

Open Courts Challenge: Taking a New Aim at Tort Reform

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James E. Girards, member, Girards Law Firm, Dallas (cover image)

Mark Graham

The tort reform of 2003 reshaped medical-malpractice litigation in Texas. Now, two Dallas plaintiffs lawyers are mounting a constitutional attack on part of that legal overhaul.

They've filed three federal lawsuits, all based on the same set of allegations. They argue that the 2003 Legislature's deletion of Texas Civil Practice & Remedies Code §41.001(7)(B) violates the Texas Constitution's open courts provision by setting an impossibly high standard for plaintiffs who bring a negligent-credentialing suit against a hospital.

The "open courts" provision ensures that all litigants receive the opportunity to redress their grievances and receive their day in court. It provides that an injured person "shall have remedy by due course of law" and prohibits lawmakers from unreasonably abrogating well-established common-law claims.

By cutting §41.001(7)(B), the Legislature violated those open courts rights, the plaintiffs argue in the complaints in *Passmore v. Baylor Health Care System*, *Fennell v. Baylor Health Care System* and *Efurd v. Baylor Health Care System*. The statutory section the lawmakers removed had allowed malice claims when, "viewed objectively, defendants' actions caused extreme risk" and defendants had "an objective awareness of the risk," explained Jay Harvey, past president of the Texas Trial Lawyers Association, who welcomed what he calls a "novel" argument by the plaintiffs.

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Harvey said Dallas lawyer James Girards, who filed Passmore, has written "a damn smart" complaint.

The litigation "represents the need that medical consumers have to hold these hospitals responsible" when they allow "physicians to practice when they shouldn't be and [hide] behind an immunity statute that is unreasonable and unprovable under current definitions," said Harvey, a partner in Austin's Winckler & Harvey.

"The whole negligent malicious credentialing issue is critically important to anyone who goes to these hospitals. But with tort reforms, the protections got eroded," said Girards, member of The Girards Law Firm.

Kay Van Wey, a founder of Kay Van Wey Law, represents the plaintiffs in Fennell and Efurd.

Texas Hospital Association General Counsel Charles Bailey said that, if he were plaintiffs counsel, "I would pursue that argument." But he doesn't necessarily expect the plaintiffs to prevail, "based on our current conservative [Texas Supreme] Court."

But not all lawyers accept that the plaintiffs' argument is novel. Mike Hull, a partner in Austin's Hull Henricks, is counsel at the Texas Alliance For Patient Access, which advocates for med-mal reform. He wrote in a March 4 email, "The Texas Supreme Court has not decided whether the 2003 statutory definition of 'malice' applies to a credentialing case, and TAPA has not taken a position on the issue."

In a follow-up email, Hull referred to a 1997 Texas Supreme Court decision in *St. Luke's Episcopal Hospital v. Agbor*, which lawyers on both sides of the tort reform issue know may prove important to this litigation. Hull wrote, "Agbor (1997) applied the Chapter 41 definition of malice to a credentialing case. Chapter 41 and the definition of malice was amended in 2003. The Texas Supreme Court has not opined on whether the amended definition of malice in Chapter 41 applies to a credentialing case. If the court eventually rules that Chapter 41 does apply, if it reaffirms Agbor, then the question is not novel."

Girards, however, believes that the allegations in the suit may prompt the Texas Supreme Court to revisit questions about hospitals' liabilities. He noted that Agbor deemed constitutional §41.001(7)—which defines "malice" as meaning "a specific intent to cause substantial injury or harm to a claimant." But the justices did so only because, at that time, §(B) remained part of the statute; it's now gone, because of tort reform, Girards said.

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Over the past three months, the plaintiffs in *Passmore*, *Fennell* and *Efurd* have filed the complaints against defendants Baylor Health Care System and Baylor Regional Medical Center of Plano, among others.

The plaintiffs base their arguments on the same allegations: The Baylor defendants credentialed and, by not reporting the physician's alleged problems to regulatory authorities, allowed other hospitals to credential neurosurgeon Christopher Duntsch.

The plaintiffs bring a cause of action for negligence, among other things, arguing that the defendants violated applicable standards of care because of the credentialing flaws; they claim malice, but they note the impossibility of proving that, given what they argue is the unconstitutional construct of the statute.

According to the plaintiffs' allegations in all three complaints filed, the Baylor defendants had reason to know that Duntsch was "unable to practice safely due to impairment from drugs and alcohol"—behavior that plaintiffs allege led to severe complications for patients and even death.

The "impairment from drugs and alcohol" was the same language that the Texas Medical Board used in its findings of fact in a June 26, 2013, order of temporary suspension of Duntsch's license.

But in a Dec. 4, 2013, agreed order of revocation of Duntsch's license, the TMB reported that although the neurosurgeon had "violated the standard of care" with six patients, the board found explicitly that the evidence did not support a finding that Duntsch was "impaired by drugs and alcohol" or was "under the influence of drugs and alcohol during any of the procedures in question." Duntsch agreed to the revocation of his license to avoid "inconvenience and expense of litigation" but did not admit or deny any findings, the order states.

Duntsch declined to speak in detail about the allegations, except to deny them, and said: "I absolutely respect my patients' rights to take issue with their own care and to follow due process, which they have access to. ... That being said, ... I would prefer to defend my position in a formal setting, not in the press."

Linda "Lee" Maloney of The Law Office of Linda Maloney in Fort Worth, who represented Duntsch before the TMB, did not return a call for this story.

The Texas Department of State Health Services has initiated an investigation into the hospitals' credentialing of Duntsch, including Baylor, according to Carrie Williams, a spokeswoman for the agency.

"We are investigating the Texas hospitals he was connected to. Our focus is the areas of patient rights, physician supervision, quality assurance, reporting and credentialing. The investigation is open and ongoing," she wrote in an email.

The Baylor defendants, most recently on Feb. 18, filed answers denying the allegations. John Anthony Scully, a partner in Dallas' Cooper & Scully, who represents the Baylor defendants, declined to comment on pending litigation.

Craig Civale, a spokesman for the Baylor defendants, emailed on March 5 what he identified as "the official statement from the Baylor Regional Medical Center at Plano." It said: "The quality of the patient care we provide is of paramount

importance to us and we take all patient care-related claims very seriously. With the cases in litigation, we do not think it is appropriate to comment further at this time."

Duntsch, who filed bankruptcy in federal court in Colorado, was not named as a defendant in the federal cases. But Mary Efurd, one of the federal court plaintiffs, in June 2013, had filed malpractice claims against Duntsch, among others, in the 193rd District Court in Dallas. The state court stayed that case, also styled *Efurd v. Duntsch*, because of Duntsch's bankruptcy proceedings.

William Chamblee, the managing partner in Dallas' Chamblee, Ryan, Kershaw & Anderson, and Douglas Lewis, a partner in the same firm, represent Duntsch in the state court med-mal case. Lewis declined to comment.

In an answer filed Sept. 5, 2013, however, Duntsch denied the allegations, specifically denying that "one explanation for his behavior may have been that he was under the influence of drugs and/or alcohol," and asserted as an affirmative defense that a finding of negligence could not be based solely on evidence of a bad result to a patient in question, according to §74.303 (e)(2) of the Texas Civil Practice & Remedies Code.

Factual Allegations

In a Dec. 27, 2013, complaint in *Passmore*, the plaintiffs alleged that in 2011 the Baylor defendants entered into a joint venture with another health care provider to hire Duntsch to perform spinal surgeries at their Plano facilities and paid for Duntsch, who was moving from out of state, to stay at the W. Hotel.

The complaint alleges that, even at that time, the Baylor defendants should have known that, during Duntsch's earlier residency program, "he was reported for having used cocaine hours before participating in a surgery," he "evaded drug testing for a number of days following that incident but ultimately tested positive for illicit substances," and he "was placed into an impaired physician treatment program."

The complaint states that, "[W]ithin weeks of [his] arriving in Dallas, Duntsch's behavior was so erratic that he was deemed a danger to patients" by the other health care provider in the Baylor defendants' joint venture. The other health care provider terminated Duntsch, reported Duntsch's "erratic behavior" to the Baylor defendants and told them the physician "was not fit emotionally to be a surgeon but acted like a sociopath, a drug or alcohol abuser or similar," the complaint states. But Baylor defendants allowed Duntsch to continue, the complaint alleges.

"Baylor had spent a lot of money on Duntsch and wanted it back," the complaint states. "Therefore, Baylor reached an agreement with Duntsch that Baylor would provide Duntsch a location in an office building owned by Baylor Health Care System or one of its affiliated entities to use as his doctor's office and would give Duntsch a title, an additional stipend, and income guarantees."

During a surgery on plaintiff Leroy Passmore, "a surgeon present in the operating room saw that Duntsch was doing things that were unusual and, soon, alarming," the complaint states. "Duntsch was operating near Passmore's spinal cord without having a clear view and the other surgeon objected to that vocally.

Duntsch began to remove a certain anatomical structure in Passmore's spine—the other surgeon objected to that as well. The other surgeon, at one point, grabbed Duntsch's hands/surgical instruments and told him to stop."

Van Wey said, "We rely on hospitals to exercise reasonable care in credentialing doctors. These cases provide one of the most flagrant examples that I am aware of. There is no penalty, no accountability for hospitals, which make reckless and irresponsible credentialing decisions. And the backdrop to all of this is: Most hospitals are for-profit entities."

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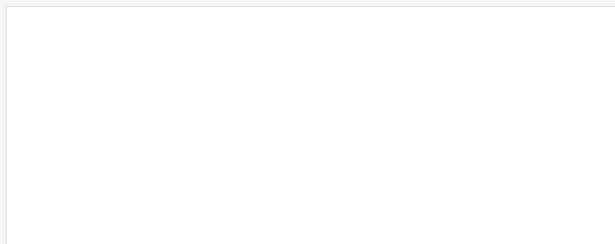
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