MICHAEL P. PENICK
Burdin Mediations
Dallas, Texas
972-248-6200
214-528-1411

State Bar of Texas
14TH ANNUAL ADVANCED
MEDICAL MALPRACTICE COURSE
March 15-16, 2007
Santa Fe, NM

CHAPTER 9.3
# TABLE OF CONTENTS

I. DAMAGES IN WRONGFUL PREGNANCY CLAIMS ....................................................................................... 1

II. TIMING OF EXPERT REPORTS ............................................................................................................... 1

III. SUING EMPLOYEES OF TEXAS TORT CLAIMS ACT ENTITIES ................................................................. 1
BURNING ISSUES IN MEDICAL
MALPRACTICE

I. DAMAGES IN WRONGFUL PREGNANCY CLAIMS

Wrongful pregnancy claims are claims brought by the parents of a child born following a failed tubal ligation or a failed vasectomy. The burning issue is what damages are recoverable in these cases.

Nationally, the courts take four approaches to determining what damages may be obtained in a wrongful pregnancy case. The rules of recovery are (1) full recovery, (2) no recovery, (3) the benefits rule, and (4) limited damages. Full recovery allows all traditional elements of damage to be recovered, which is permitted in only two states. No recovery is the law only in Nevada; no damages are available in these cases there. Six states apply the benefits rule, where the jury is asked to award the costs of raising the child in the case. In the remaining forty-one states, including Texas, apply the limited damages rule, which does not permit recovery of the costs of raising the child, but does allow recovery of some elements of damage but not others.

Texas adopted the limited damages rule in Flax v. McNew, 896 S.W. 2d 839 (Tex. App. - Waco 1995, no writ). In Flax, the Waco court determined that allowable damages are medical expenses for both the original and any corrective procedure, the mother's pain and suffering during pregnancy and during any corrective procedure, emotional distress, lost wages and permanent impairment.

Flax was controlling Texas precedent on this issue for one year. In 1996 the Texarkana court of appeals weighed in, deciding Crawford v. Kirk, 929 S.W. 2d 633 (Tex. App. - Texarkana 1996, writ denied). In Crawford, the Texarkana court agreed with the Waco court that Texas should adopt the majority rule of limited damages, but disagreed significantly as to what elements of damage would be permitted. Under Crawford, the parents may only recover medical expenses associated with the original procedure and any corrective procedure.

Since the holding in Crawford v. Kirk, there have been no further reported appellate cases in Texas on this issue. Litigants in Waco and Texarkana know what law will apply. Outside those jurisdictions, plaintiffs continue to argue the merits of Flax, while defendants rely on Crawford. We continue to await a pronouncement from the Texas Supreme Court.

II. TIMING OF EXPERT REPORTS

The burning issues here are (1) when does the time period for the filing of the 120-day report begin to run and (2) how does non-suiting and refiling the case affect the report's due date.

In 2003 the legislature enacted section 74.351(a) in this form:

In a health care liability claim, a claimant shall, not later than the 120th day after the date [ the claim ] was filed, serve... expert reports... (brackets added)

In 2005, the legislature amended this statute, deleting the words "the claim" and substituting the words "the original petition".

The Houston 14th court of appeals considered the timing issue under the 2003 version of the statute in Mokkala v. Mead, 178 S.W. 3d 66 (Tex. App. - Houston [14th Dist.] 2005, pet. filed). In Mokkala, plaintiffs filed the 120-day mandated report more than 120 days after suit was filed. Plaintiffs then took a non-suit and then refiled the same claims against the same defendants. Under these facts, the Mokkala court held the 120-day expert reports untimely. The court noted that the plain language of the statute said that the report was due not later than the 120th day after the claim was filed and that a claim is a cause of action, not a lawsuit. The court also noted that if the legislature had wanted to set the 120-day time limit in relation to the date the claimant files a lawsuit, it could have done so.

In 2005, the legislature did so, amending the statute as set out foregoing. This revision was apparently made so that plaintiffs can nonsuit and refile as was attempted in Mokkala, but a final determination on the meaning of this revision has not as yet been addressed by the Texas supreme court.

III. SUING EMPLOYEES OF TEXAS TORT CLAIMS ACT ENTITIES

Suits against units of state and county governments must be brought under the Texas Tort Claims Act, CPRC Section 101.101 et seq. Notably, the statute covers suits against all county hospitals, and caps the liability of those hospitals at $100,000. The statute also requires the plaintiff to prove use or misuse of tangible real or personal property as an essential element of the claim. Prior to September 2003, plaintiffs regularly avoided the application of this statute by filing suit against the employees of the hospital, omitting the hospital completely. The case would then proceed as any other common law medical negligence case.

In 2003, the legislature amended the statute:

Sec. 101.106. ELECTION OF REMEDIES.

(a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or
recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents...

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and IF IT COULD HAVE BEEN BROUGHT UNDER THIS CHAPTER AGAINST THE GOVERNMENTAL UNIT, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed. (Emphasis added)

The burning issue is whether plaintiffs, in light of this statute, can under any circumstances proceed against the employees and avoid the application of the Texas Tort Claims Act. Plaintiffs are now advancing an interesting argument in that regard.

Section 101.021 of the act requires plaintiff to show that plaintiff's personal injury or death was caused by a condition or use of tangible personal or real property. If this element is missing, then there is no claim under the TTCA. Plaintiffs are therefore bringing cases against the employees only, asserting that the claim could not "have been brought under the act" as required by section 101.106(f) above. Recent rulings of the Texas supreme court at least indirectly support this approach, because the supreme court has continued to narrow and restrict what constitutes a condition or use of tangible property sufficient to waive immunity.

For example, in San Antonio State Hosp. v. Cowan, 128 S.W. 3d 244 (Tex. 2004), James Cowan was involuntarily committed to the San Antonio State Hospital with psychotic and suicidal tendencies. The hospital took inventory of Cowan's personal effects, including his suspenders and walker, but allowed Cowan to keep those items with him. Two days later, Cowan used the suspenders and a piece of pipe from the walker to commit suicide. Cowan's wife and children brought a wrongful death claim under the TTCA. The trial court denied the hospital's plea to the jurisdiction based on sovereign immunity, and the court of appeals affirmed, holding that the hospital employees misused the suspenders and walker by letting Cowan retain them, thereby waiving immunity. The Texas supreme court disagreed, making the distinction that the tangible property was misused by the patient, not by the hospital employees. The court concluded that a governmental unit does not use personal property within the meaning of the statute by allowing someone else to use it, and rendered judgment for the hospital. Plaintiffs are using holdings like Cowan to support their argument that no sufficient use or misuse of tangible personal property occurred to permit the suit to be brought under the TTCA and that the employees are fair game under common law negligence principles.

While there are no Texas Supreme Court cases that directly address the issue, several courts of appeal have spoken to it. In Williams v. Nealon, 199 S.W. 3d 462 (Tex. App. - Houston [1 Dist.] 2006, pet. filed 9/28/06), plaintiff sued two doctors employed by the University of Texas Medical Branch but did not name the tort claims act entity itself. Defendants moved for dismissal, asserting that the case could have been filed against the UTMB and that they were entitled to dismissal under section 101.106(f). The trial court granted the motion, but the court of appeals reversed, holding that the claims were for common law negligence and could not have been brought under the TTCA. Therefore, plaintiffs could proceed under common law against the defendants. Similarly, in Phillips v. Dafonte, 187 S.W. 3d 669, (Tex. App. - Houston [14th Dist.] 2006, no pet. h.), plaintiff sued two physicians employed by UTMB, alleging that they failed to inform her that her biopsy indicated breast cancer. UTMB was not sued, but it was alleged, admitted and agreed that the doctors were acting within the course and scope of their employment with UTMB. The defendants sought dismissal under 101.106(f). The court found that the claim was one for negligent failure to communicate a medical diagnosis and could not have been brought under the TTCA; dismissal was therefore denied.

The San Antonio court of appeals addressed the issue in Franka v. Velasquez, 2006 WL 2546535 (Tex. App. - San Antonio 2006, pet. filed 2/21/07). This shoulder dystocia case was filed against two physicians employed by the University of Texas Health Sciences Center. The physicians moved for dismissal, asserting
that tangible personal property was used because a vacuum extractor was employed to assist in the delivery process. Looking at the case as a whole, the court opined that it was in reality a claim for medical negligence not encompassed by the TTCA's waiver of immunity, and dismissal was denied.

On November 30, 2006 the Amarillo court of appeals discussed the law as related to this issue in Walkup v. Borchardt, 2006 WL 3455254 (Tex. App. - Amarillo 2006, no pet. h.). Here two physicians employed by Texas Tech University Health Sciences Center were sued. Plaintiff alleged fifteen acts of negligence causing her to become paralyzed, the primary acts being failure of the physicians to obtain an MRI, thin section CT or other diagnostic procedure sufficient to diagnose her condition. Both doctors were within the course and scope of their employment at the time of the alleged negligence. The court concluded that the substance of plaintiff's cause of action was the failure of the doctors to act or to use medical equipment to diagnose plaintiff's condition and that such failures do not constitute a cause of action under the TTCA. Dismissal was denied.

We await final resolution of this issue by the Texas supreme court.