



Case Summaries May 10, 2024

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DECIDED CASES

MEDICAL LIABILITY

Damages

Noe v. Velasco, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[22-0410](#)]

The issue in this case is what damages, if any, are recoverable in an action for medical negligence that results in the birth of a healthy child.

Grissel Velasco allegedly requested and paid for a sterilization procedure to occur during the C-section delivery of her third child. Her doctor, Dr. Michiel Noe, did not perform the procedure and allegedly did not inform her of that fact. Velasco became pregnant again and gave birth to a healthy fourth child. Velasco brought multiple claims against Dr. Noe, including for medical negligence. The trial court granted Dr. Noe summary judgment on all claims. A divided court of appeals reversed as to the medical-negligence claim, concluding that Velasco raised a genuine issue of material fact regarding her mental-anguish damages, as well as the elements of duty and breach.

The Supreme Court reversed and reinstated the trial court's judgment. The Court first held that Velasco's allegations stated a valid claim for medical negligence. But the Court explained that Texas law does not regard a healthy child as an injury requiring compensation. Thus, when medical negligence causes the birth of a healthy child, the types of recoverable damages are limited. The Court rejected recovery of noneconomic damages arising from pregnancy and childbirth, such as mental anguish and pain and suffering, reasoning that those types of damages are inherent in every birth and therefore are inseparable from the child's very existence. The Court also held that the economic costs of raising the child are not recoverable as a matter of law. But the Court held that a parent may recover economic damages, such as medical expenses, proximately caused by the negligence and incurred during the pregnancy, delivery, and postpartum period. The Court emphasized that these types of damages do not treat the pregnancy itself or the child's life as a compensable injury. In this case, because Velasco failed to present evidence of recoverable damages, the trial court correctly granted summary judgment.

PROCEDURE—TRIAL AND POST-TRIAL

Incurable Jury Argument

Alonzo v. John, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) ([per curiam](#)) [[22-0521](#)]

The issue in this personal injury suit is whether an accusation of race and gender prejudice directed at opposing counsel was incurably harmful.

Roberto Alonzo was driving a tractor-trailer when he rear-ended Christine John and Christopher Lewis. To recover for their injuries, John and Lewis sued Alonzo and his employer, New Prime, Inc. John requested \$10-12 million in non-economic damages, but the defense asked the jury to award her \$250,000. In closing, plaintiffs' counsel argued that "we certainly don't want this \$250,000" and then remarked: "Because it's a woman, she should get less money? Because she's African American, she should get less money?" The defense moved for a mistrial, but the motion was overruled. The jury awarded John \$12 million for physical pain and mental anguish, and the trial court rendered judgment on the verdict. The court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court, holding that defense counsel was entitled to suggest a smaller damages amount than John sought without an uninvited accusation of race and gender bias. The resulting harm was incurable by withdrawal or instruction because the argument struck at the heart of the jury trial system and was designed to turn the jury against opposing counsel and their clients.

PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

Transfer of Trust Property

In re Tr. A, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[22-0674](#)]

This case raises issues of subject-matter jurisdiction and remedies arising from a co-trustee's transfer of stock from the family trust to herself and then to others.

Glenna Gaddy, a co-trustee of a family trust, transferred stock from the family trust to her personal trust without the participation or consent of the other co-trustee, her brother Mark Fenenbock. Glenna then sold the stock to her two sons. Mark sued Glenna.

The probate court declared the stock transfer void and ordered that the stock "be restored" to the family trust. Glenna appealed. The court of appeals vacated and remanded, holding *sua sponte* that the probate court lacked jurisdiction to declare the stock transfer void because Glenna's sons, the owners of the stock, were "jurisdictionally indispensable" parties.

The Supreme Court reversed both the court of appeals' judgment and the probate court's order. The court of appeals relied on Texas Rule of Civil Procedure 39 to support its jurisdictional holding, but the Supreme Court pointed to its caselaw teaching that parties' failure to join a person will rarely deprive the court of jurisdiction. The Court concluded that this is not such a rare case, and while the absence of Glenna's sons may have limited the relief the probate court could grant, it did not deprive the court of jurisdiction to resolve the case before it.

The Court then turned to other issues raised by the parties. The Court rejected Glenna's contention that she did not commit a breach of trust as a matter of law. But it agreed the probate court had erred by imposing a constructive trust requiring Glenna to restore the stock shares to the family trust when she no longer owns or controls the shares. The Court remanded to the probate court for further proceedings with the instruction that if Glenna's sons are not made parties on remand, then any relief must

come from Glenna or her trust or through the ultimate distribution of the family trust's remaining assets.

GOVERNMENTAL IMMUNITY

Official Immunity

City of Houston v. Sauls, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[22-1074](#)]

The issue in this interlocutory appeal is whether a city established that official immunity would protect its police officer from liability in a wrongful-death suit for the purpose of retaining its governmental immunity under the Tort Claims Act.

Officer Hewitt was responding to a priority two suicide call when his vehicle struck a bicyclist crossing the road, tragically ending the bicyclist's life. At the time of the accident, Hewitt was traveling 22 miles per hour over the speed limit and without lights or sirens to avoid agitating the patient on arrival. The bicyclist's family sued the City of Houston for wrongful death based on Hewitt's alleged negligence.

The Tort Claims Act waives a city's immunity from suit for injuries or death caused by its employee's negligence in operating a motor vehicle if the employee would be personally liable. But when government officials perform discretionary duties in good faith and within their authority, the law shields them from personal liability. Relying on Hewitt's official immunity, the City moved for summary judgment, asserting that its governmental immunity was not waived. The trial court denied the motion, and the court of appeals affirmed, holding that the City did not establish Hewitt's good faith through the required need–risk balancing factors.

The Supreme Court reversed the court of appeals' judgment. Emphasizing that the good-faith test is an objective inquiry, the Court held that the City established Hewitt was (1) performing a discretionary duty while acting within the scope of his authority in responding to the priority two suicide call and (2) acting in good faith, given that a reasonably prudent officer in the same or similar position could have believed his actions were justified in light of the need–risk factors. Because the plaintiffs failed to controvert the City's proof of Hewitt's good faith, the Court rendered judgment dismissing the case.

PROCEDURE—APPELLATE

Finality of Judgments

In re Lakeside Resort JV, LLC, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) (per curiam) [[22-1100](#)]

The issue in this mandamus proceeding is whether a purportedly “Final Default Judgment” is final for purposes of appeal despite expressly describing itself as “not appealable.”

Mendez was a guest at Margaritaville Resort Lake Conroe, which Lakeside Resort JV owns but does not manage. Mendez alleged that she sustained severe bodily injuries after stepping in a hole. She sued Lakeside, seeking monetary relief of up to \$1 million. Lakeside failed to timely answer; it alleged that its registered agent for service failed to send it a physical copy of service and misdirected an electronic copy. Mendez subsequently moved for a default judgment. The draft judgment prepared by Mendez's counsel was labeled “Final Default Judgment” and contained the following language: “This Judgment finally disposes of all claims and all parties, and *is not appealable*. The Court orders execution to issue for this Judgment.” (Emphasis added.) The trial court signed the order. After the trial court's plenary jurisdiction had expired and the time

for a restricted appeal had run, Mendez sent Lakeside a letter demanding payment.

Lakeside quickly filed a motion to rescind the abstract of judgment and a combined motion to set aside the default judgment and for a new trial, arguing that the “Final Default Judgment” was not truly final. The trial court denied Lakeside’s motions, thinking that the judgment was final and that its plenary power had expired. The court of appeals denied mandamus relief, describing the judgment as erroneously stating that it was “not appealable” but holding that the judgment was clearly and unequivocally final on its face.

In a per curiam opinion, the Supreme Court conditionally granted Lakeside’s petition for writ of mandamus. The Court held that the judgment’s assertion of non-appealability does not unequivocally express an intent to finally dispose of the case, but in fact affirmatively undermines or contradicts any such intent. The Court then held that default judgments that affirmatively undermine finality are not final regardless of whether the trial court’s order or judgment resolves all claims by all parties, so finality may not be established by turning to the record to make that showing. Accordingly, the Court ordered the trial court to vacate its orders denying Lakeside’s motions and allowing execution.

EVIDENCE

Privilege

In re Richardson Motorsports, Ltd., ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[22-1167](#)]

The issue in this case is whether a minor’s psychological treatment records are discoverable under the patient-litigant (*i.e.*, patient-condition) exceptions to the physician-patient and mental-health-information privileges.

Father purchased an ATV from Richardson. During a ride with his two children, E.B. and C.A.B, a recalled steering mechanism malfunctioned, causing the vehicle to roll over. E.B. suffered physical injuries and contemporaneously witnessed her brother’s death. E.B. later sued Richardson for negligence, seeking damages for her physical injuries and for mental anguish. During discovery, Richardson requested E.B.’s psychological treatment records from E.B.’s treating psychologist and pediatrician, and E.B. moved to quash the requests, claiming privilege under Texas Rules of Evidence 509(c) and 510(b). The parties primarily disputed the extent to which E.B.’s mental condition was at issue and the applicability of the patient-condition exceptions.

Following the trial court’s denial of the motions to quash, E.B. filed a petition for writ of mandamus. The court of appeals conditionally granted mandamus relief vacating the trial court’s orders, holding that E.B.’s routine claim of mental anguish was insufficient to trigger the patient-condition exceptions.

Richardson filed a petition for writ of mandamus in the Supreme Court and the Court conditionally granted relief. After rejecting the argument that bystander recovery alone was sufficient to trigger the exceptions, the Court held that E.B.’s mental condition is part of both her claim and Richardson’s causation defense. As such, the patient-condition exceptions to privilege apply and E.B.’s records are discoverable.

PROCEDURE—APPELLATE

Finality of Judgments

In re Urban 8 LLC, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) (per curiam) [[22-1175](#)]

This case concerns the effect of a trial court order declaring a default judgment issued months prior to be a final judgment.

Susan Barclay sued Urban 8 for negligence. After Urban 8 failed to answer, the trial court issued an order titled “Final Order of Default” in November 2021. The order awarded Barclay all the damages she requested except for exemplary damages. Months later, Urban 8 filed a “Motion to Set Aside Interlocutory Judgment and Motion for New Trial,” which the trial court denied in August 2022. That order expressly stated that the November 2021 order was the court’s final judgment and that it fully and finally disposed of all parties and claims and was appealable.

Urban 8 filed both a petition for writ of mandamus challenging the November 2021 order and a notice of appeal as to the August 2022 order. The court of appeals abated Urban 8’s appeal pending resolution of its petition for writ of mandamus, which it then denied.

The Supreme Court also denied mandamus relief, holding that Urban 8 had an adequate remedy by appeal. The Court cautioned that a judgment cannot be backdated or retroactively made final, as doing so could deprive a party of an adequate remedy by appeal. But the Court did not read the August 2022 order to have that effect. The August 2022 order modified the November 2021 order by providing that it fully and finally disposed of all parties and claims and was appealable. The modification caused the timeline for appeal to run from the date of the August 2022 order. As a result, the court of appeals has jurisdiction over Urban 8’s pending appeal.

PROCEDURE—APPELLATE

Interlocutory Appeal Jurisdiction

Harley Channelview Props., LLC v. Harley Marine Gulf, LLC, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[23-0078](#)]

The issue in this case is whether an interlocutory order requiring a party to convey real property within thirty days as part of a partial summary judgment ruling is an appealable temporary injunction.

Harley Marine Gulf leases a maritime facility from Harley Channelview Properties. When Harley Marine attempted to exercise a contractual option to purchase the facility, Channelview refused on grounds that any option right had terminated. Harley Marine sued for breach of the option contract and sought specific performance.

The trial court granted Harley Marine’s partial summary judgment motion, and it ordered Channelview to convey the property to Harley Marine within thirty days. Channelview appealed, but the court of appeals dismissed the appeal for want of jurisdiction, holding that the trial court’s order granted permanent relief on the merits and thus was not an appealable temporary injunction.

The Supreme Court reversed. It held that an order to immediately convey real property based on an interim ruling is a temporary injunction from which an interlocutory appeal may be taken. An order functions as a temporary injunction when it operates during the pendency of the suit and requires a party to perform according to the relief demanded. The absence of the protective hallmarks of a temporary injunction, like a trial date or a bond, may invalidate the injunction, but it does not change the

character and function of the order.

JURISDICTION

Subject Matter Jurisdiction

Tex. Windstorm Ins. Ass'n v. Pruski, ___ S.W.3d ___, 2024 WL ___ (Tex. May 10, 2024) [[23-0447](#)]

The issue in this case is whether Section 2210.575(e) of the Insurance Code, which provides that a suit against the Texas Windstorm Insurance Association “shall be presided over by a judge appointed by the judicial panel on multidistrict litigation,” deprives a district court of subject matter jurisdiction over such a suit when the judge is not appointed by the panel.

Stephen Pruski filed two claims with his insurer, TWIA, which partially accepted and partially denied coverage for both claims. Pruski sued TWIA in Nueces County district court under Chapter 2210 of the Insurance Code, seeking damages for improper denial of coverage. The case was assigned to a court without an appointment by the MDL panel. Pruski argued that the judge was not qualified to render judgment because she was not appointed by the panel, as required by statute. The court denied Pruski’s motion for summary judgment, granted TWIA’s motion for summary judgment, and rendered a final, take-nothing judgment for TWIA.

The court of appeals reversed, holding that a trial judge who is not appointed by the MDL panel is without authority to render judgment in a suit under Chapter 2210. The court thus held that the trial court’s judgment was void and remanded with instructions to vacate the judgment.

The Supreme Court reversed, holding that although the panel-appointment requirement is mandatory, it is not jurisdictional. The Court first explained that a statute can be, and often is, mandatory without being jurisdictional and that classifying a statutory provision as jurisdictional requires clear legislative intent to that effect. The Court then reasoned that nothing in Section 2210.575(e) or Chapter 2210, generally, demonstrates a clear legislative intent to deprive a district court of jurisdiction over a suit against TWIA unless the judge is appointed by the MDL panel. Thus, the trial court did not lack subject matter jurisdiction over the suit simply because the judge was not appointed by the MDL panel. The Court remanded the case to the court of appeals to address additional issues raised by the parties.