

January 2003

## Health Care Law

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### Recommended Citation

Thomas Wm. Mayo, *Health Care Law*, 56 SMU L. REV. 1767 (2003)  
<https://scholar.smu.edu/smulr/vol56/iss3/23>

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# HEALTH CARE LAW

Thomas Wm. Mayo\*

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## INTRODUCTION

**D**ESPITE much turmoil in the health care industry, the past Survey year was a relatively quiet one for health law developments in Texas, even for a non-legislative year. To some extent, the year has been at least as notable for the cases that were not decided as for the ones that were. One important case—*Ramirez v. McIntyre*<sup>1</sup>—was de-

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1. *Ramirez v. McIntyre*, 59 S.W.3d 821 (Tex. App.—Austin, 2001, pet. granted) (holding that whether a physician who did not bill for emergency services was nonetheless



cided by the Austin Court of Appeals during the early part of the current Survey year and was significant enough to be included in last year's *Texas Survey*.<sup>2</sup> The case had been at the Supreme Court of Texas for fourteen months before it was argued,<sup>3</sup> however, and a decision is probably still months away. A similar fate appears to have befallen a case argued to the supreme court on the April 3, 2002:<sup>4</sup> *HCA, Inc. v. Miller ex rel. Miller*.<sup>5</sup> The year has offered up some important cases, though, and even a little drama.

## I. INDIVIDUAL RIGHTS

### A. ABORTION

In 1999, the legislature enacted chapter 33 of the Family Code, a "parental-notification" law that requires physicians to notify parents of a minor at least forty-eight hours before performing an abortion.<sup>6</sup> The notification requirement does not apply, however, if an immediate abortion is needed to save the life of the minor or to protect her from serious bodily harm,<sup>7</sup> or if the minor has obtained a judicial bypass of the notification requirement.<sup>8</sup> The judicial bypass procedure requires the trial court to rule on the minor's application for bypass and to "issue written findings of fact and conclusions of law not later than 5 p.m. on the second business day after the date the application is filed with the court."<sup>9</sup> Fail-

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precluded from invoking the protection of Texas' Good Samaritan law was a disputed question of fact that made summary judgment inappropriate).

2. See Thomas Wm. Mayo, *Health Care Law*, 55 SMU L. REV. 1113, 1121-28 (2002).

3. See docket sheet for McIntyre v. Ramirez, Tex. No. 01-1203, available at <http://www.supreme.courts.state.tx.us/FILES/SCT/01/01-1203.HTM> (last accessed on March 23, 2003).

4. See docket sheet for S.A.M. ex rel. Miller v. HCA, Inc., Tex. No. 01-0079, available at <http://www.supreme.courts.state.tx.us/FILES/SCT/01/01-0079.HTM> (last accessed on March 23, 2003). The petition was filed with the supreme court on January 29, 2001.

5. *HCA, Inc. v. Miller ex rel. Miller*, 36 S.W.3d 187 (Tex. App.—Houston [14th Dist.] 2000, pet. granted) (reversing a \$60 million judgment against the defendant hospital and holding that the hospital had a duty to resuscitate the newborn, and the parents had no legal right to withhold their consent to resuscitation). This case was discussed in Mayo, *supra* note 2, at 1117-20. Although the author contributed research and analysis for the brief filed by the hospital defendants both in the court of appeals and the supreme court, the comments in this article are mine alone and should not be attributed in any way to the defendants.

6. TEX. FAMILY CODE ANN. § 33.002 (Vernon 2002). A guardian or managing conservator may also be notified. *Id.*

7. *Id.* § 33.002(a)(4).

8. *Id.* § 33.002(a)(2). The bypass procedure permits a court of competent jurisdiction to approve the abortion without parental consent if the court finds one of three preconditions has been proved by a preponderance of the evidence: (1) that "the minor is mature and sufficiently well informed to make the decision to have an abortion without" parental notification; (2) that "notification would not be in the best interest of the minor"; or (3) that "notification may led to physical, sexual, or emotional abuse of the minor." *Id.* § 33.003(h).

9. *Id.* § 33.003(h). A nearly identical deadline applies to the decision of the court of appeals. *Id.* § 33.004(b). If the minor's application is denied by the trial court and that decision is affirmed by the court of appeals, the minor has the right to an "expedited confidential appeal" to the supreme court. *Id.* § 33.004(f).



ure to meet the statutory deadline means the application is deemed to have been granted<sup>10</sup> and is the basis for the statute's third exception to the parental-notification requirement.<sup>11</sup>

In *In re Jane Doe 10*,<sup>12</sup> the trial court denied the minor's application by placing the word "No" next to two of the three grounds that would support granting the application, leaving blank the third ground (relating to the possibility of sexual, physical, or emotional abuse if the parents are notified) and placing a check mark next to the words, "The application is denied."<sup>13</sup> In addition to not ruling on the abuse prong, the trial made no written findings of fact or conclusions of law as to any of the bases for bypass.

On appeal from the appellate court's affirmance of the trial court's denial of her application, the minor argued that the trial court's failure to enter the mandatory findings and conclusions within the two days meant that her application should be deemed granted. The supreme court agreed<sup>14</sup> as long as the minor had introduced at least "some evidence" of the potential for abuse.<sup>15</sup> The supreme court extended its earlier holding in *In re Jane Doe*<sup>16</sup> and ruled that the omitted ruling, finding, or conclusion will be deemed to have been found in the minor's favor if there is "some" evidence—more than a scintilla—to support the omitted finding.<sup>17</sup> The supreme court reviewed the minor's uncontradicted testimony with respect to the possibility of physical or emotional abuse and concluded that she had met the low evidentiary burden of "some evidence" and reversed the court of appeals.

This was not the first time a trial court failed to make findings and conclusions in support of its ruling, and a somewhat impatient supreme court repeated its "admonishment" to the lower courts that findings and conclusions are mandatory under the statute, and that "particularized findings [are required] when credibility or maturity issues are involved."<sup>18</sup>

In the next parental-notification case to come before it, the supreme court's impatience must have turned into astonishment. The trial court in

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10. *Id.* § 33.003(h).

11. *Id.* § 33.002(a)(3).

12. *In re Jane Doe 10*, 78 S.W.3d 338 (Tex. 2002).

13. *Id.* at 340.

14. *Id.*

15. *Id.* at 341.

16. *In re Jane Doe*, 19 S.W.3d 346, 357 (Tex. 2000).

17. *In re Jane Doe 10*, 78 S.W.3d at 341, 342. In *Jane Doe*, the trial court ruled against the applicant on the "mature and sufficiently well informed" prong of the bypass statute. The court specifically found that the minor was not sufficiently well informed and made no finding as to her maturity. 19 S.W.3d at 356. The supreme court held that on appeal, the applicant is entitled to a finding that she is mature as long as there is some evidence in the record on that issue. *Id.* at 357. Thus, in *Jane Doe*, the supreme court applied the "some evidence" rule to an omitted element in the first prong of the judicial bypass statute. In *Jane Doe 10*, the court applied the rule to an entire prong, holding that it would deem the abuse prong to have been established, in the absence of a ruling or a finding on that prong, as long as there was some evidence in the record as to the potential for sexual, physical, or emotional abuse if the applicant's parents were notified. 78 S.W.3d at 341.

18. *In re Jane Doe 10*, 78 S.W.3d at 343.



*In re Jane Doe II*<sup>19</sup> never ruled on the merits of the minor's application. Instead, on the day of the evidentiary hearing, the court "sua sponte concluded that the parental bypass law was unconstitutional on various grounds."<sup>20</sup> The supreme court reminded the district court that it had ruled more than two years earlier that trial courts should not raise and decide constitutional issues *sua sponte*, especially in judicial bypass proceedings, and that the supreme court expected lower courts to follow its rulings, not disregard or criticize them.<sup>21</sup>

## B. HEALTH CARE PROVIDERS AND FREEDOM OF SPEECH

In 1999, the legislature enacted section 101.201(b)(4) of the Texas Occupations Code,<sup>22</sup> which prohibits testimonials in advertising by health care professionals. The attorney general reviewed the law and concluded that "[a]lthough we cannot definitively conclude as a matter of law that a blanket ban is unconstitutional, we believe it is highly likely that a court would so conclude."<sup>23</sup>

The attorney general noted that the United States Supreme Court has held that professional advertising is a type of commercial speech and is entitled to some protection. The government can regulate commercial speech that concerns unlawful activity or is misleading. Although section 101.201 deems all testimonials to be inherently misleading, the attorney general concluded that health-care testimonials do not concern an unlawful activity and have not been shown to be inherently misleading.<sup>24</sup> Accordingly, the government can regulate testimonials by health professionals only if the state satisfies the three-part test laid down by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*:<sup>25</sup> (1) "The State must assert a substantial interest to be achieved by restrictions on commercial speech," (2) "the restriction must directly advance the state interest involved," and (3) "the governmental interest could [not] be served as well by a more limited restriction on commercial speech."<sup>26</sup>

Even assuming the state could satisfy the first two prongs of the *Central Hudson* test, the attorney general concluded that the restriction likely failed the third prong of the test—that the restriction be narrowly tailored.<sup>27</sup> Section 101.201 does not define "testimonial" and leaves a health care professional without any guidance as to its likely scope or interpretation by a court.<sup>28</sup> The Occupations Code also does not state

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19. *In re Jane Doe II*, 92 S.W.3d 511 (Tex. 2002).

20. *Id.* at 512.

21. *Id.* at 512-13 (citing *In re Jane Doe II*, 19 S.W.3d 278, 284 (Tex. 2000)).

22. TEX. OCC. CODE ANN. § 101.201(b)(4) (Vernon 2003).

23. Op. Tex. Att'y Gen. No. JC-0458 (2002).

24. *Id.* at 3.

25. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

26. *Id.* at 564.

27. Op. Tex. Att'y Gen. No. JC-0458, at 3.

28. *See id.*



who can make a testimonial used in health professional advertising, and the case law does not support blanket bans on classes of advertising.<sup>29</sup> Finally, a statutory requirement of disclaimers or explanations would be an effective and more narrowly drawn restriction that could avoid the constitutional defect in section 101.201.<sup>30</sup>

## II. PHYSICIANS

### A. CERTIFIED NONPROFIT ORGANIZATIONS

In Attorney General Opinion JC-0559,<sup>31</sup> Attorney General Cornyn answered whether the Insurance Code authorizes the Texas Department of Insurance to examine the records of “approved nonprofit health corporations”<sup>32</sup> (“ANHC’s”), which are regulated by the Texas State Board of Medical Examiners. The question concerned ANHCs that have a contract with an HMO to provide only medical services that the organization’s physicians are professionally licensed to provide in exchange for a capitated payment.

The attorney general began with the observation that ANHCs that provide health care services on a capitated basis on behalf of an HMO are not required to obtain a certificate of authority under either the Health Maintenance Organization Act<sup>33</sup> (“HMO Act”) or article 21.52F of the Insurance Code.<sup>34</sup> On the other hand, article 20A.17 of the HMO Act<sup>35</sup> authorizes the department to examine HMOs, and that authority extends to the examination to those records of a contracting ANHC that are “relevant to its relationship with the health maintenance organization.”<sup>36</sup> The department’s authority to examine a nonprofit organization depends only on the existence of a contract between the HMO and the ANHC and is not affected by the fact that the ANHC’s physicians provide only medical services or that the ANHC is paid on a capitated basis. The scope of the Department’s examination authority extends to patient-care records (for the purpose of reviewing the quality of health care services provided) as well as to contracts, books, and other records that relate the

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29. *See id.* at 4.

30. *See id.* The attorney general’s opinion is consistent with, and drew support from, *Snell v. Dep’t of Prof. Regulation*, 742 N.E.2d 1282 (Ill. App. 2001), which still appears to be the only decided case on this issue.

31. Op. Tex. Att’y Gen. No. JC-0559 (2002).

32. Before the codification of the TEXAS HEALTH & SAFETY CODE, “certified nonprofits” (or “5.01(a)’s”) were authorized and regulated by the Texas State Board of Medical Examiners pursuant to § 5.01(a) of the Medical Practice Act, TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.01(a) (Vernon Supp. 1999), which has since been codified as TEX. OCC. CODE ANN. § 162.001-.003 (Vernon 2003). *Cf.* Thomas Wm. Mayo, *Health Care Law*, 53 SMU L. REV. 1101, 1101-02 & n.7 (2000).

33. TEX. INS. CODE ANN. art. 20A (Vernon Supp. 2002).

34. *Id.* art. 21.52F (requiring a certificate of authority from the Department of Insurance if ANHC “arrange[s] for or provide[s] a health care plan to enrollees on a prepaid basis”).

35. *Id.* art. 20A.17.

36. Op. Tex. Att’y Gen. No. JC-0559, at 10.



HMO-AHNC relationship.<sup>37</sup>

## B. DTPA

In the modern era of informed consent, to say nothing of the current litigation climate, it is rare (and generally unwise) for a physician to promise or guarantee a particular result. In the 1994 case of *Sorokolit v. Rhodes*,<sup>38</sup> the supreme court held that when such a promise is made and the results fall short of what was warranted, the physician may be subject not only to a claim of medical malpractice, but also to claims under the Deceptive Trade Practices Act<sup>39</sup> ("DTPA") for breach of express warranty and knowing misrepresentation.<sup>40</sup> Even when DTPA claims were properly raised, however, the supreme court "note[d] the possible application of the statute of frauds in such cases when properly raised by a defendant as an affirmative defense."<sup>41</sup>

In *Smith v. Elliott*,<sup>42</sup> the El Paso Court of Appeals took up the supreme court's suggestion. In this case, the physician allegedly promised her patient that after breast-reduction surgery "her breasts would look good," "she would be very pleased with the results," and the results would resemble those shown in photographs of previous surgeries performed by the defendant.<sup>43</sup> Instead, after the surgery there was significant scarring and the patient's breasts and nipples were different sizes. After concluding that the plaintiff had pleaded valid DTPA claims for misrepresentation and breach of warranty, the court of appeals ruled that the defendant had properly raised the affirmative defense of statute of frauds and, following *Sorokolit*, that the absence of a writing was fatal to her claims. The plaintiff argued that at least the misrepresentation claim, which she argued arises in tort, should survive the statute of frauds defense, even if the breach of warranty claim, which arises in contract, does not.<sup>44</sup> The court of appeals rejected the distinction, which was not supported by the

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37. *Id.* at 8. The opinion also addressed the scope of the department's authority with respect to an ANHC that has entered into a delegation contract with an HMO. This part of the opinion relied upon TEXAS INSURANCE CODE article 20A.18C before it was amended in 2001 and is relevant only to delegation agreements that were entered into before January 1, 2002, and have not been renewed after that date. See Op. Tex. Att'y Gen. No. JC-0559, at 14-20.

38. *Sorokolit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994).

39. TEX. BUS. & COM. CODE ANN. ch. 17 (Vernon 2002).

40. *Sorokolit*, 889 S.W.2d at 242-43. In its post-*Sorokolit* rulings, the supreme court has consistently narrowed its holding in *Sorokolit*, frequently finding that DTPA claims were simply medical malpractice claims masquerading as deceptive practices claims, in violation of the Medical Liability and Insurance Improvement Act, which prohibits DTPA suits based upon the physician's negligence, TEX. REV. CIV. STAT. ANN. art. 4590i, § 12(a) (Vernon Supp. 2003); see, e.g., *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999) (holding that alleged deceptive practices were merely attempts to recast medical malpractice claims); *MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38 (Tex. 1998) (same); *Gormley v. Stover*, 907 S.W.2d 448 (Tex. 1995) (same); *Walden v. Jeffrey*, 907 S.W.2d 446 (Tex. 1995) (same).

41. *Sorokolit*, 889 S.W.2d at 243 n.5.

42. *Smith v. Elliott*, 68 S.W.3d 844 (Tex. App.—El Paso 2002, pet. denied).

43. *Id.* at 845.

44. *Id.* at 847.



supreme court's opinion in *Sorokolit* and also is missing from the statute of frauds itself.<sup>45</sup>

### III. HOSPITALS

#### A. TEXAS HEALTH CARE INFORMATION COUNCIL

##### 1. Confidentiality

The Texas Health Care Information Council ("THCIC") is charged with developing "a statewide health care data collection system to collect health care charges, utilization data, provider quality data, and outcome data" and disseminating it for the benefit of employers, other health-care consumers, and health-care providers.<sup>46</sup> Covered hospitals must submit discharge data to the council, including: the individual patient's name, birth date, address, sex, race, ethnicity, and social security number; information about admission, diagnosis, surgical procedures, charges, and source of payment; certain accounting information, the name and number of the attending physician and the operating or other physician, and the name and address of the facility.<sup>47</sup>

In 2001 the legislature enacted chapter 181 of the Texas Health and Safety Code,<sup>48</sup> which requires hospitals to obtain written authorizations from patients prior to sending statutorily required confidential identifying information to THCIC. In response, the Executive Director of THCIC requested an opinion from the attorney general on the issue whether a reporting hospital must obtain the written consent of patients whose data are reported to the THCIC before the hospitals can submit the required information. The attorney general's answer was no.<sup>49</sup>

After concluding that a reporting hospital is a "covered entity," the opinion observed that chapter 181 allows certain disclosures of health information without the patient's written authorization:

A covered entity may use or disclose protected health information without the express written authorization of the individual for public health activities or to comply with the requirements of any federal or state health benefit program or any federal or state law. A covered entity may disclose protected health information: (1) to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including the reporting of disease, injury, vital events such as birth or death, and the conduct of public health sur-

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45. *Id.* at 847-48. The statute of frauds provides that the requirement of a signed writing applies to "an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider . . . ." TEX. BUS. & COM. CODE ANN. § 26.01(b)(8) (Vernon 2002).

46. TEX. HEALTH & SAFETY CODE ANN. § 108.006(a) (Vernon 2001).

47. 25 TEX. ADMIN. CODE § 1301.19(e) (2002). *See also id.* § 1301.12(a) (hospitals shall submit discharge files on inpatients).

48. TEX. HEALTH & SAFETY CODE ANN. ch. 181 (Vernon Supp. 2003).

49. Op. Tex. Att'y Gen. No. JC-0508, at 1 (2002).



veillance, public health investigations, and public interventions . . . .<sup>50</sup>

Based upon this express exception, the attorney general concluded that reporting hospitals need not obtain the prior written consent of their patients to report identifiable health information covered by the THCIC reporting statute.<sup>51</sup>

## 2. *Hospitals' Right to Review*

Another question submitted to the attorney general by THCIC's executive director asked whether THCIC must provide a hospital with an opportunity to review and comment on certain data as well as the agency's analysis of that data before THCIC may release them in response to a request for information about the hospital.<sup>52</sup> THCIC's opinion request was prompted by two requests for information, one "from a legislator 'for hospital-by-hospital admissions for treatment relating to trauma incidents,' and the other from a member of the public regarding the number of deaths at a particular hospital in 1999 and 2000."<sup>53</sup>

The attorney general began by noting that the THCIC statute requires the council to notify the reporting hospital if it receives a request for public use data about that provider.<sup>54</sup> The statute also "requires the council to allow a hospital to submit written comments regarding any specific public use data to be released concerning the hospital."<sup>55</sup> These provisions "apply whether or not the public use data is released in a report."<sup>56</sup> In addition, the attorney general concluded that the release of THCIC's summaries or analyses of "public use data" should be treated as a "report" within the meaning of the statute, which provides that "a report issued by the Council shall include a reasonable review and comment period for the affected providers before public release of the report."<sup>57</sup> The attorney general concluded that "'public release' means the release of a report to anyone or any entity other than the [THCIC] and affected providers, including another agency or a legislator."<sup>58</sup>

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50. Op. Tex. Att'y Gen. No. JC-0508, at 4 (quoting TEX. HEALTH & SAFETY CODE ANN. § 181.103).

51. Op. Tex. Att'y Gen. No. JC-0508, at 1. The remainder of the attorney general's opinion considered the preemptive effect of the federal privacy rule on Texas' scheme. But after the release of the attorney general's opinion, the Bush Administration eliminated the requirement that patients execute a prior written authorization before their health information may be released, thus eliminating the preemption problem. See, e.g., U.S. Dep't of Health & Hum. Servs., *Fact Sheet: Modifications To The Standards For Privacy Of Individually Identifiable Health Information—Final Rule* (Aug. 9, 2002), available at <http://www.hhs.gov/news/press/2002pres/20020809.html> (last accessed March 23, 2003).

52. Op. Tex. Att'y Gen. No. JC-0545 (2002).

53. *Id.* at 2 (quoting Letter from Jim Loyd, Executive Director, Texas Health Care Information Council, to Honorable John Cornyn, Texas Attorney General 1 (Mar. 21, 2002) (on file with the Opinion Committee)).

54. *Id.* at 6 (quoting TEX. HEALTH & SAFETY CODE ANN. § 108.011(e)).

55. *Id.* at 7 (citing TEX. HEALTH & SAFETY CODE ANN. § 108.011(g)).

56. Op. Tex. Att'y Gen. No. JC-0545, at 7.

57. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 108.011(f)).

58. *Id.* at 8-9.



## B. LIABILITY FOR CREDENTIALING DECISIONS—EXPERT'S REPORT

The plaintiff in *Rose v. Garland Community Hospital*<sup>59</sup> underwent several cosmetic surgeries that left her with painful and unsightly scarring around her face, breasts, abdomen, and other parts of her body. Subsequently, she sued her surgeon and the hospital. Rose alleged the hospital was negligent in its credentialing of the surgeon who operated on her.<sup>60</sup> The hospital moved to dismiss on the ground that Rose had not made a good faith effort to comply with the requirement in the Medical Liability and Insurance Improvement Act ("MLIIA") that she timely file an expert report.<sup>61</sup> The plaintiff argued unsuccessfully that her negligent credentialing claims were not "health care liability claims" that are governed by the MLIIA, and the trial court granted the hospital's motion to dismiss. The Dallas Court of Appeals reversed.

The court of appeals noted that not every claim asserted against a health care provider is a health care liability claim subject to the requirements of the MLIIA.<sup>62</sup> To determine which claims are within the scope of the statute, the court asked: Is the factual basis for the claim an inseparable part of the rendition of care to the plaintiff such that the claim requires a determination of whether a health care provider failed to meet the applicable standard of medical care?<sup>63</sup>

The court concluded that the negligent-credentialing claim did not fall within the MLIIA because the credentialing process is not performed during a patient's medical care, treatment, or confinement, but occurs separate from a patient's medical care and before a physician can treat a patient in the hospital.<sup>64</sup> Therefore, the court of appeals concluded that the plaintiff's credentialing claim against the hospital is not governed by the MLIIA and no expert's report was required.<sup>65</sup>

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59. *Rose v. Garland Cmty. Hosp.*, 87 S.W.3d 188 (Tex. App.—Dallas 2002, no pet.).

60. *Id.* at 189.

Specifically, [the plaintiff] alleged the hospital was negligent because it (i) allowed the doctor to perform and continue to perform surgery, (ii) entrusted the operating room and equipment to the doctor, (iii) recommended, granted, renewed, and continued the doctor's staff privileges, (iv) failed to deny or suspend the doctor's staff privileges and perform a reasonable investigation, and (v) failed to perform a reasonable investigation into the background, qualifications, history of surgical cases, and history of serious malpractice before recommending, granting, renewing, and continuing the doctor's staff privileges at a time when it knew or should have known the doctor was a reckless and careless physician and constituted a threat to his patients' safety.

*Id.* at 189 (footnote omitted). Additionally, she alleged the hospital was vicariously liable for the doctor's negligence on a variety of agency theories. *Id.*

61. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon Supp. 2003).

62. *Rose*, 87 S.W.3d at 191.

63. *Id.* at 191 (citing *Sorokolit*, 889 S.W.2d at 242; *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 672 (Tex. App.—Dallas 2001, no pet.) citing *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995) (per curiam)).

64. *Id.* at 192-93.

65. *Id.* at 193.



## C. OUT-OF-STATE HOSPITALS AND PERSONAL JURISDICTION

In *Townsend v. University Hospital*,<sup>66</sup> Julia Caren Townsend Olivares came to Mesquite Medical Center complaining of shortness of breath and coughing up blood. The examining physicians deemed her condition too serious to be treated there and transferred her to Medical City of Dallas. Dr. Weill, her examining physician at Medical City, reached the same conclusion as Mesquite Medical Center and transferred the patient to the Pulmonary Hypertension Center at University Hospital - University of Colorado ("UCH") in Denver, where the patient died five days later.<sup>67</sup>

The patient's survivors sued UCH, the University of Colorado Health Sciences Center, six physicians, and the individual members of the Institutional Review Board for UCH (collectively "the Colorado defendants"). The action was filed in Dallas County.<sup>68</sup> The Colorado defendants filed a special appearance and contested personal jurisdiction. The trial court agreed with the Colorado defendants and dismissed all claims for lack of personal jurisdiction.<sup>69</sup>

On appeal, the plaintiffs had two main arguments. First, they contended the Colorado defendants were subject to "specific jurisdiction" based upon their acceptance of the referral of a Texas resident and their treatment of her. The court studied the Colorado defendants' contacts with Texas and determined they were insufficient to satisfy specific jurisdiction:

The Colorado defendants all practiced in Colorado, none owned property or paid taxes in Texas, none were licensed to practice medicine in Texas, none advertised services in any Texas newspaper, magazine, telephone book, or other print media, or on any Texas radio or television network. All patients seeking treatment from the Colorado defendants traveled to Colorado; none of the Colorado defendants traveled to Texas or any other state to render care. All of the care received by Olivares by the Colorado defendants occurred in Colorado. . . . [N]one of the Colorado doctors had any contact with Olivares before her admission to UCH; the decision to transfer Olivares to UCH was Weill's independent decision made after consulting with Olivares and other Texas physicians; and no one at UCH or UCHSC encouraged or influenced Weill to transfer Olivares to Colorado. . . . None of the Colorado doctors contracted with Weill or any other Texas doctor or hospital for the referral of Texas patients. The Colorado defendants' only contact with Texas was that Olivares lived in Texas and her body was returned to Texas after her death in Colorado . . . . Specific jurisdiction over the Colorado defendants does not arise merely because they treated a Texas resident in their home state.<sup>70</sup>

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66. *Townsend v. Univ. Hosp.*, 83 S.W.3d 913 (Tex. App.—Texarkana 2002, pet. denied).

67. *Id.* at 918.

68. *Id.* at 913.

69. *Id.* at 918.

70. *Id.* at 920-21.



Based upon the impressive list of ways in which the Colorado defendants lacked contacts with Texas, the court of appeals observed, "Out-of-state doctors should not be subject to jurisdiction simply because the patient who receives treatment at their office happens to reside and work in Texas."<sup>71</sup>

The plaintiffs' second principal argument was that because the Colorado defendants advertised their program and services over the internet, Texas courts acquired general jurisdiction over them. The court noted that "[w]hen general jurisdiction is alleged, there must be 'continuous and systematic contacts' between the nonresident defendant and Texas."<sup>72</sup> For purposes of establishing general jurisdiction, the court observed that internet use falls into three groups: (1) "websites clearly used for transacting business over the internet;" (2) "'passive' websites, used only for advertising;" and (3) "interactive websites."<sup>73</sup> Because the website contained only contact information and product information, the court of appeals agreed with the trial court that general jurisdiction did not exist.<sup>74</sup>

#### IV. LIABILITY

##### A. MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT

###### 1. *Prejudgment Interest*

Subchapter P of the Medical Liability and Insurance Improvement Act ("MLIIA") provides for prejudgment interest on health care liability claims.<sup>75</sup> Subchapter K of the same statute caps awards of damages (other than those for past or future medical, hospital, and custodial care) against a physician or health care provider at \$500,000, adjusted for inflation.<sup>76</sup> The question for the Texas Supreme Court in *Columbia Hospital Corp. of Houston v. Moore*<sup>77</sup> was whether the cap in subchapter K applies to the award of prejudgment interest under subchapter P. The court held that it does.<sup>78</sup>

The court closely tracked its analysis in the 2000 case, *Horizon/CMS Healthcare Corp. v. Auld*,<sup>79</sup> in which the court held that the former general prejudgment interest statute—which, like Subchapter P, made no reference to Subchapter K or its cap—was subject to the Subchapter K cap in a health care liability case. "[T]he heart of Auld's analysis contin-

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71. *Id.* at 921 (citing *Oden v. Marrs*, 880 S.W.2d 451, 457 (Tex. App.—Texarkana 1994, no writ)).

72. *Id.* at 922 (citing *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991)).

73. *Id.*

74. *Id.*

75. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 16.01-.02 (Vernon Supp. 2003).

76. *Id.* § 11.02(a) (providing for \$500,000 cap), 11.04 (providing for adjustment of statutory cap based upon consumer price index).

77. *Columbia Hosp. Corp. of Houston v. Moore*, 92 S.W.3d 470 (Tex. 2002).

78. *Id.* at 474-75.

79. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887 (Tex. 2000).



ues to apply,” wrote the court, “and compels the result we reach today.”<sup>80</sup>

The court held that the *Auld* analysis applies to subchapter P for three reasons. First, prejudgment interest is prejudgment interest, regardless of whether it flows from the general statute on prejudgment interest or subchapter P. The type of damages authorized by subchapter P is the same as the type of damages the *Auld* court said are capped by subchapter K.<sup>81</sup> Second, the court asserted that general statutory purpose of the MLIIA, and of subchapters P and K in particular, is the same: to limit the damages liability of health care providers.<sup>82</sup> The application of subchapter K’s cap to subchapter P’s prejudgment interest provision would further the general and specific statutory purpose of the MLIIA in the same manner as the *Auld* decision did in 2000. And third, a cap is not inconsistent with prejudgment interest, and both subchapter K and subchapter P can live in perfect harmony.<sup>83</sup>

As the three dissenting justices pointed out, however, *Auld* is not a perfect guide for the decision because the similarities between *Auld* and *Moore* are more apparent than real.<sup>84</sup> They argued that, unlike the general prejudgment statute, subchapter P was enacted later in time than subchapter K and is the more specific of the two.<sup>85</sup> They concluded that these distinguishing features, in tandem with ordinary principles of statutory construction, support the conclusion that subchapter P’s interest should be exempt from subchapter K’s cap. In addition, in a version of “the dog that didn’t bark” argument, the dissent observed that when the legislature amended the MLIIA and added subchapter P, it was well aware of the existence of subchapter K but chose not to refer to it—a clear sign that subchapter K should not be applied to prejudgment interest under the MLIIA.<sup>86</sup>

## 2. Statute of Limitations

In *Shah v. Moss*,<sup>87</sup> “Ronald Moss sued [Dr. Shah], claiming Shah negligently performed surgery on Moss’ right eye and neglected to provide adequate follow-up treatment.”<sup>88</sup> The timeline for the critical events in the case are as follows:<sup>89</sup>

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80. *Moore*, 92 S.W.3d at 473.

81. *Id.*

82. *Id.* at 473-74. This is easy to understand as to the MLIIA and subchapter K, but not as obvious as to subchapter P. The court explained that subchapter P excludes prejudgment interest on future damages, while the general prejudgment statute allowed interest to accrue on future damages. *Id.* at 473. Thus, even though the legislature added a new source of liability when it amended the MLIIA to add subchapter P, the net effect was to reduce the total damages that had been available prior to the enactment of subchapter P.

83. *Id.* at 474.

84. *See id.* at 475-77 (Phillips, C.J., and Baker & Hankinson, JJ., dissenting).

85. *Id.* at 476.

86. *Id.* at 477.

87. *Shah v. Moss*, 67 S.W.3d 836 (Tex. 2001).

88. *Id.* at 838-39.

89. *See id.* at 839.



- MAY 9, 1991: Dr. Shah first saw Moss after another eye doctor diagnosed Moss as having a detached retina.
- JUNE 21, 1991: "Dr. Shah surgically implanted a scleral buckle to keep the retina in place." Moss complained of blurred vision and saw a second specialist, who recommended removal of the scleral buckle. Shah advised against removal of the buckle.
- NOVEMBER 28, 1992: Dr. Shah removed the scleral buckle.
- DECEMBER 1992: Moss saw Dr. Shah for a follow-up visit.
- JANUARY 1993: Moss saw Dr. Shah for two "one-month recheck" visits.
- MAY 1993: Moss saw Dr. Shah for a "three-month recheck" visit.
- OCTOBER 21, 1993: Moss saw Dr. Shah for his final recheck visit; retina still in place.
- NOVEMBER 22, 1994: During his "yearly exam," Moss complained of a new "floater" in his vision. Shah discovered that retina had again become detached.
- DECEMBER 12, 1994: Shah repaired the second detached retina. However, Moss still complained of blurred vision and eventually lost sight in the eye.
- JULY 24, 1995: Moss visits Dr. Shah for the last time. Dr. Shah tells Moss he can do nothing more to improve Moss' vision.
- APRIL 19, 1996: Moss notified Shah of his malpractice claims.
- JUNE 28, 1996: Moss filed suit.

The trial court granted Shah's motion for summary judgment, finding that Moss' claims were time-barred under the Medical Liability and Insurance Improvement Act.<sup>90</sup> The trial court apparently agreed with Shah's assertion that his treatment was complete after the November 1992 surgery and that subsequent visits did not constitute a continuing course of treatment but were instead routine periodic checkups. The El Paso Court of Appeals reversed and remanded for a trial on the merits, holding that the statute of limitations did not bar Moss' action, based on the court's conclusion that the follow-up visits were part of a continuing course of treatment and that the two-year limitations period did not begin to run until the medical treatment was completed.<sup>91</sup>

The supreme court held Moss' claims to be time-barred. First, the negligent-surgery claim was on a date certain and the court of appeals erred in applying the course-of-treatment completion doctrine.<sup>92</sup> Subsequent recheck visits and the yearly exam may have constituted on-going treatment, but that is irrelevant to the negligent-surgery claims where the date

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90. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2003).

91. *Shah*, 67 S.W.3d at 840.

92. *Id.* at 843.



of the surgery (Nov. 28, 1992) is ascertainable.<sup>93</sup> Thus, the two-year limitations period expired on November 28, 1994, nineteen months before Moss filed suit.

The court concluded that the final recheck visit, in October 1993, was the last date on which Shah could have failed to provide adequate follow-up treatment.<sup>94</sup> This follows from the court's conclusion that the November 1994 "yearly exam" was not part of the follow-up treatment for the November 1992 surgery. Thus, the negligent follow-up claim was time-barred after October 23, 1995.<sup>95</sup>

Four justices dissented. They concluded that, when viewed in the light most favorable to the non-movant (Moss), a fact question existed as to whether the November 1994 exam was part of the follow-up treatment for the November 1992 surgery.<sup>96</sup> Moreover, by the majority's reckoning, the limitations period began to run on Moss' negligent follow-up claim before he had suffered injury, a result deemed "anomalous" by the dissenters.<sup>97</sup> Even with respect to the negligent-surgery claim, the dissenters disagreed that the negligence occurred on an ascertainable date and therefore would have applied the course-of-treatment doctrine, pursuant to which the limitations period begins to run when the course of treatment is complete. Because of the existence of triable fact issues as to the completion date, the dissenters would have affirmed the court of appeals as to the negligent-surgery claim as well.<sup>98</sup>

## B. DEATH OF AN UNBORN FETUS

In the 1999 case of *Parvin v. Dean*,<sup>99</sup> the Fort Worth Court of Appeals ruled that the parents of a stillborn post-viability fetus could maintain a wrongful death cause of action against the driver whose alleged negligence caused or contributed to the collision that produced the *in utero* injuries to the fetus. Despite supreme court precedent that is (and continues to be) directly contrary,<sup>100</sup> the court of appeals held that any interpretation that denies parents a claim based on the stillbirth of their fetus is unconstitutional.

In *Reese v. Fort Worth Osteopathic Hospital, Inc.*,<sup>101</sup> the Fort Worth Court of Appeals reaffirmed its holding in *Parvin* and applied it for the

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93. *Id.*

94. *Id.* at 845.

95. *Id.*

96. *Id.* at 848 (O'Neill, J., Phillips, C.J., and Enoch & Hankinson, JJ., dissenting).

97. *Id.*

98. *Id.* at 850-51.

99. *Parvin v. Dean*, 7 S.W.3d 264 (Tex. App.—Fort Worth 1999, no pet.).

100. See *Witty v. Am. Gen. Capital Distribs., Inc.*, 727 S.W.2d 503, 504 (Tex. 1987) (citing *Yandell v. Delgado*, 471 S.W.2d 569 (Tex. 1971) ("In 1971, we held that live birth was required for a child to have a cause of action for prenatal injuries. Similarly, where there has been no live birth, the clear, unambiguous language of the Wrongful Death Act precludes recovery for the death of a fetus.")).

101. *Reese v. Fort Worth Osteopathic Hosp.*, 87 S.W.3d 203 (Tex. App.—Fort Worth 2002, pet. filed).



first time to a defendant in a medical malpractice case.<sup>102</sup> The plaintiffs in *Reese* were parents of a viable fetus that died *in utero* and was stillborn, allegedly as the result of the negligence of a physician who treated the mother for rapid heartbeat and dizziness. Plaintiffs sued the physician and the hospital where the care was delivered both for their own loss and as legal representatives of Clarence Reese, the stillborn fetus. The trial court ruled that supreme court precedent barred claims for injury to a fetus that dies before being born and granted summary judgment to the defendants.<sup>103</sup>

The court of appeals affirmed as to the father's medical malpractice claim because he was merely a bystander, not a patient of either the physician or the hospital.<sup>104</sup> The court reversed as to all other claims: the mother's own claim for medical malpractice and the parents' claim on behalf of the stillborn fetus, Clarence.<sup>105</sup> The court of appeals stated that "we find no reason why our holding in *Parvin* should not apply to cases involving claims for medical negligence."<sup>106</sup>

#### V. HEALTH CARE FINANCE: REIMBURSEMENT ACTION BY INSURER

In *Bryan v. Citizens National Bank in Abilene*,<sup>107</sup> the leading Texas case on restitution based upon the payor's mistake of fact, the Texas Supreme Court described the rule this way: "Generally, a party who pays funds under a mistake of fact may recover restitution of those funds if the party to whom payment was made has not materially changed his position in reliance thereon."<sup>108</sup> In a subsequent health-benefits case, the Fourteenth Court of Appeals fashioned an exception to the *Bryan* rule. In *Lincoln National Life Insurance Co. v. Brown Schools, Inc.*,<sup>109</sup> an insurer was not allowed to recover overpayments where it had mistakenly paid a hospital for care after the expiration of benefits. The court of appeals held that the risk of loss should stay with the insurer when "(1) the overpayment was made due solely to the insurer's mistake and lack of care; (2) the hospital made no misrepresentations to induce the payment; and (3) the hospital acted in good faith without prior knowledge of the mistake."<sup>110</sup>

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102. *Id.* at 205.

103. *Id.* at 204-05.

104. *Id.* at 206.

105. *Id.*

106. *Id.* at 205.

107. *Bryan v. Citizens Nat'l Bank in Abilene*, 628 S.W.2d 761 (Tex. 1982).

108. *Id.* at 763.

109. *Lincoln Nat'l Life Ins. Co. v. The Brown Schools*, 757 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1988, no writ).

110. *Id.* at 413-14, *relying on* *Federated Mut. Ins. Co. v. Good Samaritan Hosp.*, 214 N.W.2d 493 (Neb. 1974). Both *Lincoln National* and *Federated Mutual* are notable for their express disavowal that the payee must have changed its position or relied to its detriment in order to avoid liability to the payor for any overpayment. *See Lincoln Nat'l*, 757 S.W.2d at 413 ("we find a material change of position unnecessary in our analysis of this case"); *Federated Mut.*, 214 N.W.2d at 495 ("Defendant here was not required to show a



In *Holden Business Forms Co. v. Columbia Medical Center of Arlington Subsidiary, L.P.*,<sup>111</sup> the Fort Worth Court of Appeals adopted the *Lincoln National* rule. The case involved an insured who was treated in a hospital after suffering serious injuries in a high-speed motorcycle crash. After the insurer paid almost \$90,000 to the hospital, it discovered that its insured was intoxicated at the time of the accident, which was the basis for an express exclusion in the policy. The court of appeals held that, as between the innocent third-party hospital and the insurer, the risk of loss should fall on the party in the better position to know that the claim was not covered by the policy.<sup>112</sup> The court emphasized that the insurer's mistake might have consisted solely in its payment of the hospital's claim with inadequate knowledge as to the applicability of the intoxication exclusion.

The "lack of care" requirement was not discussed much by the Fort Worth court, and it is difficult to tell whether the court regarded it to be an element of the *Lincoln National* defense. The court did note, however, that the insurer introduced no evidence that it had sought the insured's medical records. Thus, its argument that it was impeded in its ability to make a coverage determination by the refusal of the Louisiana police to release the accident record rang somewhat hollow.<sup>113</sup>

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change of position in reliance and to its detriment, because it was in the position of a bona fide purchaser for value"). *But see* R. Brent Cooper & Michael W. Huddleston, *Insurance Law*, 44 Sw. L.J. 329, 377 (1990) ("the [*Lincoln National*] court held that overpayment to a third party, as opposed to the insured, could not be the subject of a claim of restitution if the third party materially changes its position in reliance on the payment"). If a change of position and detrimental reliance on payment were required, the *Lincoln National* rule would be of doubtful applicability to situations in which the hospital was under a state or federal duty to provide the care, regardless of the availability of insurance or the patient's ability to pay, as is the case under, *e.g.*, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2000).

111. *Holden Bus. Forms Co. v. Columbia Med. Ctr. of Arlington Subsidiary, L.P.*, 83 S.W.3d 274 (Tex. App.—Fort Worth 2002, no pet.).

112. *Id.* at 278.

113. *Id.*