



Case Summaries January 12, 2024

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OPINIONS

NEGLIGENCE

Willful and Wanton Negligence

Marsillo v. Dunnick, ___ S.W.3d ___ (Tex. Jan. 12, 2024) [[22-0835](#)]

In this healthcare-liability case arising from an emergency-room physician's treatment of a snakebite, the issue is whether the plaintiff has produced evidence of "willful and wanton negligence" by the physician.

Because antivenom poses risks to a patient, the hospital at which Dr. Kristy Marsillo worked developed detailed guidelines for the determination of whether and when administration of antivenom is appropriate. Marsillo followed those guidelines when treating rattlesnake-victim Raynee Dunnick. As a result, Marsillo began infusing Raynee with antivenom three hours after she arrived at the hospital and four hours after she was bitten. Raynee was transferred to a children's hospital where she continued to receive antivenom over the course of a few days before being released.

Raynee's parents sued Marsillo, alleging that her failure to administer antivenom immediately upon Raynee's arrival at the hospital caused Raynee lasting pain and impairment. By statute, a physician is not liable for injury to a patient "arising out of the provision of emergency medical care in a hospital emergency department" without proof that the physician acted "with willful and wanton negligence." The trial court granted Marsillo's no-evidence motion for summary judgment on breach of duty and causation, but the court of appeals reversed.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's summary judgment for Marsillo. The Court began by examining the meaning of willful and wanton negligence. The parties and the lower courts have assumed that the term is synonymous with gross negligence. The Court agreed that willful and wanton negligence is "at least gross negligence."

Next, the Court explained that Raynee had not produced evidence sufficient to raise a genuine issue of material fact on gross negligence because her expert's affidavit is conclusory and, thus, no evidence. Because Raynee had not raised a fact issue on gross negligence, the Court left to a future case the task of defining the precise contours of willful and wanton negligence.