

# Trial and Litigation Newsletter

## Chamblee Ryan P.C.

### TEXAS SUPREME COURT DECISION

***Virjar v. Puente*** addressed two major topics often seen in medical malpractice suits--settlement credits under Chapter 33 of the Texas Civil and Practice Remedies Code and periodic payments for future medical expenses under the Texas Medical Liability Act.

This case arose after a patient developed a severe brain disorder due to a thiamine deficiency. More specifically, there was evidence that the nurses noted symptoms associated with thiamine deficiency and the doctor did not read the notes. As a result, the doctor failed to order thiamine supplement. Experts testified that the alleged failure resulted in the patient developing Korsakoff's Syndrome—a debilitating brain disorder. The jury ultimately returned a \$14 million verdict.

#### 1 SETTLEMENT CREDITS

The patient's minor daughter sought damages for loss of consortium and loss of services. The minor daughter settled her claims prior to trial, leaving only the patient's claims to be tried at trial. The defendants moved for a settlement credit requesting a reduction in the award based on the daughter's prior settlement agreements pursuant to §33.012(c) of the Texas Civil Practice and Remedies Code, which provides that if a "claimant" in a healthcare liability claim pursuant to Chapter 74 has settled with one or more persons, the court shall reduce the amount of damages to be recovered by the claimant. The Texas Supreme Court reviewed and made clear that Chapter 33 of the Civil Practice and Remedies Code required a credit for the daughter's settlement because the daughter's claims were based on her mother's injuries—making the minor daughter a "claimant" as defined in Chapter 33 of the Texas Civil Practice and Remedies Code.

#### 2 PERIODIC PAYMENTS

Pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code, a court shall order periodic payments for future medical, health care, or custodial services at the request of the defendant physician or health care provider. The Court clarified that a request for periodic payments does not need to be included in an answer and can be requested post-trial.

### FAST FACTS

**Family Law:** Simply living with your significant other (even for several years) doesn't mean you're "common law" married. To be "common law" married, you need to (1) agree to be married; (2) live together as spouses; and (3) represent to others you're married. This issue came up in a recent case, *In the Interest of L.A.M. and L.A.M.*, minor children.

**Slip and Falls:** Premise liability and negligence are not interchangeable causes of action—a plaintiff may only assert one or the other, not both. The determination of which cause of action is applicable is fact dependent. *United Scaffolding, Inc. v. Levine* (Texas Supreme Court).

## JOKE OF THE MONTH

What is the difference between a catfish and a lawyer?

Answer: One is a bottom-dwelling, scum-sucking scavenger and the other is a fish.

## Our Community

Reagan Boyce is co-hosting the State Bar Women and Law Section's inaugural celebration of International Women's Day.

Join us at Taco Lingo in uptown on March 8, 2022, 5:30 p.m. – 7:00 p.m.

## ARBITRATION AND CONTRACT DISPUTES

The Dallas Court of Appeals in *Toriano Mandrell Kirk v. Tanita Nash Atkins* was faced with determining whether a contract with both an arbitration clause and a remedies provision rendered the earlier arbitration clause moot. The court noted that a party seeking arbitration had to show (1) an agreement to arbitrate existed; and (2) the claims were within the scope of that agreement. *Seven Hills Commercial, LLC v. Mirabel Custom Homes, Inc.* The court also noted that doubts as to scope are resolved in favor of arbitration. *Ascendant Anesthesia PLLC v. Abazi*. Accordingly, the court held that the arbitration agreement was never meant to be rendered moot by the later remedies provisions and reversed the trial court's order denying the motion to compel arbitration.

The key takeaway is to clearly lay out your intentions within the contract—leaving nothing to interpretation or chance. Keep in mind that if the contract has an arbitration clause, the chances of getting out of arbitration are slim as evidenced by the Dallas Court of Appeals decision referenced above.

