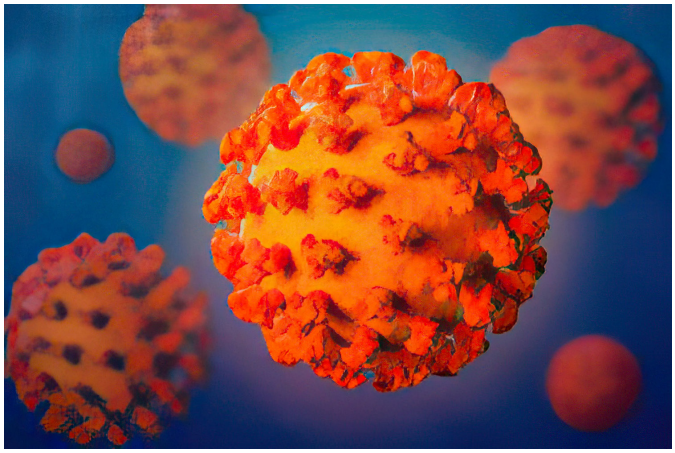
Houston [14th] Court of Appeals Grants Mandamus Compelling Trial Court to Allow Health Care Providers Affirmative Defense Under the Pandemic Liability Protection Act

by George Christian | Aug 28, 2024



In a pair of parallel cases, the Houston [14TH] Court of Appeals has granted a health care provider's petition for writ of mandamus, reversing a Washington County district court order denying the provider the gross negligence defense under the Pandemic Liability Protection Act.

The underlying proceeding in *In re Regency HIS of Brenham, LLC* (No. 14-23-00950-CV; July 18, 2024) from a health care liability claim filed in February 2022 against a nursing home for the death of a patient from COVID-19. The patient's death occurred on April 26, 2020. When Defendant answered the lawsuit in March, 2022, it asserted that "all claims related to the alleged exposure and contraction of COVID-19 are barred pursuant to" § 74.155, CPRC. This section raises the standard of proof from negligence to gross negligence in malpractice claims against health care providers "arising from the care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease," if the provider makes certain showings required by the statute. Plaintiff waited more than a year before filing a motion to strike Defendant's affirmative defense based on § 74.155 and then filed a motion for the trial court to establish plaintiff's standard of care as ordinary negligence by a preponderance of the evidence, not gross negligence. After a hearing, the trial court granted that motion. Defendant petitioned for mandamus.

A panel consisting of Chief Justice Christopher and Justices Wise and Jewell granted the petition. The court determined that the trial court clearly abused its discretion and that Defendant had no adequate remedy by appeal. Noting that the § 74.155 affirmative defense is as yet little developed, the court turned for help to a federal district court decision in Norman v. Dallas Tex. Healthcare LLC (No. 3:20-CV-03022-L, 2023 WL 4157485, (N.D. Tex. June 7, 2023), report and recommendation adopted, No. 3:20-CV-3022-L, 2023 WL 8791183 (N.D. Tex. Dec. 19, 2023). In that case, plaintiff filed a medical malpractice lawsuit against several providers in state court in August 2020. Defendants removed the case to federal court. About 10 months later, the Legislature enacted the Pandemic Liability Protection Act with retroactive effect. Defendants sought leave to amend their answer to assert the new defenses established under § 74.155. After the trial court granted leave, Defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

The federal district court determined that Texas law and the federal rules did not conflict and that Federal Rule of Civil Procedure 8 required a party to "affirmatively state any avoidance or affirmative defense... with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced to prevent unfair surprise." The court found that Defendants' amended answer provided specific facts supporting their entitlement to the § 74.155 defense. Observing that § 74.155(g) requires a health care provider who intends to raise a defense under that section by a specific deadline (the later of 60TH day after the date the claimant serves an expert report or the 120TH day after the date the provider files an original answer), the court of appeals concluded that Defendant gave Plaintiff fair notice and "specific facts" that it intended to assert the § 74.155 defense in both their original and amended answers. Additionally, the court remarked, Plaintiff could hardly claim "unfair surprise" when Plaintiff filed a motion to establish the burden of proof. The court further held that Defendant did not have an adequate remedy on appeal because the trial court's order meant that the case would be tried under the wrong standard, which would waste everybody's time and resources. It thus ordered the trial court to vacate its order and proceed in accordance with the opinion.

The second case, In re Brenham Nursing and Rehabilitation Center and Regency HIS of Brenham, LLC (No. 14-23-00949-CV; July 18, 2024), came from the same Washington County district court and arose from the death of a nursing home resident from COVID-19 on in April 2020. In an identical opinion, the same panel granted mandamus to vacate the trial court order establishing Plaintiff's burden of proof based on ordinary negligence rather than gross negligence.

These are the first cases we have seen in which health care providers have invoked the Pandemic Liability Protection Act's defenses in a trial court, only to be rebuffed (there may be some others, but we haven't yet picked up on them yet). As the court of appeals pointed out, § 74.155 is a (relatively) new statute that has not undergone much appellate review to date. We are encouraged by the court of appeals' ruling, which should in all likelihood terminate these cases and give trial courts the guidance they need to apply the statute appropriately.