

Sanctions Requested for Cow in the Road Case

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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

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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. 



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