



Case Summaries November 10, 2023

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GRANTED CASES

PROCEDURE—PRETRIAL

Summary Judgment

Malouf v. State ex rel. Ellis, 656 S.W.3d 402 (Tex. App.—El Paso 2022) *pet. granted* (Nov. 10, 2023) [[22-1046](#)]

A primary issue in this case is whether the State can conclusively establish Medicaid fraud at summary judgment when scienter is an essential element of the claim.

Dr. Malouf is a dentist who owned a chain of dental offices. Dr. Malouf and his associates were approved Medicaid providers who provided dental and orthodontic services to Medicaid recipients. Over a three-year period, Dr. Malouf submitted forms falsely representing that he provided services to Medicaid recipients, although the dental services provided to the beneficiaries of those claims were actually performed by other dentists in Dr. Malouf's practice.

Two private citizens brought separate qui tam actions against Dr. Malouf for violations of the Texas Medicaid Fraud Prevention Act. The trial court consolidated the cases after the State intervened in both. The State's live petition at the time of summary judgment asserted that Dr. Malouf knowingly failed to identify the license type and Medicaid billing number of the treating dentist on more than 1,800 Medicaid claims, listing himself as the treating dentist, when, in fact, another dentist had provided the services. Both parties moved for summary judgment, the State on traditional grounds and Dr. Malouf on no-evidence grounds. The district court denied Dr. Malouf's motion, granted the State's, and awarded more than \$16 million in civil penalties, attorney's fees for the State and the private citizens who originally brought qui tam actions, and other costs and sanctions against Dr. Malouf.

Dr. Malouf filed a petition for review, arguing that the State did not conclusively show that he failed to indicate the treating dentist's license type or that he acted knowingly. Specifically, Dr. Malouf contends that he did indicate the correct license type and that his testimony that he lacked personal knowledge of improper billing raised a genuine issue of material fact as to scienter. The Court granted the petition for review.

PROCEDURE—PRETRIAL

Discovery

In re Barnes, 655 S.W.3d 658 (Tex. App.—Dallas 2022), *argument granted on pet. for writ of mandamus* (Nov. 10, 2023) [[22-1167](#)]

The issue in this case is whether E.B.’s healthcare records are privileged from discovery when E.B. is seeking mental-anguish damages in a negligence and bystander-recovery suit.

Ten-year-old E.B. was injured, and her younger brother was killed, in an ATV rollover accident. E.B. and her parents sued the seller of the ATV, Richardson Motorsports, and other defendants. E.B.’s claims are for negligence and bystander recovery, for which she seeks mental-anguish and other damages. In her initial disclosures, E.B. designated a clinical psychologist and her pediatrician as fact witnesses and nonretained testifying experts. At one defendant’s request, E.B. produced unredacted healthcare records from those providers without objection.

Two years later, Richardson subpoenaed E.B.’s psychologist and pediatrician for updated records related to their treatment of E.B. for psychological issues. E.B. filed motions to quash, arguing that the physician–patient privilege in Texas Rule of Evidence 509 and the mental-health-information privilege in Rule 510 shield the records from discovery. E.B. then stated at the oral hearing that she would withdraw her designation of the doctors as testifying witnesses, though she has never amended her discovery responses to do so. The trial court denied the motions and ordered that the records be produced.

A split panel of the court of appeals granted E.B.’s mandamus petition and directed the trial court to vacate its orders and to grant E.B.’s motions to quash. The majority held that the records are not discoverable under the privileges’ patient–litigation exception, which applies when a party relies on the patient’s mental or emotional condition as part of a claim or defense. The majority characterized E.B.’s bystander claim as involving a routine claim for mental-anguish damages, which courts have held does not trigger the exception. The court rejected Richardson’s argument that the “shock” element of E.B.’s bystander claim triggers the exception.

In its petition for writ of mandamus to the Supreme Court, Richardson challenges the court of appeals’ holding that the patient–litigation exception does not apply and argues that E.B. waived the privileges’ application by designating her providers as testifying witnesses and producing some of their records. The Court set the petition for oral argument.