

**WILLFUL AND WANTON, RES IPSA
AND INFORMED CONSENT**

Bill Liebbe
LAW OFFICE OF BILL LIEBBE, P.C.

TYLER
223 South Bonner Avenue
Tyler, Texas 75702
903-595-1240 telephone
903-595-1325 telecopier

DALLAS
3811 Turtle Creek Boulevard
Suite 1400
Dallas, Texas 75219
214-321-6100

bill@lobl.com

State Bar of Texas
17TH ANNUAL ADVANCED MEDICAL MALPRACTICE COURSE
March 18-19, 2010
San Antonio

WILLFUL AND WANTON, RES IPSA AND INFORMED CONSENT

I. WILLFUL AND WANTON

Failure to opine that defendant acted “willfully and wantonly” in an emergency room case does not render the report inadequate. *Bosch v. Wilbarger Gen. Hosp.*, 223 S.W.3d 460 (Tex. App.-Amarillo 2006, pet. denied); *Benish v. Grottie* 281 S.W.3d 184 (Tex. App.-Fort Worth, 2009, pet. denied).

Texas Civil Practice and Remedies Code Section 74.153 is titled “Standard of *Proof* in Cases Involving Emergency Medical Care.” The statutorily created *standard of proof* and the *applicable medical standards of care* are not the same. *Bosch* at 464 holding that “as used in the context of medical malpractice actions, the phrase “standard of care” and “standard of proof” are not synonymous; a rejecting the argument that Section 74.153 requires an expert to speculate in his report as to whether a physician’s negligence was willful and wanton.

The standard of proof imposed by Section 74.153 requires proof - that is, evidence at trial that will more than likely be *circumstantial* - that the physician or healthcare provider’s mental state or intent at the time of any deviation from the medical standard of care was willful and wanton. The Texas Supreme Court has explained repeatedly that it is a tortfeasor’s intent or mental state that distinguishes between negligence, gross negligence, knowing acts or omissions, willful negligence and intentional conduct. *Benish* at 191.

Given the limited discovery available prior to the service of expert reports, it is doubtful that an expert preparing a Section 74.351 report would ever be able to offer an opinion that a healthcare provider acted with the requisite state of mind to establish gross negligence or willful and wanton negligence. *Benish* at 192; *Bosch* at 464.

By choosing the words “standard of proof” rather than “standard of care,” the legislature intended, as it stated in Section 74.153, that a claimant “may prove” a departure from the standard of care in providing emergency medical care only if the plaintiff shows that the physician or healthcare provider “with willful and wanton negligence” deviated from the standard of care. Thus, the legislature prescribed a claimant’s *burden of proof at trial* in a case involving emergency medical care. *Benish* at 193.

Query: Is “willful and wanton negligence” an affirmative defense or plea in avoidance? Section 74.151(a) provides that a person who in good faith administers emergency care...*is not liable* in civil damages for an act performed during the emergency unless the act is willfully and wantonly negligent. In *Kinnear v. Texas Comm. on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000), the Texas Supreme Court confirmed that “immunity from liability, like other affirmative defenses to liability, must be pleaded, or else it is waived.” see also *Texas Beef Cattle Co. v. Green* 921 S.W.2d 303 (Tex. 1996) holding that “an affirmative defense...is one of confession and avoidance...that does not seek to defend merely by denying plaintiff’s claims, but rather seeks to establish an independent reason why the plaintiff should not recover. The committees comment to Texas Pattern Jury Charge Section 51.19 acknowledges that “in the usual case, question [two or three involving willful or wanton negligence] will be pleaded and argued as an affirmative defense.

II. RES IPSA LOQUITUR

Expert reports are required in *res ipsa loquitur* cases. In *Garcia v. Marichalar*, 198 S.W.3d 250 (Tex. App.-San Antonio 2006, no pet. h.) holding that *res ipsa loquitur* is not a cause of action separate and apart from negligence, instead it is an evidentiary rule by which negligence may be inferred by a jury. Even if the doctrine of *res ipsa loquitur* applies, the plaintiff would still be

required to file an expert report to prove causation.

III. INFORMED CONSENT

In *Greenberg v. Gillen*, 257 S.W.3d 281 (Tex. App.-Dallas, 2008, pet. dismissed.) Gillen based her healthcare liability claim on the lack of informed consent. Her expert's report discussed the standard of care and breach of the standard of care regarding informed consent then stated:

“If Ms. Gillen elected not to have the surgery, she would not have sustained the nerve injury. Therefore, Dr. Greenberg's violation of the standard of care was a cause of Ms. Gillen's injury.”

In holding that the report was inadequate, the court noted that Dr. Stetson's report merely stated the obvious facts that if Gillen had elected not to have the surgery, she would not have been injured. It failed to show how the alleged negligence in failing to obtain informed consent caused Gillen's injury or damage. Specifically, the report did not discuss whether the alleged undisclosed information would have influenced a reasonable person in deciding whether to give or withhold consent.