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Texas Court Says Birth Injury Suit Needn't Clear Higher Bar

By **Y. Peter Kang**

Law360, Los Angeles (February 17, 2017, 10:55 PM EST) -- A Texas appeals court held Thursday that medical malpractice claims arising from emergency treatment are only subject to a heightened legal standard when the patient is first treated in a hospital's emergency department, giving the parents of a baby who was injured during birth a better chance to pursue their claims.

A trial judge had ruled that the baby's parents must prove negligence by a "willful and wanton" liability standard under a Texas law regarding emergency medical treatment, but a three-judge Second District panel said the judge interpreted the law incorrectly. The panel said Section 74.153 of the Texas Civil Code does not apply to emergency medical care provided in an obstetrical unit when the patient is not first treated in an emergency department.

"The protections of Section 74.153 are triggered by the evaluation and treatment of the patient in the hospital emergency department," the panel wrote in a 27-page opinion. "Once triggered, whether the subsequent emergency medical care is administered in the hospital emergency department itself or whether the patient is then transferred to an obstetrical unit or a surgical suite to receive the emergency medical care, a willful and wanton negligence standard applies."

The case concerns a baby who experienced a shoulder nerve injury during its delivery by Dr. Marc Wilson at Texas Health Presbyterian Hospital in Denton.

The panel said that although emergency medical care was given to the mother, referred to in court papers as M.A., it didn't qualify for the heightened standard since she wasn't first treated in an emergency care unit.

The opinion, penned by Judge Bonnie Sudderth, discusses at length the "ambiguous" text used in a Texas law meant to stem the number of malpractice lawsuits, which included provisions designed to protect emergency department doctors treating first-time patients. Although Wilson argued that the heightened standard should apply in his case because emergency care was rendered, the panel said that to do so would run counter to the spirit of the legislation.

Looking at the legislative history, the panel said state lawmakers were addressing situations in which emergency department doctors and first responders are treating patients "blindfolded" as to their medical history and therefore should not be held to the standard of ordinary negligence — not situations such as the one presented in the instant suit.

"Read in light of the Legislature's unmistakable, expressed concern about the application of this statute to a fact scenario nearly identical to the one that presents itself here, we cannot ignore what plain grammar also tells us is a reasonable reading of this ambiguous statute — that Section 74.153 does not apply to patients who were not evaluated or treated in a hospital's emergency department immediately before receiving emergency care," the opinion states.

An attorney for the family, Kirk Pittard of Kelly Durham & Pittard LLP, told Law360 on Friday they were satisfied with the result.

"I think it was a good ruling. It was a very heavy grammatical analysis and very detailed," he

said. "It is clear from the legislative history that this is what the Legislature intended. They did not intend to have the protections for emergency room doctors apply to care given in an obstetrical unit."

An attorney for Wilson said the doctor and his legal team were disappointed with the ruling and are currently considering their options. An attorney for the hospital declined to comment.

The family is represented by Kirk L. Pittard of Kelly Durham & Pittard LLP and Maria Wormington of Wormington & Bollinger.

The hospital is represented by Greg P. Blaies of Blaies & Hightower LLP.

Wilson is represented by David M. Walsh IV and William H. Chamblee of Chamblee Ryan Kershaw & Anderson PC.

The case is D.A. et al. v. Texas Health Presbyterian Hospital of Denton et al., case number 02-16-00148-CV, in the Second Court of Appeals of the State of Texas.

--Editing by Mark Lebetkin.

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