

# Sanctions Requested for Cow in the Road Case

by JOHN COUNCIL  
jcouncil@alm.com  
@john\_council

After a recent Texas Supreme Court decision cast serious doubts on his unusual argument, a retired doctor abandoned his attempt to use the state's medical malpractice tort reform laws to shield himself from a lawsuit filed by a plaintiff allegedly injured after hitting the defendant's loose cows.

Yet because the 82-year-old doctor has refused to completely dismiss his appeal—one that has tested the limits of the 2003 Texas Medical Liability Act (TMLA), which was designed to protect physicians from frivolous lawsuits—the plaintiff moved for sanctions in the case on May 14.

The background to *Archer v. Tunnell* is as follows. [See "How Is Hitting a Cow in the Road Med Mal?," *Texas Lawyer*, Jan. 19, 2015.]

Bobby Tunnell sued Richard K. Archer Sr. for personal injury after hitting several cows owned by Archer that had wandered into a roadway. Archer attempted to get the case dismissed by arguing that Tunnell's accident was really a health care liability claim by virtue of the fact that Archer is a retired physician. As such, Archer argued that Tunnell had failed to comply with Chapter 74 of the Texas Civil Practice & Remedies Code, which requires plaintiffs to first file "expert reports" detailing the expected standard of care of doctors before they can sue them.

The Fifth Court denied Archer relief

**"Appellants abandoned the only basis they claimed gave the court jurisdiction, and yet still refuse to dismiss the appeal," according to Tunnell's recent motion before the Fifth Court.**

last year, but Archer reasserted the Chapter 74 claim again before a trial court judge last month. The trial court denied Archer's motion to dismiss the case, a decision which he appealed to the Fifth Court. [See "Dallas Judge: Doctor's Cow in the Road Is Not Med Mal," *Texas Lawyer*, April 20, 2015.]

The basis of Archer's motion to dismiss is *Texas West Oaks Hospital v. Williams*, a 2012 decision from the Texas Supreme Court that requires plaintiffs to file expert reports when they sue doctors—even if

the plaintiff's claim has no direct relation to health care.

But on May 1, the high court arguably pulled back from that decision when it issued *Ross v. St. Luke's Episcopal Hospital*, which held that "a safety standards-based claim does not come within the TMLA's provisions just because the underlying occurrence took place in a health care facility, the claim is against a health care provider, or both." [See "Plaintiffs Bar Gives Rare Thumbs-Up for SCOTX Med-Mal Ruling," *Texas Lawyer*, May 4, 2015.]

Tunnell's lawyer, Leighton Durham, sent Archer's attorney Phillip Russ a letter requesting that the defendants dismiss the appeal in light of *Ross*, cautioning that he would pursue a motion for sanctions if they refused. Archer agreed to drop his Chapter 74 claim, but refused to completely dismiss the appeal so he could argue another jurisdictional question before the Fifth Court, according to Tunnell's motion for sanctions.

Tunnell argued that the court no longer has jurisdiction over Archer's remaining claim, and the defendant's refusal to dismiss the appeal should be punished.

"To the extent this appeal was not sanctionable when filed, it certainly is now. Appellants abandoned the only basis they claimed gave the court jurisdiction, and yet

still refuse to dismiss the appeal," according to Tunnell's recent motion before the Fifth Court.

"The only possible purpose for the refusal to dismiss the appeal is that appellants intend to delay this litigation as long as possible and cause unnecessary expense regardless of the consequences," according to the motion.

Russ, an Amarillo solo, said he and his client have done nothing wrong by pursuing—and later abandoning—the Chapter 74 claims.

"All you have to do is read *Texas West Oaks Hospital*. If that case hadn't said what it said, we wouldn't have done it," Russ said.

"I filed a status report saying we were going to abandon our claim about the expert reports in light of [*Ross*]. But we have a jurisdictional question for the court of appeals to rule on," said Russ, who added that the motion for sanctions is "ridiculous."

Durham, a partner in Dallas' Kelly, Durham & Pittard, said he filed the sanctions motion against the defendants as a last resort.

"I asked him twice to dismiss the appeal, and he's refused to do it. And it's clear there is no jurisdiction for an interlocutory appeal," Durham said.

"It was absurd from the beginning, and it's obvious that this was done for delay, because the two times he's brought this up, it was on the eve of trial settings," Durham said. 



Durham

## Attorneys Serving the Community - 29th Annual Luncheon

Friday, June 12 | 12 Noon at the Omni Hotel Dallas

### PRESENTING SPONSOR

The Members of Attorneys  
Serving the Community

### CRYSTAL SPONSORS

Baron & Budd, P.C.  
Carrington Coleman

### PLATINUM SPONSORS

D CEO Magazine  
Locke Lord LLP  
Eric and Vicki Niedermayer  
Omni Hotels and Resorts  
Platinum IDS  
Sidley Austin LLP  
Texas Lawyer  
The Marketing Connection  
TIER REIT  
Winstead PC

### GOLD SPONSORS

American National Bank of Texas  
Amy Stewart PC  
Baker Botts L.L.P.  
Lisa Blue Baron  
Cigna-HealthSpring  
Gardere Wynne Sewell LLP  
Gray Reed & McGraw, P.C.  
Jackson Lewis P.C.  
McKool Smith  
Mockingbird Financial Architects  
ORIX Foundation  
Thompson & Knight Foundation  
TXU Energy

### SILVER SPONSORS

Altep/SuperiorReview  
Counsel on Call  
Deloitte  
Fish & Richardson, P.C.  
HSSK  
Hunton & Williams LLP  
Jackson Walker L.L.P.  
Khirallah PLLC  
Lennox International Inc./  
Bracewell & Giuliani  
Littler Mendelson, P.C.  
Mac Adams Financial Group  
Newhouse + Noblin/  
Cortland Kelly Grynwald  
Norton Rose Fulbright  
Vinson & Elkins LLP



### KEYNOTE SPEAKER | Dick Hoyt

Make plans to hear Dick's amazing story of love and dedication. Hear how he and his son, Rick, have overcome incredible odds to become two of the most inspirational (and unlikely) athletes.

### HONORARY CHAIR | Dr. Logan Sherman

### MASTER OF CEREMONIES | Dawn Neufeld

### LUNCHEON CO-CHAIRS

Kelli Hinson

Carrington Coleman

Cortland Kelly Grynwald

Newhouse + Noblin Legal and Executive Search

For information and tickets to the luncheon  
please scan the QR code at left or contact:

KIMMIE HACK AT 817.635.6020 OR  
KHACK@HRATEXAS.ORG



**HELPING RESTORE ABILITY**  
independence through opportunity  
WWW.HELPINGRESTOREABILITY.ORG

Helping Restore Ability's goal is to help restore ability to individuals with disabilities by assisting them to remain self-sufficient so they may continue to live in their homes, go to school and/or work, and most importantly to maintain their independence and dignity.