Robinson* because the rails simply cannot be used at all unless they are used as a part of the bed. Therefore, [in] the examination of whether there is a use of property as contemplated in the statute, the "property" in question is the entire bed and not its adjunctive safety rails.

....

The rails were part of the bed; failure to properly employ the bed qualifies as the hospital's use of its tangible property. Roach's allegations were sufficient to implicate the statute's waiver of immunity provision.

418 S.W.3d at 680, 681. Consequently, the Court affirmed the denial of the plea to the jurisdiction.

***University of Texas Health Science Center v. DeSoto*, 401 S.W.3d 319 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).**

Facts

The patient sustained injury to her left ureter during spinal surgery. One of the surgeons sutured the injury without consulting a urologist. Patient developed a hematoma, compressing the ureter and leading to obstruction of the kidney. The patient and her husband sued the state university hospital. Their expert opined that the surgeon failed to order a urology consult, failed properly to repair the ureter injury, failed to monitor the patient's recovery and failed to identify and treat the hematoma. There was no claim that either surgeon negligently used any surgical instruments. Defendant Hospital filed a plea to the jurisdiction, contending that the injuries were not caused by the negligent use of any instrumentality. Trial court denied the plea.

Issue

Whether the Texas Tort Claims Act waived sovereign immunity for claims stemming from injuries caused by a surgeon's negligent failure to address complications caused by the non-negligent use of non-defective tangible personal property. The Hospital contended the claims were actually based on the surgeon's negligent failure to use proper medical judgment, and on his supervising and delegating duties to the other surgeon, for which there is no waiver of immunity. Plaintiffs argued that claims for injury caused by a non-negligent use of tangible personal property, but exacerbated by the physician's failure to take appropriate remedial actions, fall within the immunity waiver.

Holding

No jurisdiction. Because a private surgeon

would not be held liable for injury caused by his non-negligent use of non-defective personal property, defendant's liability would stem only from the surgeon's subsequent failure to use proper medical judgment, for which there is no waiver of immunity.

While the term "use" has a broad definition, the Court declined to ascribe breadth to the waiver of immunity provided under 6 101.021(2). The Supreme Court of Texas held in *Texas Dept. of Crim. Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001), that tangible personal property must not be merely involved, or merely furnish the condition that made an injury possible, but must, in and of itself, harm the patient. Furthermore, in *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998), the Texas Supreme Court declared that "property does not cause injury if it does no more than furnish the condition that makes the injury possible."

As in *Kamel v. University of Texas Health Science Center*, 333 S.W.3d 676 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), the *DeSoto* Court concluded that the Texas Legislature did not intend for sovereign immunity to be waived for a state employee's non-negligent use of non-defective personal property. 401S.W.3d at 326-27.

***University of Texas Medical Branch v. Qi*, 402 S.W.3d 374 (Tex. App.—Houston [14th Dist.] 2013, no pet.).**

Facts

Plaintiff delivered a stillborn child at the state university hospital. She alleged that the providers negligently failed to diagnose preeclampsia, and were negligent in the use of blood pressure cuffs/testing equipment and urine test strips, by improperly reading and interpreting the results produced thereby. Defendant alleged that plaintiff's claim derived not from the use of the alleged tangible personal property but from the failure to use that property in order to diagnose the existence of pre-



eclampsia. The trial court denied the plea to the jurisdiction.

Issue

Whether improper reading and interpreting of results produced by medical testing equipment constitutes a use of tangible personal property that waives governmental immunity.

Holding

No jurisdiction—the property itself must have proximately caused the personal injury or death in order to waive the immunity.

The Court distinguished the Texas Supreme Court's holding in *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983), which ruled that an allegation of defective or inadequate tangible property is not necessary to state a cause of action under the Texas Tort Claims Act if “some use” of the property, rather than “some condition,” is asserted to be a contributing factor to the injury. Improper reading and interpretation of an electrocardiogram, which purposes to diagnose, was deemed to constitute negligence of the hospital district's employees in the use of tangible property. *Id.* at 32. The *Qi* Court focused on the change in the language in the Texas Tort Claims Act from the time *Salcedo* was decided, when it provided for a waiver caused from “some” condition or “some” use of tangible property. The recodified version deleted the word “some” and repealed a companion provision that had mandated liberal construction of the Act to achieve the purposes thereof. 402 S.W.3d 382.

Cases following *Salcedo*, including *Kamel* and *Bossley*, *supra*, increasingly restricted the waiver of immunity under 6 101.021(2). As stated in *Bossley*, while some involvement of property is necessary, mere involvement, without causation, is insufficient. 968 S.W.2d at 342. Moreover, as recognized in *University of Texas Medical Branch v. York*, 871 S.W. 2d 175, 179 (Tex. 1994), information is not tangible property. Information is itself an abstract

concept, and the fact that it is recorded in writing on paper or by medical device does not render the information tangible property.

Because there was no pleading and no showing that the medical equipment itself caused the stillbirth of *Qi's* baby, there was no causal nexus between the use of the equipment and the injury. Therefore, plaintiff's claims were directed at the medical judgment exercised by the hospital's employees and their failure to act, neither of which invoked waiver of immunity under the Texas Tort Claims Act. 402 S.W.3d at 389-90.

University of Texas M. D. Anderson Cancer Center v. King, 417 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2013 pet. denied).

Facts

Somewhat similar facts to *Titus Regional Medical Center v. Roach*, *supra*, discussed hereinabove. The patient fell from a hospital bed after a nurse raised the upper side rails and not the lower side rails. However, it was not a situation where rails were absent or not used at all, but one in which the lower side rails could be independently raised or lowered, and it was possible for the medical staff to exercise discretion in determining which ones were appropriate. Jurisdictional evidence showed that the nursing staff did use medical judgment in deciding not to raise the two lower side rails of the bed.

Issue

Whether plaintiff's claims involved the use of tangible personal property for which immunity would be waived.

Holdings

Case dismissed. The Court determined that the crux of the plaintiff's complaint was that the nurse used poor medical judgment in balancing the risk of falling against the risk of entrapment. Such exercise of medical judgment was analogous to deciding to administer a medication in

a short-lasting oral form or a long-lasting injectable form, deemed not to invoke the use of tangible property in *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582 (Tex. 1996). A complaint that the state actor should have done “something more” is not a complaint about the use of property. Allowing waiver of immunity in this type of case would mean “there would be no immunity for claims in which the use *or nonuse* of particular side rails was determined through the exercise of a health-care provider's medical judgment.” 417 S.W.3d at 8-9 (emphasis original).

Dallas Metrocare Svcs. v. Juarez, 420 S.W.3d 39 (Tex. 2013).

Facts

While attending a counseling session, Mr. Juarez was injured when a whiteboard fell on his head. No one was writing on or moving the whiteboard when it fell. Metrocare filed a plea to the jurisdiction. Plaintiff's petition alleged that the whiteboard and the conference room constituted an “unsafe condition.” The trial court denied the plea to the jurisdiction.

Issue

Did the defendant's making the whiteboard available for use constitute a “use” of that item of property?

Holding

No; case remanded. Following its recent decision in *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012), which held that a hospital did not “use” a plastic bag with which a patient committed suicide, the Supreme Court of Texas ruled that displaying the whiteboard could not constitute a “use,” else immunity would be waived every time a piece of government property causes injury. 420 S.W.3d at 41-42.

The Court expressed no opinion on whether the facts of the case represented a “condition” of tangible personal property for which immunity might be waived.



Cervantes v. McKellar, 424 S.W.3d 226 (Tex. App.—Texarkana 2014, no pet.)

Facts

Bad baby case. Plaintiff's child was born with encephalopathy. Plaintiff filed a medical liability claim, alleging that employees of Titus Regional Medical Center negligently used, interpreted, monitored and responded to a external fetal heart rate monitor. Plaintiff did not allege that the fetal heart rate monitor was itself defective or that it produced inaccurate information. The trial court sustained the plea to the jurisdiction.

Issue

Does alleged negligence in monitoring, interpreting and responding to a piece of equipment constitute use of tangible personal property when there is no showing that the equipment was faulty?

Holding

No; citing *Bossley*, *supra*, the opinion reiterated that property does not cause an injury if it only furnishes the condition that makes the injury possible. Additionally, a governmental unit does not waive its immunity by "using, misusing or not using information," which is itself intangible. 424 S.W.3d at 230.

Plaintiff had relied on *Salcedo*, *supra*, which, admittedly, had been limited in scope by subsequent decisions. The plaintiff's petition, however, did not assert that a condition or use of the fetal heart monitor caused injury, but instead complained that the nurses' failure to respond timely to information provided by the monitor caused a delay in delivery that resulted in the child's injury. Furthermore, plaintiff's expert report criticized the nurses, not the device, which appeared to be functioning properly and providing correct information. Allegations of failure to respond appropriately to information produced by properly functioning equipment do not involve the use of tangible property and thus do not qualify for the limited waiver of immunity. *Id.* at 237.

University of Texas Health Science Center v. McQueen, 431 S.W.3d 431 (Tex. App.—Houston [14th Dist.], pet. pending).

Facts

Plaintiffs alleged that the state university hospital's physician employees injured Mrs. McQueen's bowel through negligent use of various instruments during a surgical procedure. Defendant denied receipt of notice of the claim, as required within six months of the incident, pursuant to Tex. Civ. Pract. & Rem. Code 6 101.101. In response, plaintiffs submitted medical records, deposition testimony and an affidavit from their expert describing deviations from the standard of care, purporting to establish actual notice from the occurrence itself.

Issue

Did the doctors' supposed awareness of the happening of the injury impute actual notice to the Health Science Center? Do the medical records themselves rise to the level of "subjective awareness" to place the Health Science Center on actual notice of its fault?

Holding

No; consequently, the trial court lacked subject matter jurisdiction. Tex. Civ. Pract. & Rem. Code 6 101.101(a) requires that a governmental unit receive notice of a claim not later than six months after the occurrence date of the subject incident, which notice must reasonably describe the damage or injury claimed, the time and place of the incident and the incident itself. This notice requirement does not apply if the governmental unit has actual notice that death has occurred or that the claimant has received some injury. *Id.* 6 101.101(c). This notice requirement is jurisdictional. Tex. Gov't Code 6 311.034.

Mere knowledge that an incident has occurred does not establish actual notice. Additionally, the governmental unit must have subjective awareness of its fault, in producing or contributing to the claimed

death or injury, and knowledge of the identity of the parties involved. *University of Texas Southwest Med. Ctr. v. Estate of Arancibia*, 324 S.W. 3d 544, 548-49 (Tex. 2010). However, actual notice may be imputed to the governmental entity if an agent or representative gains knowledge of those elements and has a duty to investigate the facts and report them to a person of sufficient authority. 431 S.W.3d at 755, citing *University of Texas Health Science Center v. Stevens*, 330 S.W.3d 335, 339 (Tex. App.—San Antonio 2010, no. pet.).

Unlike the situation in *Arancibia*, where evidence, consisting of e-mails and conversations between the attending physician and his supervisor, demonstrated subjective awareness of the patient's death and standard of care issues contributing thereto, in *McQueen*, there was no communication between any physician and any supervisor or risk management. Medical records simply stated "bowel injury during hysterectomy." The treating physician could not identify anything untoward that had occurred during the procedure or any use of any of the tools that fell below the standard of care. Under these circumstances, the court could not stretch its interpretation of the medical records to fit the actual notice requirement:

While we acknowledge that "an unqualified confession of fault" is not required ... and that "a government cannot evade the determination [of liability] by subjectively refuting fault," ... we conclude there must exist something in the circumstances to provide a subjective signal to the governmental unit within the six-month period that there might be a claim, even if unfounded, at issue. There must be something more than the mere fact of a "bad result," even one that perhaps a prudent person or physician would have investigated. [citations omitted]. Otherwise, the hospital would then be charged with actual notice in and



need to investigate every instance where a risk or possible complication generally attributable to a surgical or other procedure resulted in an injury. While this might not fully “eviscerate” the notice requirement’s purpose, it certainly appears to be in tension with it.

431 S.W.3d at 761.

III. EXPLORING THE DEFINITION OF “HEALTH CARE LIABILITY CLAIM”—Or, if it Does Not Quack, Can it Still Be a Duck?

In *Texas West Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171 (Tex. 2012), the Supreme Court of Texas addressed claims by the hospital’s employee for injuries sustained at the hands of a mental health patient during a physical altercation. Williams had taken the patient to an outdoor enclosed smoking area, in violation of policy in the psychiatric unit. Williams sustained injury and the patient died. The family sued the hospital and later joined Williams himself as a defendant. Williams filed a cross-claim against his employer, alleging that it had failed properly to train, warn and supervise him to work with potentially violent psychiatric patients and, as a result, failed to provide a safe workplace. *Id.* at 172-73. The hospital sought dismissal of the cross-claim because of the employee’s failure to provide an expert report under Chapter 74.

The Supreme Court held that the employee’s cross-claim constituted a health care liability claim, which, since 2003, is defined as follows:

“Health care liability claim” means a cause of action against a health care provider or a physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proxi-

mately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.

Tex. Civ. Pract. & Rem.
Code 6 74.001(a)(13).

As stated in the *West Oaks* opinion, a health care liability claim has three basic elements: (1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant’s act or omission complained of must have proximately caused the injury to the claimant. 371 S.W.3d at 179-80.

The court reasoned that a “health care facility’s ‘training and staffing policies and supervision and protection of [a patient] and other residents are integral components of [the facility’s] rendition of health care services.’” *Id.* at 181, quoting *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005). Therefore, the acts of providing supervision and security for patients and a safe workplace for caregivers constitute “health care.” *Id.* at 182.

The *West Oaks* decision has spawned numerous innovative efforts at bringing causes of action that initially appear to fall outside the ambit of health care within the umbrella of Chapter 74, so as to impose the Texas Medical Liability Act’s restrictions on damages and, more important, its requirements for an expert report. Appellate decisions are, not surprisingly, all over the map in dealing with these issues, and it appears the Supreme Court of Texas may soon provide definitive guidance for dealing with them.

A. Premises Cases.

Good Shepherd Med. Ctr.-Linden, Inc. v. Twilley, 422 S.W.3d 782 (Tex. App.—Texarkana 2013, pet. denied).

Facts

Mr. Twilley, an unlucky director of plant operations for the medical center, sustained two work-related injuries. He fell from a ladder attached to the hospital building, and later tripped and fell over a mound of hardened cement. He brought negligence and gross negligence claims against Good Shepherd, which, about a year later, filed a motion to dismiss under 6 74.351. Good Shepherd asserted that, on the authority of *West Oaks*, Twilley’s pleadings alleged health care liability claims requiring an expert report.

Issue

Notwithstanding the fact that the plaintiff had no involvement in providing health care or receiving health care from the provider, does a claim of injury by departure from accepted standards of safety by the health care provider satisfy the statutory definition of a health care liability claim?

Holding

No. The court acknowledged that the *West Oaks* decision did disavow the necessity of a health care relationship between the claimant and the provider, or of the safety component of a health care liability claim to the provision of health care. 422 S.W.3d at 785, citing *West Oaks*, 371 S.W.3d at 179, 186. Because the definition of “health care liability claim,” “since 2003, has utilized the term “claimant” rather than “patient” the Legislature thereby expanded the scope of the statutory definition and the expert report requirement. 371 S.W.3d at 174, 178.

Unlike the situation in *West Oaks*, however, Twilley’s claim had no relationship, direct or indirect, to health care. While the Texas Supreme Court in *West Oaks* had construed the phrase “directly related to health care” in the definition of a health care liability claim as modifying “professional or administrative services” but not “safety,” it concluded that the safety component of a health care liability claim need not be directly related to the provision of health care. *Id.* at 185-86. To characterize a safety claim against a health care provider,



having no relationship whatsoever to health care, as a “health care liability claim” goes too far. “Said differently, if every safety claim against a health care provider were considered a health care liability claim, there would be no need to analyze the nature of the acts or omissions which cause the alleged injuries.” 422 S.W.3d at 788 (emphasis original). Furthermore, requiring a report from an expert qualified under Chapter 74 to address standards involving a fall from a ladder or tripping over a concrete mound would be “terribly difficult, if not impossible.” *Id.* at 789. Thus, no expert report was required.

Christus St. Elizabeth Hosp. v. Guillory, 415 S.W.3d 900 (Tex. App.— Beaumont 2013, pet. filed).

Facts

Hospital visitor slipped and fell on the floor of a hallway near a nurse’s station. Plaintiff claimed the hospital negligently failed to maintain the floor or warn her of its unsafe condition. After the issuance of the *West Oaks* decision, the hospital filed a motion to dismiss for plaintiff’s failure to submit an expert report. Plaintiff responded by alleging that she was not on the premises to receive medical treatment and that the hospital had departed from accepted standards of safety.

Issue

Whether a “garden-variety premises case involving a visitor’s slip-and-fall” constitutes a “health care liability claim.” 415 S.W.3d at 902.

Holding

In the absence of any connection between the plaintiff’s claims and the hospital’s duties of providing health care, plaintiff has not asserted a health care liability claim. Plaintiff did not allege that the hospital departed from any accepted standards of health care, only that it breached a duty of providing safe conditions to visitors on its premises. Additionally, plaintiff would not and should not be required to produce opinions from a medical expert

regarding the hospital’s duty to clean, inspect or light its premises. *Id.* at 903. No expert report required.

As of this writing, petition for review is pending in the Supreme Court of Texas, No. 13-1032.

Weatherford Texas Hosp. Co., LLC v. Smart, 423 S.W.3d 462 (Tex. App.— Fort Worth 2014, pet. filed).

Facts

As in *Guillory*, plaintiff slipped in the hospital’s lobby while visiting a patient. She brought negligence and premises liability claims against the hospital, which filed a motion to dismiss based on her failure to provide an expert report.

Issue

Does a slip-and-fall claim, not involving any connection to the provision of health care and not involving a patient, but arising on the premises of a health care provider, constitute a “health care liability claim”? Even if the safety component of a health care liability claim need not be directly related to the provision of health care, under *West Oaks*, must it have “some nexus, however tenuous, to health care” to trigger the provisions of the Texas Medical Liability Act? 423 S.W.3d at 463.

Holding

In accordance with *Twilley*, plaintiff’s incident was totally unrelated to the provision of health care services and thus does not give rise to a health care liability claim. In no respect did it differ from a safety claim occurring on the premises of a non-medical provider. Moreover, the Court deemed it impractical to require the plaintiff to locate a premises liability expert who also qualified as a health care expert. *Id.* at 467. In a footnote, the *Smart* opinion concurred with the *Twilley* Court’s observation that the provider’s argument would lead to the conclusion that a vehicle accident in a hospital parking lot involving a hospital-owned vehicle would constitute a health care liability claim, which would be

“patently absurd.” *Id.*

Petition for review is pending in the Supreme Court of Texas, No. 14-0174.

Memorial Hermann Hosp. Sys. v. Galvan, 434 S.W.3d 176 (Tex. App. — Houston [14th Dist.] 2014, pet. filed).

The same basic facts as in *Guillory* and *Smart*. Plaintiff, a hospital visitor, fell in a hallway, and filed a slip-and-fall premises lawsuit. Defendant cited Chapter 74 in its answer, and following the expiration of the expert report deadline, filed a motion to dismiss. Predictably, the trial court denied the motion.

Issue

Does a non-patient’s slip-and-fall claim against a hospital constitute a health care liability claim, requiring submission of an expert report?

Holding

Yes! Citing what it characterized as “judicial dicta” in the *West Oaks* opinion, to the effect that Chapter 74 requires only that safety claims be based upon claimed departures from accepted standards of safety, the *Galvan* Court reasoned that such claims need not involve an alleged departure from standards involving health care or be directly or indirectly related to health care. 434 S.W.3d at 181-82. Because the *West Oaks* Court did not directly state that health care liability claims must have an indirect relationship to health care, they need only “involve an alleged departure from standards for protection from danger, harm or loss.” *Id.* at 184. Consequently, a slip-and-fall claim against a health care provider, based upon alleged departure from accepted standards of safety, constitutes a health care liability claim. As such, plaintiff was required to provide a 674.351(a) expert report, and her failure to do so mandated dismissal of her case. *Id.* at 186.

Petition for review is pending in the Supreme Court of Texas, No. 14-0410.



Methodist Healthcare Sys. v. Dewey, 423 S.W.3d 516 (Tex. App.— San Antonio 2014, pet. filed).

Plaintiff sustained injury while at the hospital, on his way to visit his mother, when an electronic door closed on him. In response to the hospital's motion to dismiss, plaintiff contended that no expert report was required because he had merely asserted a premises liability claim.

Issue

How broadly to construe *West Oaks*?

Holding

Unlike the Houston Court of Appeals in *Galvan*, the San Antonio Court of Appeals chose to follow *Guillory* and *Doctors Hosp. Renaissance, Ltd. v. Mejia*, No. 13-12-00602-CV, 2013 WL 485-9592 (Tex. App.— Corpus Christi 2013, pet. filed) in narrowly construing *West Oaks* only to recognize a health care liability claim involving safety that is directly or indirectly related to health care. Mr. Dewey resembled any other visitor who might be injured on the premises of any other business, and his safety claims did not involve health care, directly or indirectly. Contrary to the situation in *West Oaks*, where the employee was assaulted by a patient for whom he was providing health care, a visitor's slip-and-fall case is "completely untethered to it." 423 S.W.3d at 519-20. There was no health care liability claim and thus no requirement for an expert report.

Petition for review is pending in the Supreme Court of Texas, No. 14-0223.

Morrison v. Whispering Pines Lodge I, L.L.P., 428 S.W.3d 327 (Tex. App.— Texarkana 2014, pet. filed).

Facts

Employee of a nursing home slipped and fell in an area that had just been mopped by a fellow employee. The trial court dismissed the plaintiff's claims for failure to submit an expert report under Chapter 74.

Issue

Does a medical employee's injury claim, similar to the situation in *West Oaks* and *Twilley*, indirectly relate to health care and thus constitute a health care liability claim?

Holding

Yes. Unlike *Twilley*, which concerned a non-medical employee's on-the-job injury claims, having no relationship to health care, the injury to Ms. Morrison occurred in connection with the provider's attempts to carry out its legal duty to furnish a sanitary environment for its residents, as required by 40 Tex. Admin. Code 619.1701. Therefore, one could not conclude that, as a matter of law, her claims are "totally untethered from health care." 428 S.W.3d at 334. Along the way, the *Morrison* opinion wrestles with the differing results in *Dewey*, *Smart*, and *Galvan*. In its final analysis, it concludes that, due to the indirect connection to conduct involving health care, the claim constituted a health care liability claim. *Id.* at 334-35. Citing *Twilley*, plaintiff argued that medical expertise would not be required to explain how she slipped and fell, and that it would be impossible to find a qualified health care expert to address the issues concerning her fall. Seemingly putting the cart before the horse, the *Morrison* court rejected that argument; simply because *Twilley* involved claims that were totally unrelated to health care, and with an indirect connection to health care in this case, "the difficulty in locating an appropriate expert should be no different than in any other TMLA case." *Id.* at 335.

Petition for review is pending in the Supreme Court of Texas, No. 14-0318.

East Texas Med. Ctr. Regional Health Care Sys. v. Reddic, 426 S.W.3d 343 (Tex. App.— Tyler 2014, pet. filed).

Facts

Plaintiff fell on a mat saturated with water in the hospital's lobby. Trial court denied

hospital's motion to dismiss for failure to submit an expert report.

Issue

Does such a slip-and-fall claim by a non-patient constitute a "health care liability claim" against a health care provider?

Holding

Yes. A fall, even by a visitor, in a hospital lobby meets the statute's safety prong so that this claim constitutes a health care liability claim:

And even if we assume that Reddic's claims concerning the floor around the front desk do not relate directly to ETMC's providing health care to patients, the care of the floor around an area frequented by numerous patients throughout the day has an indirect relationship to the provision of health care that is sufficient to satisfy the safety prong of the TMLA.

426 S.W.3d at 348.

As evidence of the tortuous logic employed in analyzing the differing precedents on this issue, the *Reddic* court distinguished the holding in *Twilley* on the basis that these injuries occurred outside the hospital, in an area where patients or visitors may not have traversed. *Id.* Because claims arising from a fall in a lobby "have a strong indirect relationship to the safe provision of health care for patients," they are at least indirectly related to health care and constitute a health care liability claim under Chapter 74.

Petition for review is pending in the Supreme Court of Texas, No. 14-0333.

Fortunately, the Supreme Court has agreed to consider and interpret these differing results and difficult rationales. On November 5, 2014, the Court heard oral argument in *Ross v. St. Luke's Episcopal Hosp.*, No. 14-12-00885-CV, 2013 WL 113-6613 (Tex. App. — Houston [14th Dist.] 2013, pet. granted). In that case, the Court of Appeals affirmed the dismissal of a hos-



pital visitor's slip-and-fall claim for failure to submit an expert report, reasoning that the plaintiff's status as a visitor was irrelevant, and that she constituted a "claimant" by invoking the safety standards applicable to a health care provider, thus triggering the provisions of Chapter 74. On May 1, 2015, the Supreme Court of Texas issued its long-awaited opinion in *Ross v. St. Luke's Episcopal Hospital*, No. 13-0439.

Plaintiff was a visitor and not a patient. She was exiting the hospital through the lobby when she slipped and fell in an area where the floor was being cleaned and buffed. The trial court and the Houston Court of Appeals ruled that plaintiff's lawsuit against the hospital constituted a health care liability claim, and must be dismissed for failure to provide an expert report under Chapter 74.

The Supreme Court of Texas reversed, because there was no evidence of any relationship between the alleged violation of safety standards and the provision of health care. The record did not demonstrate that the area where the plaintiff fell was a patient care area or an area where patients possibly would be in the course of the hospital's providing health care services to them; nor was there evidence that the area had to meet particular cleanliness or maintenance standards related to the provision of health care or patient safety.

But although the mere location of an injury in a health care facility or in a health care setting does not bring a claim based on that injury within the TMLA so that it is an HCLC, the fact that the incident could have occurred outside such a facility or setting does not preclude the claim from being an HCLC. The pivotal issue in a safety standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety. [Opinion at 13].

Recognizing that it may be difficult to segregate a safety standards-based claim that is a health care liability claim from one that is not, the Court listed certain non-exclusive considerations important to the analysis thereof:

1. Did the alleged negligence of the defendant occur in the course of the defendant's performing tasks with the purpose of protecting patients from harm;
2. Did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated;
3. At the time of the injury was the claimant in the process of seeking or receiving health care;
4. At the time of the injury was the claimant providing or assisting in providing health care;
5. Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider;
6. If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care; or
7. Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?

[Opinion at 13–14].

In the absence of any evidence that the negligence alleged by the plaintiff was based on safety standards arising from professional duties owed by the hospital as a health care provider, the slip-and-fall claim did not constitute a health care liability claim. Therefore, plaintiff was not required to serve an expert report to avoid dismissal of her lawsuit.

It will be interesting to see how the Supreme Court of Texas handles the

numerous court of appeals decisions in other cases that are presently before it, some of which had deemed such a claim to require an expert report and some of which did not.

B. Non-Premises Cases.

Psychiatric Solutions, Inc. v. Palit, 414 S.W.3d 724 (Tex. 2013).

Facts

Virtually identical to the factual setting in *West Oaks*. Mr. Palit, a psychiatric nurse, sustained injury while physically restraining a psychiatric patient. He sued the employer, alleging improper security and failure to provide a safe working environment.

Issue

Do such allegations state a health care liability claim, requiring an expert report under the Texas Medical Liability Act?

Holding

Yes. As in *West Oaks*, the court determined that Mr. Palit's contentions implicated an alleged departure from accepted standards of safety and alleged departure from the standard of health care owed to psychiatric patients. 414 S.W.3d at 726. Such claims additionally depend upon expert health care testimony to support or refute the allegations, and thus qualify as a health care liability claim. *Id.* at 727.

Methodist Hosp. v. Halat, 415 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2013, no pet.)

Facts

Physician sued hospital for breach of contract, quantum meruit, unjust enrichment, fraud in the inducement and negligent misrepresentation. Hospital asserted that the suit be dismissed for failure to file an expert report, contending that the claims related to health care.



Issue

Do a doctor's employment-related claims against a health care provider relate to health care and thus constitute health care liability claims?

Holding

No. Hospital tried to link the physician's resignation to his concerns about health and safety of patients due to understaffing and poor communication among hospital employees. The Court rebuffed that effort, deeming the physician's reasons for terminating or breaching the employment agreement as irrelevant to the contractual claim. None of his motivations had any bearing on the gravamen of his complaints, which did not allege causes of action for "treatment, lack of treatment, or other claim departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care." 415 S.W.3d at 522, citing *Loaisiga v. Cerda*, 379 S.W.3d 248 (Tex. 2012).

Hill Country San Antonio Mgmt. Svcs., Inc. v. Trejo, 424 S.W.3d 203 (Tex. App.—San Antonio 2014, pet. dismiss'd).

Facts

Plaintiff's adult child fell as he exited a van owned by an adult day-care facility. Plaintiff alleged that the facility's employees left her son unassisted, despite knowledge of his physical and mental limitations. The facility originally denied that it was a health care provider under the Texas Medical Liability Act and requested that plaintiff amend her pleadings to eliminate any allegations of medical negligence. Plaintiff did so. Thereafter the defendant filed a motion to dismiss based on plaintiff's failure to provide an expert report under Chapter 74. The trial court denied the motion.

Issue

Does an adult day-care facility qualify as a health care provider, and thus did plain-

tiff's cause of action constitute a health care liability claim?

Holding

No. Plaintiff produced evidence that the facility employed no medical personnel and provided no medical services. Defendant asserted that it was a licensed institution providing services for persons with mental retardation. The Court of Appeals concluded that defendant was not providing medical care, treatment or confinement. The patient received no medical care or treatment and the employees had no type of medical training. The facility was not overseen by medical professionals and did not provide health care services, and thus did not constitute a "health care provider" as defined in Chapter 74. 424 S.W.3d at 210.

Furthermore, unlike the situation in *West Oaks*, the injuries did not result from an employee's failure to follow doctor's orders, and were sustained outside the facility and were not a result of a breach of medical, health care, or safety standards. Thus plaintiff's claims only sounded in general negligence and did not invoke the provisions of Chapter 74. *Id.* at 212.

Bioderm Skin Care, LLC v. Sok, 426 S.W.3d 753 (Tex. 2014).

Facts

Plaintiff sustained burns while undergoing laser treatment at a hair removal facility. She sued the facility and its supervising physician, claiming the laser operator was negligent in handling the equipment. Plaintiff filed no expert report. The trial court denied defendants' motion to dismiss, which ruling was affirmed by the Court of Appeals, on the basis that the laser hair removal did not amount to "treatment."

Issues

Was the facility a health care provider? Did plaintiff's claims allege departure from accepted standards of medical or

health care, and thus amount to a health care liability claim?

Holding

Yes. The evidence showed that the physician was the sole owner of the facility and possessed the power to direct its management and policies. He supervised patient evaluations, diagnoses and treatments. Consequently, the facility qualified as the physician's "affiliate" and therefore as a health care provider under Tex. Civ. Pract. & Rem. Code 674.001(a)(12)(B). 426 S.W.3d at 759.

In *Loaisiga v. Cerda*, 379 S.W.3d 248 (Tex. 2012), the Supreme Court of Texas had recognized a rebuttable presumption that claims against physicians or health care providers, based on facts implicating a defendant's conduct during a patient's care, treatment or confinement, indeed qualify as health care liability claims. Because plaintiff alleged that she suffered burns and scars during the course of her treatment, the *Sok* Court utilized the rebuttable presumption. 426 S.W.3d at 756. The burden thus fell to plaintiff to rebut the presumption so as to excuse her failure to serve an expert report as required by Chapter 74. She could only do so by proving that her claim did not constitute an alleged departure from accepted standards of medical care or health care. *Id.* at 759-60.

Analysis of that issue pivoted on whether expert medical or health care testimony was needed to establish the requisite standard of care and breach. *Id.*

Because federal regulations governing the use of the laser in question required that such equipment may only be acquired by a licensed medical professional for supervised use in a medical practice, the Court determined that the testimony of a licensed medical practitioner would be necessary to prove or refute the claim that the use of the device departed from accepted standards of health care. *Id.* at 761-62. Furthermore, the proper operation and use of such a regulated surgical device required extensive training and experi-



ence, beyond the common knowledge of laypersons. Accordingly, the necessity of expert medical testimony to approve or refute the claim rendered it a health care liability claim, requiring the submission of an expert report. Accordingly, the motion to dismiss should have been granted. *Id.* at 762-63.

***Rio Grande Valley Vein Clinic, P. A. v. Guerrero*, 431 S.W.3d 64 (Tex. 2014).**

This case, dealing with similar facts, basically follows the holding in *Sok*, which had been decided four weeks earlier.

***Barrows v. Carnes*, 434 S.W.3d 836 (Tex. App. — Dallas 2014, no pet.).**

Also follows *Sok*, with regard to a claim for injuries sustained during an intense pulsed light skin rejuvenation procedure. Plaintiff contended that the operator improperly used the device, causing her injury, which related to the physician's failure to adequately staff, train or supervise an employee in the use of the device. "Such claims are integral components of health care, which implicate medical expertise and the departure from accepted standards of health care." 434 S.W.3d at 841 (citations omitted). Failure to serve an expert report therefore necessitated dismissal of the case.

***Christus Health Gulf Coast v. Carswell*, 433 S.W.3d 585 (Tex. App.—Houston [1st Dist.] 2013, pet. filed.**

Facts

Plaintiff sued defendant hospital for negligence resulting in her husband's death, and for post-mortem fraud, breach of fiduciary duty and negligence concerning the hospital's attempt to obtain her consent to an autopsy. The jury found for the defendant on the medical negligence claims, but ruled in favor of plaintiff on the post-mortem claims.

Husband died January 22, 2004. Plaintiff filed suit for medical malpractice on June 7, 2005. Nineteen months later, on

January 5, 2007, she amended her petition to assert the post-mortem claims, addressing the conduct of hospital employees in obtaining her consent to the autopsy and the retention of her husband's heart tissue, including allegations of fraud, breach of fiduciary duty, Deceptive Trade Practices Act violations and intentional infliction of emotional distress.

As part of its appeal, defendant hospital contended that the post-mortem fraud claim should be characterized as a health care liability claim, subject to the damage limitations of Chapter 74.

Issue

Were the claims concerning the handling of the decedent's tissue and autopsy after his death a health care liability claim, encompassed within the claim for medical negligence causing his death, and thus subject to the limitations and damages cap of Chapter 74?

Holding

No. Because the post-mortem claims dealt with handling of a dead body, they did not concern the provision of health care to the husband while he was alive. Thus those claims did not implicate the standard of care in performing medical services for a patient, and the complained-of conduct did not constitute "an inseparable part of the rendition of medical services." 433 S.W.3d at 610. The post-mortem claims stemmed from fraudulent misrepresentations made after the patient's death, to the patient's family, who likewise were not patients.

Id. at 618. Thus Chapter 74 did not apply to them.

***DHS Mgmt. Svcs., Inc. v. Castro*, 435 S.W.3d 919 (Tex. App.—Dallas 2014, no pet.).**

Facts

The "patently absurd" argument, predicted in the footnote to the opinion in *Weatherford Texas Hosp. Co., LLC v. Smart*, *supra*, that claims arising from a

motor vehicle accident could be characterized as a health care liability claim, came to fruition. Plaintiff sustained injuries in a traffic accident involving a vehicle owned by a provider of mobile imaging services and operated by one of its technologists. Eight months after the filing of suit, defendants filed a motion to dismiss her claims for failure to file expert report under 674.351. The trial court denied the motion to dismiss.

Issue

Do claims arising from a motor vehicle accident, involving a health care provider, invoke the safety component of a health care liability claim, thus subjecting the lawsuit to the requirements of Chapter 74?

Holding

No. The conduct at issue was completely unrelated to any provision of health care services. The Court seized on the lesson of *West Oaks*. While claims against a health care provider involving a departure from accepted standards of safety need not be directly related to the provision of health care, the Texas Supreme Court did not hold that a "safety" claim could be completely unrelated to the provision of health care and still come within the definition of a health care liability claim. 435 S.W.3d at 921.

Next issue— Expert Reports



H. Keith Myers is a shareholder at Mounce, Green, Myers, Saff, Paxson & Galatzan in El Paso

ABLE Accounts: A New Savings Tool for Individuals with Disabilities

Craig Hackler

Branch Manager / Financial Advisor

Raymond James Financial Services, Inc., Member FINRA/SIPC

If you or a family member has a disability that began before the age of 26, you may be able to benefit from a new type of savings account called an ABLE account. This savings option was made available through the Achieving a Better Life Experience (ABLE) Act of 2014 that was signed into law in December as part of the tax extenders bill. The ABLE Act authorized the establishment of private tax-advantaged savings accounts that can help you save for long-term expenses without sacrificing eligibility for public benefits such as Medicaid and Supplemental Security Income (SSI).

The following information is an overview of ABLE accounts. These accounts will be governed under Internal Revenue Code Section 529A and will be established and operated by states under federal guidelines. The IRS and the Treasury Department still have to finalize regulations and issue guidance before states may establish programs and begin accepting account applications, but in the meantime, here are answers to some questions you may have about this new savings tool.

What is an ABLE account?

An ABLE account is a tax-advantaged savings vehicle that can be used to save for future needs without sacrificing an individual's eligibility for public benefits such as SSI and Medicaid. To receive public benefits, individuals with disabilities must meet a means or resource test. Because individuals who have more than \$2,000

in assets may lose their eligibility for these much needed public benefits, they may not be able to save for retirement, education, or even general living expenses.



But with the passage of the ABLE Act, saving for the future may now be easier. The stated

purpose of the legislation is to (1) encourage and assist individuals and families in saving private funds for the

purpose of supporting individuals with disabilities to maintain health, independence, and quality of life; and (2) provide secure

funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources.

ABLE accounts are modeled after 529 college savings accounts and have many similar features and benefits. Once an account is established for a beneficiary, account contributions will accumulate tax deferred and any earnings will be tax free at the federal level if the money is used for qualified expenses. If any funds are withdrawn and not used for qualified expenses, then the earnings portion of the withdrawal will be taxed at the recipient's rate and subject to a 10% federal penalty. There are no federal tax incentives for contributions, but states may offer their own income tax incentives to residents such as a tax deduction for contributions.

One feature unique to ABLE accounts is a Medicaid payback provision. Any funds remaining in an ABLE account upon the beneficiary's death may be claimed by the state as repayment for assistance the state has provided under the state's Medicaid plan before any remaining assets are passed on to heirs. This is a potential drawback of establishing an ABLE account that will need to be weighed against the potential benefits.

When will ABLE accounts become available?

The IRS and the Treasury Department have six months from the date of enactment (which was December 19, 2014) to issue regulations and provide guidance, and there will also be a public comment period. After this, states may establish their own ABLE programs (or contract with another state) and begin accepting applications. This means that ABLE accounts may not become available until the third quarter of 2015 at the earliest.

What are the criteria for opening an ABLE account?

The account beneficiary must meet the definition of an "eligible individual." The beneficiary can be any age, but his or her disability must have begun before age 26. In addition, to be eligible, the beneficiary must be entitled to Social Security Disability Insurance (SSDI) benefits or SSI benefits, or obtain a disability certification that meets IRS rules.

Only one ABLE account can be opened for each beneficiary, and the beneficiary must use the plan offered by his or her state of residence (or the plan offered by the contracting state, if any, that provides ABLE account services for his or her state of residence).

How much can be contributed to an ABLE account?

Contributions to an ABLE account may be made by the beneficiary, parents, grandparents, friends, or others, but the total annual contribution limit from all sources is \$14,000 (the annual gift tax limit). This limit may increase from year to year since it is indexed for inflation. The lifetime contribution limit will be tied to each state's 529 contribution limit, which in

most states is \$300,000 or more. However, if an individual with a disability is eligible for SSI, only \$100,000 is exempted from the state's individual resource limit. That means that if the ABLE account balance exceeds \$100,000, the individual's monthly SSI benefit will be suspended until the account balance falls below \$100,000. Eligibility for Medicaid will not be affected.

What investment options will be offered?

States may offer various investment options for ABLE account funds. Of course, it will be up to account owners to select investment options that match their financial need and tolerance for risk. Investment allocations can be changed twice per year.

All investing involves risk, including the possible loss of principal, and there can be no guarantee that any investing strategy will be successful.

What can account funds be used for?

Funds may be used for disability-related expenses. These qualified expenses may include the following:

- Education

- Housing (but a distribution for housing expenses is not disregarded for purposes of the SSI program)
- Transportation
- Employment training and support
- Assistive technology and personal support services
- Health, and prevention and wellness expenses
- Financial management and administrative services, legal fees, and expenses for oversight and monitoring
- Funeral and burial expenses

Will ABLE accounts replace other planning tools such as special needs trusts?

No. ABLE accounts give individuals with disabilities and their families an additional tool to address financial challenges. Which tool or tools work best will depend on individual needs and circumstances, and each individual or family will need to determine how an ABLE account might fit into a comprehensive special needs plan.

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Residential Construction Defects

By Scott Alagood, Esq.

With a hopefully improving economy, our State and local community should see an increase in new housing development. If our past history is a good indicator of the future, then the increase in new construction will necessarily increase the number of construction defect claims between the Buyers of these new homes and the Contractors who constructed them. This article will briefly discuss the history of residential construction claims in Texas and set forth the current legal framework for home owners and builders who may soon find themselves on one side or the other of a residential construction defect claim.



History

Prior to 1999, residential construction disputes in Texas were primarily dealt with through general contract principles and consumer protection statutes. As a result of a real or perceived increase in the number of claims brought by owners against builders and the large damage claims potentially available under certain State consumer protection statutes, the Texas legislature enacted the Texas Residential Construction Liability Act in Chapter 27 of the Texas Property Code ("RCLA"). RCLA framed construction defect claims into specific procedural and damage limitation considerations. However, it seemingly did little to reduce the number of suits and arbitrations or to reduce the large damage claims sought by home owners against builders. In response to a very powerful Texas builders' lobby (with input from a somewhat less influential consumers' lobby), the Texas legislature

enacted the Texas Residential Construction Commission Act ("TRCCA") in 2003. The general purpose of TRCCA was to 1) provide a builder registration program, 2) provide a mandatory administrative state-sponsored inspection and dispute resolution process for construction defects, and 3) set forth minimum building standards and warranties for residential construction. Without getting into the details of TRCCA, it should be noted that an owner's failure to follow the mandatory state-sponsored inspection and dispute resolution process could result in the owner losing the ability to prosecute a claim in court or through arbitration.

The mandatory and harsh effects of TRCCA when combined with the economic downturn effectively resulted in litigated and arbitrated construction defect claims virtually ceasing to exist between 2003 and 2009 in Texas. However, TRCCA was subject to the sunset laws governing administrative agencies, and as part of the sunset process TRCCA was repealed in 2009. Now that TRCCA has been repealed, owners and builders face going "back to the future" when dealing with construction defect claims under traditional contract principles, consumer protection statutes, and the Residential Construction Liability Act.

Implied Warranties

When TRCCA was dissolved in 2009, one of the consequences was the removal of the minimum building standards and warranties for residential construction. With TRCCA out of the way, the common law of Texas which existed at the time of TRCCA reappeared. Through several former Texas Supreme Court decisions, two common law implied warranties once again set the standard for residential construction defects in Texas.

The first implied warranty is the "warranty of good and workmanlike manner". This warranty requires a Contractor to construct a residence in the same manner as would a generally proficient Contractor engaged in similar work and performing under similar circumstances. Any express warranty must equal or exceed the performance required by the implied warranty of good and workmanlike manner, and it cannot

completely disclaim the implied warranty by providing performance standards which do not meet or exceed those required by the residential construction industry.

The second implied warranty is the warranty that the home is suitable for human habitation and only extends to defects that render the home unsuitable for its intended use as a home. This warranty is only applicable to latent defects, that is, those defects that are not disclosed or clearly known to the Buyer of the home. This warranty may not be generally disclaimed. If fully disclosed by a builder to a Buyer, those defects which are knowingly and voluntarily accepted will not be subject to the implied warranty of habitability.

Deceptive Trade Practices: the Home Owner's Sword

The Deceptive Trade Practices—Consumer Protection Act (Section 17.41 et. seq. of the Texas Business and Commerce Code, herein "DTPA") applies to the sale of homes. The DTPA expressly allows a consumer to maintain an action where the breach of an express or implied warranty produces economic damages or damages for mental anguish. Where a builder has not built the home in "a good and workmanlike manner" or to be "habitable", such builder has breached either or both of the two warranties implied by law on a new residence, thus making such "breach" actionable under the DTPA.

The benefits that the DTPA provides over general contract principles are primarily two-fold. First, the claimant only has to show that its damages were "produced," rather than "proximately caused," by the builder's breach of the implied warranty. This means that the claimant need not prove that any resulting damages were reasonably foreseeable. Any damages, no matter how remote, may be proven by the claimant, so long as they result from the builder's breach of the implied warranty. Secondly where the claimant can prove that the builder intentionally or knowingly "breached" the implied warranty, the claimant may also be awarded mental anguish damages and up to three times the claimant's actual or economic damages.

Residential Construction Liability Act: the Builder's Shield

Since the expiration of TRCCA, RCLA continues to provide builders with a statutory filter through which construction defect claims must navigate. While RCLA does not in and of itself provide the home owner with a separate cause of action against a builder, failure to comply with the Act has consequences for both the home owner and the builder.

First, RCLA makes it clear that to the extent of any conflict between RCLA and the DTPA, the provisions of RCLA will control. Second, RCLA limits the liability of a Contractor for defects caused by several statutory acts which are deemed to be outside of the Contractor's control. Third, RCLA requires that the home owner give the Contractor at least 60 days prior written notice by certified mail of the specific construction defects that are the subject of the complaint prior to filing suit or invoking arbitration proceedings. Fourth, RCLA allows the Contractor during the first 35 days following receipt of the home owner's RCLA notice to inspect the home and construction defects by supplying the home owner with a written request for inspection.

Fifth, RCLA allows the Contractor to provide a written offer of settlement to the home owner by certified mail that may include an agreement by the Contractor to repair or have repaired any of the applicable construction defects and may describe the kind of repairs to be made. Additionally, under certain specific circumstances, the Contractor may also make an offer to repurchase the home. Any offered repairs must be made not later than 45 days after the Contractor's receipt of the home owner's written acceptance of the Contractor's offer, unless delayed by the home owner or by other events beyond the Contractor's control.

Sixth, if the home owner believes that the Contractor's initial offer of settlement is not reasonable, then the home owner must advise the Contractor in writing of such fact and provide details why within 25 days of receipt of the Contractor's initial offer. In such instance, the Contractor has an additional 10 days from receipt of such notice from the home owner to make a supplemental written offer of settlement to

the home owner.

Seventh, if the home owner rejects a reasonable offer from the Contractor or fails to permit the Contractor to perform under such offer after acceptance, the home owner's damages are limited to the greater of the value of the Contractor's repair offer, or monetary settlement offer; and the home owner's reasonable and necessary attorney's fees incurred before the offer was rejected. Where a Contractor fails to make a timely reasonable offer, the immediately preceding damage limitations do not apply. Regardless, the current version of RCLA seems to prohibit a home owner from recovering any damages other than the following reasonable and necessary damages which are proximately caused (must be "foreseeable") by a construction defect: cost of repairs; cost for the replacement or repair of goods

damaged in the residence; engineering and consulting fees; expenses for temporary housing; reduction in fair market value related to any structural failure; and attorney's fees. Note that the heightened causation standard of "proximate cause" is reintroduced, and the limitations on damages supplied by RCLA appear to completely remove the statutory mental anguish and multiplication of damages which would otherwise be allowed by the DTPA.

Finally, under RCLA, either the home owner or the Contractor may force the construction defect disputes to be mediated.

Conclusion

As you can see, construction defect claims can be extremely complicated for both the home owner and the builder. Failure

to follow the statutory requirements of RCLA may have serious consequences for either or both parties. Therefore, if you find yourself in such a situation, it is always advisable to seek the advice of a competent attorney who regularly deals with construction defect cases.



Scott Alagood is Board Certified by the Texas Board of Legal Specialization in both Commercial and Residential Real Estate Law and is an attorney at Alagood

Cartwright Burke PC in Denton.

ANNUAL MEETING PARALEGAL DIVISION

State Bar of Texas
Friday, June 19, 2015
San Antonio, TX

Jonathan Ryan, Executive Director, RAICES (raices.org)

Keynote Speaker

11:30 am – 1:30 pm

Helping Attorneys to Help Others: How You Can Make Pro Bono Work

8:30 am – 11:00 am [2 hours CLE]

► **Reagan M. Marble, Cox Smith**

An Oil and Gas Primer: Fundamentals, Fracking, and Recent Litigation Trends
(TBLS Approved: Civil Trial Law and Real Estate Law)

► **Pat Boone, Mediator & Special Master, Boone Mediation**

Mediation: A Guide for Paralegals (TBLS Approval: Bankruptcy Law, Civil Trial Law, Family Law, Personal Injury Law, and Real Estate Law)

Online registration - May 11, 2015 by credit card, check, or money order @ www.txpd.org/annual-meeting/



Scruples

Ethics of Utilizing Cloud Storage for Documents with Personal Identifying Information

Ellen Lockwood, ACP, RP

More and more firms and corporations are going paperless, at least for some files and processes. This often includes utilizing cloud storage providers such as Goggle Drive, Microsoft OneDrive, Apple iCloud Drive, and Dropbox. Most providers offer encryption of documents, both while uploading and while stored with the provider. The majority of providers also offer different levels of access to the documents that are controlled by the account administrators. The levels of access may include the access to only certain documents or folders, the ability to read but not download documents, as well as full access to all documents and functions.

In addition to the standard responsibility of a firm or company to maintain the confidentiality of client and work-product documents, there is an additional responsibility to protect documents that include personal identifying information such as social security numbers, dates of birth, addresses, and similar information. This information may be included in documents provided by the client, medical records, or from other sources. Courts require that personal identifying information be redacted when filing documents that include this information. And while

filing cabinets may be locked and electronic files may be password protected, there are additional issues when those documents are stored by a third-party provider, especially in the cloud.

While cloud storage providers do offer many protections for documents, including encryption and restricted access, one of the primary areas of concern is when documents are downloaded, particularly onto mobile devices. Mobile devices, including laptops, are often not secured as well as desktop devices and local file servers. Theft of mobile devices is also a concern. Mobile devices are some of the most commonly lost and stolen items and are often taken from vehicles, at airports, and other public places. Users may also forward downloaded documents from their mobile devices to others, whether intentionally or accidentally. Most cloud storage systems have no method for tracking this kind of activity.

While firms and companies could prohibit download of confidential documents and documents with personal identifying information to mobile devices, doing so would likely be unreasonable and not enforceable. Firms and companies could also redact all personal identifying information from documents before they are uploaded to cloud storage, but that could

be time-consuming if not impossible to accomplish, as well as the potential for issues if those documents must be produced to opposing counsel.

One option would be to encrypt documents on download and require they are only unencrypted when actively working on the document and be encrypted again when saving them on the user's computer or device. There are also software options that work with a user's cloud storage accounts and put the documents in an additional "safe zone" as well as permit administrators to deactivate access immediately by a particular mobile device, among other features. However, each of these alternatives also has drawbacks and potential complications.

If a firm or company chooses to store documents with personal identifying information in the cloud, the firm or company will continue to have the responsibility of ensuring that they have taken reasonable steps and precautions to protect that information from unauthorized access. This includes researching all security features of cloud storage providers and determining what additional precautions, if any, must be taken, and how those precautions will be handled and enforced.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past

president of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook published by West Legalworks. You may follow her at www.twitter.com/paralegaletics. She may be contacted at ethics@txpd.org.

At Home in Provence as Recorded in my Memory!

Clara Luna Buckland, CP

Another wonderful trip—this year to Provence, Southern France! In telling you about this trip I know that I will find great joy in thinking back and remembering the sites, the smells, the food, the wine, the laughs and the friendships tied to this delightful trip and magnificent place. We arrived in Nice in the early afternoon on Saturday, April 18. Upon arriving we traveled by coach through the picturesque countryside to Avignon, the heart of Provence tucked between the French Alps (which in April are still covered with snow) and the Mediterranean. The lush countryside and the homes with their pale yellow or salmon-colored roofs peeking out from among the rolling hills reminded us that we were far from home.

Upon arriving in Avignon we could not ignore the city walls or ramparts. We learned that the ramparts (called “intra-Moros”) were built between 1359 and 1370. These walls and towers still encircle the inner-city today. After getting situated in our hotel rooms, getting some rest and freshening up, it was time for our welcome reception. We walked to the beautiful hotel le Cloître Saint Louis, formerly a 16th century Jesuit



school, with its moss covered fountain and impressive old sycamore trees standing 40-plus feet tall in the welcoming courtyard. There we enjoyed champagne and delicious French hors d'oeuvres as we made new friends and caught up with our fellow travelers, many of whom we had not seen since our travels to Vienna and Prague last year. Thereafter, we enjoyed exquisite French cuisine: a five-course meal in the lovely dining room. There was a group of German people enjoying what appeared to be a celebratory meal and they were singing; we applauded them. Then, at

Ginger Smith's prompting, we proudly stood up and belted out “The Eyes of Texas;” they applauded us—it was a lot of fun!

On Sunday we launched on a walking sightseeing tour of Avignon starting with a tour of one of the oldest and most important medieval Gothic buildings in Europe—the Palais des Papes (Pope's Palace). The palace was the home of the Sovereign Pontiffs in the 14th

century. Our local tour guide, Marie, met up with us and walked us through several of the larger-than-life rooms, with their Giovannetti's frescoes, some faded with age, where we enjoyed hearing about the life of the pontiffs and learning about the history of this gargoyle-adorned, beautiful old place. After the tour we took a break and enjoyed some French ice cream in one of the squares. Then it was on to the Pont d'Avignon Saint Bénézet by foot (“pont” is French for bridge), built

between 1177 and 1185. This impressive old bridge spans the Rhone River between Villeneuve-lès-Avignon and Avignon, and stands out among the hustle and



bustle of modern city life. From there we traveled by coach to Vers-Pont-du-Gard near Remoulins to the Pont du Gard, the world's tallest Roman bridge built over 2000 years ago. This magnificent structure supplied the citizens of Nimes with running water for five centuries and with its impressive stature, perfect preservation and soaring arches makes it the greatest bridge ever built in classical times. We capped off the day with a vineyard tour and wine tasting at the Caveau Domaine



Mousset. But this was not just a wine tasting—it was wine school!! We learned about the upper nose, the lower nose, the “tears of wine” in the glass and how to hold a wine glass! This beautiful green region with its rolling hills and count-



less vineyards is called the Châteauneuf du Pape and has been producing wine since the 13th century.

Next came Monday—a Monday like no other! We attended le Ecole de cuisine de La Mirande, Le Marmitan (cooking class) with Chef Séverine Sagnet, a lovely, energetic, and passionate young woman! When we arrived, we were treated to a cup of tea and pastry in the beautiful courtyard, then it was on to class in the beautiful old kitchen with its wood burning stove. All the ingredients were fresh and we learned how to cut artichokes and asparagus correctly, and how to prepare shellfish, cook monkfish and prepare duck for cooking, among many other things. Thereafter, we sat at the long table in the warm dining room that was set for all 25 of us with Chef Séverine joining us for the meal that we had prepared: Asparagus Velouté with goat cheese mousse and citrus zest, Pan Fried Monkfish with asparagus and basic coulis, Baked Filet of Duck with carrots, purple artichokes and baby potatoes, and finished with a Chocolate Cake with a Raspberry Chocolate Ganache—a Raspberry Melted Heart adorned with fresh strawberries and cream! I had never enjoyed a meal with that many people sitting at a table at the

same time—I had only seen that on television! This experience was a lot of fun for us, plus Chef Séverine gave us printed copies of the recipes we prepared that day and we got to keep our aprons!

On Tuesday we traveled to the charming town of Saint Rémy, one of the oldest towns in France and the birthplace of Nostradamus. Toward the end of the 19th century Vincent van Gogh self-admitted himself as a patient for a year at the St. Paul Asylum where he painted 150 canvases. While in Saint Remy we had the opportunity to walk around the old town and do some shopping, while others went to visit the asylum before sitting down to a delicious

lunch outdoors underneath a canopy. We learned that after the destruction of the Roman city of Glanum the town was redeveloped to the location where Saint Rémy is today. Two Roman structures however, l’Arc de Triomphe and le Mausolée des Jules, remain where the ancient city of Glanum used to be and we got to see them for ourselves. From there, we traveled to the amazing ruins of an old citadel in the heart of the Alpilles range—a true eagle’s nest, the Château des Baux-de-Provence with its working medieval-era catapult, a live presentation by combating knights and archery demonstration. Our



very own tour guide Chris showed off his talents on the crossbow. And let us not forget the breathtaking panoramic views of the region from above. Before heading back to Avignon we were treated to a most unique multimedia experience that literally immerses you in art at the Carrières de Lumières. Imagine going into an enormous, abandoned quarry with squared off caverns, then watching as the walls come to life with the art of some of the most famous painters—Michelangelo, Raphael, Da Vinci and mesmerizing moving art videos accompanied by dramatic music! It was a beautiful experience!

Wednesday’s excursion was to the



quaint city of Arles where we toured the amphitheater and the Roman arena (coliseum) which is still used today for bullfights. We learned that as in Spain, they too have the running of the bull, although in reality it appears the bull runs the humans! This day was a slow day to explore the city by foot which included shopping—lots of shopping by some—and a lovely lunch before heading back to Avignon. That evening we were free to explore on our own. A group of us went to the square where we had a delicious paella dinner and a glass (or two) of wine.

We welcomed Thursday with anticipation as we left Avignon and started our journey in the early morning traveling by coach to the small city of Aix-en-Provence. It was market day and we were “released” to do some serious shopping and have

lunch on our own. Then we hopped back into the coach and traveled through the amazing countryside and the Les Alpilles, a range of mountains which are an extension of the French Alps with the highest peak at 1,627 feet, back to the Côte d'Azur, more commonly known as the French Riviera, arriving in Nice. Seeing it for yourself makes you appreciate why this part of the world is more commonly known as the most glamorous of all the Mediterranean playgrounds with its pristine blue ocean, beautiful beaches, homes and the city that seems to spread up and lovingly embrace the mountains. When we arrived at our hotel, The Westminster, imagine our delight when we discovered that we had balconies that faced the ocean with a magnificent view. That evening we went for an orientation tour of some of the city's many sights including the Promenade des Anglais and dinner before calling it a night.

Friday was a free day so many of us decided to take the coach to Monaco. We departed early and took the route de la Moyenne Corniche—an amazing, winding road that takes you high up as it hugs the moun-



tains, traveling through several manmade tunnels in the rock, with the cities and the ocean below. Our coach driver, Cyril, stopped for us to take photos of the amazing views of the ocean, where a cruise ship had dropped anchor, the neighborhoods, beaches and peers where marvelously expensive looking yachts were docked below. The ride was amazing with spectacular vistas! On our way to Monaco we stopped at the Fragonard Parfumeur located on a cliff in Grasse, where we went on a tour of the perfumery and saw how



perfume is made, and our noses were put to several smell tests (person- ally I did not fare too well). Then we were off to our destination: Monaco! Monaco is a beautiful, spotless, small sovereign principality which consists of six districts one of which is the famous Monte-Carlos

home of the casino and the Grand Prix. As a matter of fact, preparations were underway as the rally takes place on May 9 this year. We took the lift up to the Rocher (or Rock) which overlooks the port and on which the Prince's Palace, of the Grimaldi family, stands. While there

we witnessed the changing of the guard. Up on the Rocher is a neighborhood which has residency requirements, the Neo-Romanesque Cathedral, an amazing, meticulously maintained exotic plants garden, an aquarium, restaurants and of course shops, many shops! We did some shopping and after lunch returned to Nice in the late afternoon. After dropping off our purchases in our hotel rooms, we headed back out on foot to tour Nice's Old Town.

We returned to our hotel for some

rest before heading back out in the early evening to Le Grande Balcon Restaurant in the heart of New Town Nice for our farewell dinner. Dinner that night was as all our meals were during our travel—a luxurious four course French meal accompanied by wine, and friendship. Our time together was spent talking about what an amazing time we had just had the privilege of experiencing, and questioning each other about our favorite part of the trip, and some were already making plans for the trip in 2016, questioning where it would take them next year.

If you are able, I encourage you to join the PD in its travels and stretch your mind as you enjoy a remarkable experience!

Oh, and the French love carousals, there was one in every city we visited!

Jusqu'à la prochaine



fois que nous nous rencontrons, je vous souhaite a tous sante et bonheur.

Translation: Until the next time that we see each other—I wish you health and happiness

Visit Tuscany on April 15–23, 2016 with the Paralegal Division travel group. Florence, Italy will be home base while visiting the Tuscany countryside. Don't miss viewing The David by Michelangelo, Santa Maria del Fiore Duomo in Florence, Siena for its beauty, Assisi to experience the life of St. Francis, the leaning tower of Pisa, and so much more; food and gelato, to name just two. Details of the 2016 trip can be found under the NEWS at www.txpd.org.



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