

SUMMER 2014 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *Sharon Morrison v. Whispering Pines Lodge I, L.L.P. d/b/a Whispering Pines Lodge and Whispering Pines, L.L.C. d/b/a Whispering Pines Lodge, No. 06-13-00067-CV, (Tex. App. – Texarkana, February 27, 2014)*

This lawsuit arises out of a premises liability claim in which the Defendant, Whispering Pines filed a motion to dismiss pursuant to Chapter 74 of the Texas Civil Practices and Remedies Code asserting that Plaintiff's claim was really a health care liability claim ("HCLC") and Plaintiff did not file an expert report as required by the Texas Medical Liability Act ("TMLA"). The Court of Appeals held that because the claims were at least indirectly related to health care, they affirmed the judgment of the trial court granting Whispering Pines' motion, dismissing the suit, and awarding Whispering Pines' net attorneys' fees of \$76.50.

Sharon Morrison was employed by Whispering Pines Lodge (nursing home) in 2009 when, as she was retrieving towels for a resident from the resident's shower area, she slipped and fell in an area that had just been mopped by another nursing home employee, injuring her left forearm. Morrison subsequently sued Whispering Pines in 2011 for her injury based on premises liability. A "health care liability claim" is a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract. See, Subsection 74.001(a)(13) Tex. Civ. Prac. & Rem. Code Ann. (West Supp. 2013). If a claim falls within this definition, "a claimant shall, not later than the 120th day after the original petition was filed, serve on each party or the party's attorney one or more expert reports." See, Subsection 74.351(a) Tex. Civ. Prac. & Rem. Code Ann. (West Supp. 2013).

Morrison's original petition alleges that while performing duties in the course and scope of her employment, she slipped and fell on the premises in an area that had been mopped by another employee, thus creating a dangerous condition to herself and others. She further alleged that Whispering Pines Lodge failed to warn her of the dangerous condition or to make the dangerous condition reasonably safe. The issue centered on whether Morrison's claim concerns a "departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care" under Subsection 74.001(a)(13). After going through a detailed analysis the Court held that Whispering Pines was bound to comply with health and safety laws and regulations enacted by the Legislature to ensure that nursing home facilities aim to provide the highest level of care to the residents. Whispering Pines, as a health care provider, is the defendant in this case. Plaintiff must therefore comply with the expert report requirement, which could be accomplished by retaining a physician with the requisite training, education, and knowledge necessary to provide an opinion concerning the

acceptable standard of health care and/or safety required for a nursing home facility. See, Subsection 74.402 (b)(1) Tex. Civ. Prac. & Rem. Code (West 2011). The Court reviewed opinions from the Corpus Christi, Dallas, Beaumont, Fort Worth, and San Antonio courts as well as this Court's opinion in *Twilley* that a simple slip and fall case is governed by the traditional law of premises liability.